APPENDIX A:

United States Court of Appeals Opinion

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 16-2532

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT ANNABEL, II,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	ON APPEAL FROM THE UNITED
	)	STATES DISTRICT COURT FOR
MICHIGAN DEPARTMENT OF	)	THE WESTERN DISTRICT OF
CORRECTIONS, et al.,	)	MICHIGAN
	)	
Defendants-Appellees.	)	
	)	

ORDER

Before: KEITH, SILER, and STRANCH, Circuit Judges.

Robert Annabel, II, a Michigan prisoner proceeding pro se, appeals a district court judgment dismissing his civil rights complaint filed pursuant to 42 U.S.C. § 1983; the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132; the Rehabilitation Act (RA), 29 U.S.C. § 794; the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962; and Michigan law. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

Annabel filed a complaint against the Michigan Department of Corrections (MDOC); Aramark, Incorporated, "a contracted food service provider" within the MDOC; former MDOC Director Daniel Heyns; and the following MDOC employees at the Ionia Correctional Facility (ICF): Warden Willie Smith; Deputy Wardens Nannette Norwood, Erica Huss, and John Christiansen; Captain Kevin Woods; Lieutenants Christopher King, Unknown Zwiker, and S. Rykse; Resident Unit Manager E. Smith; Sergeant Dennis Grandy; Corrections Officers J.

VanNortrick, Unknown Scott, Unknown Berrington, Unknown Bennett, Unknown Burns, and Unknown Eyer; Mailroom Officer D. Christiansen; Law Librarian Joseph Novak; Social Workers James Apol and Robert Davis; Psychiatrist Dr. W. Yee; Nurse Practitioner Sleight; Nurse Kronk; Food Service Manager J. Daugherty; and Chaplin C. Cheney. He claimed that, between March 24, 2014 and April 24, 2015, the defendants violated his First Amendment rights to free speech, access the courts, and freely practice his religion; violated his Eighth Amendment rights through "deliberate indifference to [his] medical/mental health needs" and his safety, and "prolonged corporal punishment with painful hogtying in hard restraints without food or water, often naked, inflicting mental suffering, physical injury, and permanent disfigurement"; violated his Fourteenth Amendment equal protection rights and his rights under the ADA and RA "by denying him the benefits or services of mental health programs and use of Lexis-Nexis computer aided legal research services disparately more than lesser on [sic] non-mentally ill prisoners or by discriminatory (retaliation) [aggravating] his mental disability"; retaliated against him for filing lawsuits and grievances; conspired to retaliate against him; interfered with his legal mail; denied him required photocopies resulting in dismissals of lawsuits; denied him law library materials; destroyed his legal property; and "violated civil RICO to damage [his] capital assets invested in developing a post-release-from-prison paralegal career/business." He also asserted various state-law claims against the defendants.

Annabel sought declaratory, injunctive, and monetary relief, including specific performance of a prior settlement agreement requiring him to receive Kosher meals in *Annabel v. Caruso*, No. 1:09-cv-176 (W.D. Mich. July 19, 2012). Annabel also filed a motion for a temporary restraining order and preliminary injunction.

The district court screened Annabel's complaint, pursuant to the Prison Litigation Reform Act (PLRA), and determined that it required dismissal because it sued an immune defendant, failed to state a claim for relief, and was frivolous. *See* 28 U.S.C. §§ 1915(e)(2), 1915A(b); 42 U.S.C. § 1997e(c). In particular, the district court dismissed Annabel's claim against the MDOC with prejudice on grounds of immunity and failure to state a claim; dismissed his conspiracy claim with prejudice for frivolity and failure to state a claim; dismissed his previously

adjudicated claims in *Annabel v. Michigan Department of Corrections*, No. 1:14-cv-756 (W.D. Mich. Sept. 29, 2014), with prejudice as frivolous, finding them barred by res judicata; and dismissed his remaining claims without prejudice for improper joinder. Annabel's motion for a temporary restraining order and preliminary injunction was denied as moot.

This timely appeal followed. Annabel challenges (1) the district court's dismissal of his previously-adjudicated claims as barred by res judicata; (2) the district court's sua sponte dismissal of his claims for failure to state a claim under the PLRA screening procedures without accepting the factual allegations in the complaint and by raising "potential defenses"; (3) the district court's dismissal of his claims for misjoinder; and (4) the district court's application of "erroneous legal standards for retaliation, excessive force, deliberate indifference, RICO, and Rehabilitation Act and ADA claims." He also argues that the district court was clearly biased against him.

We review de novo a district court's dismissal of a complaint under §§ 1915(e), 1915A, and § 1997e. *Wershe v. Combs*, 763 F.3d 500, 505 (6th Cir. 2014). A complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

First, Annabel challenges the district court's dismissal of his previously-adjudicated claims as frivolous after it determined that they were barred by res judicata. Annabel does not take issue with the district court's determination that nine of the claims presented in his current complaint were raised in *Annabel v. Michigan Department of Corrections*, No. 1:14-cv-756, and that those claims were adjudicated adversely against him. He argues, however, that he was not "permitted notice and a full and fair opportunity to object to the district court's prior" dismissal of those claims or to amend his complaint in that case, so res judicata cannot bar him from raising those same claims again in his current complaint.

Under the PLRA, district courts must screen and dismiss any complaint filed by a prisoner against "a governmental entity or officer or employee of a governmental entity" that "is

frivolous, malicious, or fails to state a claim upon which relief may be granted" or that "seeks monetary relief from a defendant who is immune from such relief." 28 U.S.C. § 1915A(a), (b). Thus, the district court was authorized by the statutory language of the PLRA to sua sponte dismiss Annabel's complaint in *Annabel v. Michigan Department of Corrections*, No. 1:14-cv-756, upon finding that it was frivolous, malicious, failed to state a claim, or sought damages from an immune defendant. *See Benson v. O'Brian*, 179 F.3d 1014, 1015-16 (6th Cir. 1999).

Res judicata encompasses both issue preclusion, which precludes relitigation of issues that were raised and resolved in a prior action, and claim preclusion, which precludes litigation of issues that should have been raised in a prior action, but were not. *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984). Res judicata applies when there is: "(1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their privies; (3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; and (4) an identity of the causes of action." *Rawe v. Liberty Mut. Fire Ins. Co.*, 462 F.3d 521, 528 (6th Cir. 2006) (quoting *Kane v. Magna Mixer Co.*, 71 F.3d 555, 560 (6th Cir. 1995)).

On July 15, 2014, Annabel filed a civil rights action against many of the same defendants that he sued in his current complaint, asserting many of the same claims that he asserted in his current complaint. *Annabel v. Mich. Dep't of Corr.*, No. 1:14-cv-756. The district court was familiar with that earlier-filed complaint, having presided over those proceedings, and concluded that nine of the claims raised in Annabel's current complaint were either identical claims that were previously adjudicated, or should have been raised, in *Annabel v. Michigan Department of Corrections*, No. 1:14-cv-756.

The district court identified the following claims, raised in Annabel's current complaint, that were also raised and resolved in *Annabel v. Michigan Department of Corrections*, No. 1:14-cv-756: "his transfer to ICF on May 16, 2014"; "his claim that [he] was being denied his ability to practice his 'business' as a prison paralegal"; his claims that Heyns and other MDOC officials "interfered with his legal mail between March 24, 2014 and April 10, 2014, and that Defendant Zwiker interfered with delivery of his incoming mail between June 17 and July 2, 2014, denying

him access to the courts"; his claim that the "MDOC violated his rights under the ADA and the RA by not adequately treating his mental illness and forcibly medicating him"; his claim that the defendants' conduct violated the RICO Act; his claim that Willie Smith, Norwood, and Huss "retaliated against him for filing suit by having Prisoner Halton harass [him]"; his claim that "Zwiker had violated [his] First Amendment religious rights by mocking his kosher diet and by regularly uncovering his food tray and saying how delicious the food looked"; his claim against Heyns "arising from the alleged denial of medical care to [him] by Defendants Apol and Yee"; and his retaliation claim based on the denial of grievance forms and placement "on modified grievance access" for exercising his First Amendment rights. Those nine claims were sua sponte dismissed for failure to state a claim. *Annabel v. Mich. Dep't of Corr.*, No. 1:14-cv-756, 2014 WL 4187675, at *9-14, *16, *19-20 (W.D. Mich. Aug. 21, 2014).

Res judicata bars the nine claims identified by the district court because those claims were either raised or should have been raised in the previous action. Even though Annabel's current complaint identified several additional defendants, res judicata bars the claims against them because Annabel had a full and fair opportunity to raise the claims in his prior litigation. *See Georgia-Pacific Consumer Prods. LP v. Four-U-Packaging, Inc.*, 701 F.3d 1093, 1098-99 (6th Cir. 2012); *Taylor v. United States Gov't*, 21 F. App'x 264, 266 (6th Cir. 2001). Annabel's previously-adjudicated claims were properly dismissed as frivolous because they are barred by res judicata.

Second, Annabel argues that the district court improperly screened his complaint under the PLRA with respect to his conspiracy claim. He argues that the district court did not accept the factual allegations in the complaint and acted "as counsel by arguing potential defenses." Annabel argues that the district court drew "all inferences against [him]," introduced "facts not supported by the early record," did not believe his facts, and imposed "a heightened proof standard demanding direct evidence of conspiracy and retaliatory motives." As support for his conspiracy claim, Annabel points to his allegations that the defendants communicated their retaliatory motives against him through the MDOC email system and computer network, that Yee and Apol recorded his litigation activities in his electronic medical file, that "the most

loyally corrupt employees [were promoted] to higher positions" within the MDOC, that MDOC officers authorized prisoner "Jason" to pack up other prisoners' property in segregation cells without supervision or assistance in violation of policy, that his receipt of an insolence misconduct ticket supports Novak's retaliatory motives, and that he was subjected to "many recurrent incidents with his legal mail," supporting "an inference of a centralized actor, very likely Director Heyns, who may have delegated middlemen to coordinate or relay the retaliatory edicts."

"A civil conspiracy is an agreement between two or more persons to injure another by unlawful action." *Hooks v. Hooks*, 771 F.2d 935, 943-44 (6th Cir. 1985). To state a claim, a plaintiff must show "that there was a single plan, that the alleged coconspirator[s] shared in the general conspiratorial objective, and that an overt act was committed in furtherance of the conspiracy that caused injury to the complainant." *Id.* at 944; *see also Hensley v. Gassman*, 693 F.3d 681, 695 (6th Cir. 2012). Moreover, "[i]t is well-settled that conspiracy claims must be pled with some degree of specificity and that vague and conclusory allegations unsupported by material facts will not be sufficient to state such a claim under § 1983." *Moldowan v. City of Warren*, 578 F.3d 351, 395 (6th Cir. 2009) (quoting *Gutierrez v. Lynch*, 826 F.2d 1534, 1538 (6th Cir. 1987)).

Annabel failed to state a claim for conspiracy because his allegations were conclusory and speculative and lacked the level of specificity required to plead the existence of a civil conspiracy. Annabel did not allege an agreement among the defendants to injure him. Instead, he alleged that the individual defendants caused him harm and, from there, drew unsupported conclusions to complete his conspiracy theory. In his appellate brief, he reiterates his conclusory allegations that the defendants conspired to harm him. Contrary to Annabel's contention, the district court viewed the factual allegations in his complaint "in the light most favorable to [him]" and applied the proper standard for civil conspiracy claims. Annabel's civil conspiracy claim was properly dismissed as frivolous.

Third, Annabel challenges the district court's dismissal of some of his claims for improper joinder. Defendants "may be joined in one action" if "(A) any right to relief is asserted

against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all defendants will arise in the action." Fed. R. Civ. P. 20(a)(2). "In the event of a misjoinder or nonjoinder . . . a court may (1) 'add or drop' parties or (2) 'sever' the claims against the parties." *Kitchen v. Heyns*, 802 F.3d 873, 874 (6th Cir. 2015) (quoting Fed. R. Civ. P. 21). The court may not dismiss an action based on misjoinder. Fed. R. Civ. P. 21.

The district court determined that the claims alleged in Annabel's complaint were linked solely by his frivolous conspiracy claim, that the first-named defendant, the MDOC, was immune from suit, that his ADA and RA claims against the MDOC for denial of medical care were frivolous because they were barred by res judicata, and that his ADA and RA claims against the MDOC for denial of equal library access to both segregation and general population prisoners failed to state a claim for relief. The district court concluded that Annabel made "no allegations against any other Defendant that are related to his claims against the MDOC" and dismissed "all of [his] claims, other than those against the MDOC and those that were previously decided against [him] in an earlier action" without prejudice for improper joinder.

A complaint may be dismissed at the initial screening stage if it is frivolous, malicious, fails to state a claim for relief, or seeks damages from an immune defendant. *See* 28 U.S.C. §§ 1915(e)(2), 1915A(b); 42 U.S.C. § 1997e(c). Improper joinder is not one of the grounds for dismissal of a complaint at the initial screening stage. *See* 28 U.S.C. §§ 1915(e)(2), 1915A(b); 42 U.S.C. § 1997e(c). Moreover, an action may not be dismissed for improper joinder. Fed. R. Civ. P. 21. Here, the district court dismissed a large number of Annabel's claims for improper joinder. But because the district court had dismissed all of Annabel's other claims when it dismissed those claims for improper joinder, the end result was dismissal of his entire case, a result not permitted by Rule 21. Therefore, this part of the district court's judgment must be vacated.

Fourth, Annabel argues that the district court applied the wrong "legal standards for retaliation, excessive force, deliberate indifference, RICO, and Rehabilitation Act and ADA claims." But the district court did not address any retaliation, excessive force, deliberate

indifference, or RICO claims. In the absence of certain exceptional circumstances, issues that were not reached and ruled on by the district court will not be addressed on appeal. *Maldonado v. Nat'l Acme Co.*, 73 F.3d 642, 648 (6th Cir. 1996). No exceptional circumstances exist in this case. When addressing Annabel's RA and ADA claims, the district court applied the correct legal standard but concluded that his claims were conclusory "and belied by his own factual allegations." Annabel's arguments, which remain conclusory, do not provide a reason to disturb the district court's ruling.

Fifth, Annabel argues that the district court was clearly biased against him. He argues that bias was demonstrated by the district court's "openly hostile personal attacks expressing [a] malicious desire to restrict future filings, dishonest findings of fact," and misapplication of the law.

A judge must "disqualify himself in any proceeding in which his impartiality might reasonably be questioned" or if certain circumstances exist, such as when the judge "has a personal bias or prejudice concerning a party." 28 U.S.C. § 455(a) and (b)(1). Recusal is based on an objective, rather than a subjective, standard and is required "if a reasonable, objective person, knowing all of the circumstances, would have questioned the judge's impartiality." *Johnson v. Mitchell*, 585 F.3d 923, 945 (6th Cir. 2009) (quoting *Hughes v. United States*, 899 F.2d 1495, 1501 (6th Cir. 1990)).

Annabel's allegations do not demonstrate any personal bias on the part of the district court, but instead challenge the district court's opinion. Absent a showing of "unequivocal antagonism that would render fair judgment impossible," unfavorable judicial rulings do not constitute a valid basis for a finding of bias or partiality. *Liteky v. United States*, 510 U.S. 540, 556 (1994). No basis for recusal exists on this record.

Annabel does not mention the MDOC's immunity in his appellate brief and does not challenge the district court's dismissal of his complaint against the MDOC on immunity grounds. The "failure to raise an argument in [an] appellate brief constitutes a waiver of the argument on appeal." *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 311 (6th Cir. 2005); *see also Geboy*

v. Brigano, 489 F.3d 752, 767 (6th Cir. 2007). Thus, Annabel has abandoned or waived his claim against the MDOC.

The bulk of Annabel's claims on appeal are unavailing. However, because the district court's dismissal based on improper joinder had the impermissible result of dismissing the entire action, that issue must be revisited by the court below. Accordingly, we **AFFIRM** in part and **VACATE** in part the district court's judgment and **REMAND** this case for further proceedings.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX B:

United States District Court Opinion/Judgment

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT WAYNE ANNABEL, II,

Plaintiff, Case No. 1:16-cv-543

v. Honorable Paul L. Maloney

MICHIGAN DEPARTMENT OF CORRECTIONS et al.,

Defendants.
_____/

OPINION

This is a civil rights action brought by a state prisoner against 28 defendants, pursuant to 42 U.S.C. § 1983, the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132, the Rehabilitation Act (RA), 29 U.S.C. § 794, and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1962 et seq. The Court has granted Plaintiff leave to proceed *in forma pauperis*. Under the Prison Litigation Reform Act, PUB. L. NO. 104-134, 110 STAT. 1321 (1996), the Court is required to dismiss any prisoner action brought under federal law if the complaint is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant immune from such relief. 28 U.S.C. §§ 1915(e)(2), 1915A; 42 U.S.C. § 1997e(c). The Court must read Plaintiff's *pro se* complaint indulgently, *see Haines v. Kerner*, 404 U.S. 519, 520 (1972), and accept Plaintiff's allegations as true, unless they are clearly irrational or wholly incredible. *Denton v. Hernandez*, 504 U.S. 25, 33 (1992). Applying these standards, Plaintiff's action will be dismissed in part for failure to state a claim and in part for improper joinder.

Discussion

I. Factual allegations

Plaintiff Robert Wayne Annabel, II presently is incarcerated with the Michigan Department of Corrections (MDOC) at the Ionia Correctional Facility (ICF). He sues the MDOC, its former Director Daniel Heyns, and its former food service provider Aramark Corporation, Inc. He also sues the following ICF officials: Warden Willie Smith; Deputy Wardens Nannette Norwood, Erica Huss, and John Christiansen; Captain Kevin Woods, Lieutenants Christopher King, (unknown) Zwiker, and S. Rykse; Resident Unit Manager (RUM) E. Smith; Sergeant Dennis Grandy; Correctional Officers J. VanNortrick, (unknown) Scott, (unknown) Berrington, (unknown) Bennett, (unknown) Burns, (unknown) Eyer, D. Christiansen, and Joseph Novak; Social Workers James Apol and Robert Davis; Psychiatrist Dr. W. Yee; Nurse Practitioner (unknown) Sleight; Nurse Kronk; Food Service Manager J. Daugherty; and Chaplain C. Cheney.

In his 42-page complaint, Plaintiff lists the many hardships he allegedly has suffered while housed with the MDOC since 2008. In his numerous prior lawsuits, Plaintiff has complained about being inadequately medicated for his bipolar disorder; being retaliated against for his many grievances and lawsuits; being defamed; being denied his Kosher diet; having his food poisoned; being subjected to the use of excessive force; having his property and mail stolen; being denied due process; and having prison officials interfere with his access to the courts. He has alleged that all prior defendants have been engaged in a conspiracy to deny him his rights. The first ten pages of the complaint describe incidents that occurred prior to the stated period of the complaint (March 24, 2014 through April 24, 2015) and recite the lawsuits previously filed by Plaintiff. The remainder of the complaint consists of allegations about a litany of disparate events between March 24, 2014

and April 24, 2015, ostensibly linked by a conclusory claim that all events were part of a single, global conspiracy headed by Defendant Heyns, the then-Director of the MDOC: claims involving retaliation against Plaintiff; denial of Plaintiff's access to the courts; interference with Plaintiff's mail; violations of Plaintiff's rights under the Eighth Amendment; violations of the Equal Protection Clause, the ADA and the RA; interference with Plaintiff's legal mail; violations of RICO; and deprivations of Plaintiff's property without due process. A substantial number of Plaintiff's allegations and the Defendants he names overlap with allegations he previously raised in *Annabel v. Mich. Dep't of Corr. et al.*, No. 1:14-cv-756 (W.D. Mich.). Many of those claims previously were dismissed with prejudice, though a few were subsequently dismissed without prejudice after Plaintiff failed to comply with the Court's orders.[1]

The following is a summary of Plaintiff's allegations that fall within the time-frame Plaintiff purports to cover in his complaint. On March 24, 2014, a magistrate judge from Eastern District of Michigan issued a report and recommendation (R&R) to grant one defendant's motion for summary judgment and to deny Plaintiff's motion for a temporary restraining order. *See Annabel v. Heyns et al.*, No. 2:12-cv-13590 (E.D. Mich.) (R&R Mar. 24, 2014) (ECF No. 85). Plaintiff alleged in *Annabel v. Mich. Dep't of Corr. et al.*, No. 1:14-cv-756 (W.D. Mich.), that interference

[1]In an opinion and order for partial dismissal and partial service issued on August 21, 2014, the Court dismissed numerous claims and defendants on the grounds that the allegations failed to state a claim: the conspiracy claims; the claims related to the dismissal of the Warden's Forum representative; the claims against Heyns, Campbell, Nichols, and Zwiker for interfering with his mail on March 24, April 10, June 17, and July 2, 2014; Plaintiff's retaliation claims based on being placed on modified access, being kept in a stun cuff during transport, being denied hygiene supplies and bedding, being harassed by prisoner Halton, being transferred to ICF, and being subjected to Zwiker's verbal harassment; his free exercise claim against Zwiker; his Eighth Amendment claims against all defendants except Apol, Yee and Gerlach; his equal protection claims; and his claims under the ADA and the RA. The Court therefore ordered dismissal of all Defendants in that action, except Defendants Apol, Yee and Gerlach. In accordance with Admin. Ord. 03-029, the Court ordered Plaintiff to provide three copies of the complaint for service of the complaint on the three remaining defendants. Plaintiff neither complied with the order nor sought an extension of time in which to do so. In an order and judgment issued on September 29, 2014, the Court dismissed the case for lack of prosecution, based on Plaintiff's failure to comply with the Court's order.

with his mail prevented him from receiving the R&R. Also on that date, three other events allegedly occurred: (1) MI-CURE sent Plaintiff a letter declining to investigate corruption in the grievance process; (2) two of Plaintiff's grievances were rejected; and (3) Plaintiff was placed on modified grievance access. Plaintiff contends that all of these actions were retaliatory and designed to prevent him from making additional filings.

On April 30, 2014, three additional events occurred, which Plaintiff alleges were related to one another and to Plaintiff's allegations. First, in the absence of objections from him, the district judge adopted the R&R in *Annabel v. Heyns et al.*, No. 2:12-cv-13590 (E.D. Mich. Apr. 20, 2014) (ECF No. 89). Second, prisoner Abkedya Boyd apparently committed suicide at the Gus Harrison Correctional Facility (ARF). Third, the defendants in *Annabel v. Frost et al.*, No. 2:14-v-10244 (E.D. Mich.) (none of whom are Defendants in this action) allegedly transferred the only prisoner representative in Unit 4 to Unit 5. Plaintiff alleges that Prisoner Boyd was housed near Plaintiff and that Plaintiff had assisted prisoner Boyd to file a Step-II grievance and to prepare for litigation of an incident at Macomb Correctional Facility. Plaintiff previously raised these allegations in *Annabel v. Mich. Dep't of Corr. et al.*, No. 1:14-cv-756 (W.D. Mich.), and the Court concluded the allegations failed to state a claim. *Id.* (Op. & Ord. Aug. 21, 2014).

On May 1, 2014, Officer Pigg (who is not a defendant in this action) mocked Plaintiff for assisting other prisoners in preparing affidavits for a potential suit by Boyd's estate. Plaintiff contends that Boyd's suicide was induced by staff harassment. Plaintiff complains that the same pattern had occurred with another suicide in 2013, which involved another prisoner who was engaged in protected activity with Plaintiff.

On May 13, 2014, Plaintiff told his therapist, James Dickson (not a Defendant) that he wanted to be discharged from his mental health program at ARF, ostensibly to avoid further retaliation by ARF employees. According to Plaintiff, in response to his request, "[D]efendants transferred him to the MDOC's most notoriously brutal Maximum Security, at Ionia Correctional Facility, where Plaintiff had previously suffered substantial staff abuse." (Compl., ECF No.1, PageID.13.) Plaintiff alleges that, although he had been scored since 2008 as a Level-V security classification, he had spent nearly six consecutive years waived down to a Level-IV residential treatment program (RTP) or a Level-IV Outpatient Treatment Facility. He suggests that he was transferred to Level V at ICF in retaliation for filing several lawsuits. Plaintiff also alleges that the transfer to Level V reduced his parole likelihood from "average probability" to "low probability." (*Id.*, PageID.14.) Again, Plaintiff raised these allegations in *Annabel v. Mich. Dep't of Corr. et al.*, No. 1:14-cv-756 (W.D. Mich.), and the Court dismissed the claim for failure to state a claim. *Id.* (Op. & Ord. Aug. 21, 2014).

On May 16, 2014, shortly after Plaintiff arrived at ICF, Defendant Social Worker Apol interviewed Plaintiff. Plaintiff complains that Apol was hostile, critical and aggressive in his demeanor. Apol told Plaintiff, "Spell my name right when you sue me." (*Id.*, PageID.15.) When Plaintiff expressed concerns about eating or taking medication at the facility because of his fear of staff tampering, Apol vowed to keep Plaintiff at ICF, on forced medication, if necessary. Plaintiff told Apol to be sure to get a psychiatrist's signature on the forced-medication order, and Apol assured him that he understood his job. Plaintiff raised these allegations in *Annabel v. Mich. Dep't of Corr. et al.*, No. 1:14-cv-756 (W.D. Mich.). The issues were not fully litigated before the remainder of the complaint was dismissed for lack of prosecution.

Defendant Dr. Yee interviewed Plaintiff on May 19, 2014. Plaintiff explained his long history of bipolar disorder, but Yee allegedly disregarded the proven effectiveness of the psychotropic medications listed in Plaintiff's file. When Plaintiff explained his concerns about eating and taking medication, Yee told him that a hunger strike would not get him transferred. Plaintiff indicated that he would resume eating and taking his medications. Despite Plaintiff's subsequent compliance in taking the medication, Defendant Yee discontinued that medication on May 24, 2014. On May 27, Plaintiff was interviewed by Defendant Apol, an unknown female, and an older male social worker. Apol reviewed Plaintiff's kite complaining about Yee's discontinuation of his medication. Apol was dismissive and told him that his medications would not be resumed until Plaintiff seriously self-injured. An unknown male social worker told Plaintiff that he remembered Plaintiff from 2008 and that he saw that Plaintiff was significantly improved since 2008. The unknown social worker therefore recommended resuming Plaintiff's medication. Defendant Apol rejected the recommendation. These allegations were raised in *Annabel v. Mich. Dep't of Corr. et al.*, No. 1:14-cv-756 (W.D. Mich.), and the claims were ultimately dismissed without prejudice.

On July 14, 2014, Plaintiff sent three articles of expedited legal mail to Defendant D. Christiansen. Christiansen allegedly signed and pre-dated the receipts as of July 12, 2014, and then he destroyed the documents. On August 4, 2014, an individual mailed to Plaintiff a copy of the complaint in *Annabel v. MDOC et al.*, No. 1:14-cv-756 (W.D. Mich.), but Christiansen did not deliver the mail until October 20, 2014, after unspecified Defendants had read the complaint and after a first-shift sergeant had interrogated Plaintiff about the complaint.

Plaintiff complains that he has invested much time and money developing his paralegal skills, which he believes could provide a respectable income upon his release. He contends that he invested thousands of dollars in filing fees, legal texts, photocopies, postage, stationery and footlockers. Notwithstanding this property interest, in March or April 2015, unspecified Defendants ordered the segregation porter to destroy some of Plaintiff's legal property, including paperwork related to one of Plaintiff's prior lawsuits against ICF staff, *Annabel v. Caruso et al.*, 1:09-cv-176 (W.D. Mich.).[2] Plaintiff ultimately filed a claim seeking compensation for his property to the State Administrative Board. He subsequently sent a letter to the board explaining that the MDOC was not acknowledging or processing such claims. He claims that he also received no satisfaction through the grievance process. Plaintiff suggests that he therefore was without a post-deprivation remedy. This claim was raised in *Annabel v. Mich. Dep't of Corr. et al.*, No. 1:14-cv-756 (W.D. Mich.), and the claim was dismissed with prejudice.

Plaintiff sweepingly alleges that, between June 17, 2014 and April 24, 2015, "defendants often withheld or damaged Plaintiff's property." During that same time and with an allegedly retaliatory motive, Defendants Apol and Yee allegedly denied Plaintiff psychotropic medication, ostensibly in order to induce mental destabilization. Defendants Apol and Yee allegedly placed him on suicide restrictions, in order to prevent him from accessing his legal property. Plaintiff claims that being held in the stressful environment had caused him to be depressed, unable to have restful sleep, and to be unable to litigate and acquire career skills as effectively as he would like. He asserts that Defendants collectively continue to engage in unfair

[2]The Court notes that Defendants were granted summary judgment in the cited action on August 31, 2011. *See Annabel v. Caruso et al.*, No. 1:09-cv-176 (W.D. Mich. Aug. 31, 2011) (ECF Nos. 126-128).

litigation tactics, as did the defendants in *Annabel v. Armstrong et al.*, No. 1:14-cv-796 (W.D. Mich.), *Annabel v. Caruso et al.*, No. 1:09-cv-176 (W.D. Mich.), and *Annabel v. Heyns et al.*, No. 2:12-cv-13590 (E.D. Mich.).

Plaintiff complains that Defendants Yee and Apol also have demonstrated that their actions are retaliatory, because they have referenced his litigation efforts in his psychiatric medical file, stating on August 29, 2014:

> He is quite litigious, and seems to take pleasure in announcing various lawsuits that he files. He seems to use these legal actions as a way to manipulate placement, with the reasoning that it would be 'unethical' for a provider to continue to provide services if he/she is named as a defendant in his legal action. He has shown himself to be very calculating in this regard.

(Compl., ECF No. 1, PageID.19-20.) On December 29, 2014, Dr. Yee wrote:

> Summary of Progress to Date: Prisoner is resistant to treatment. He remains highly litigious, and uses insults to try to evoke a response that he feels is grievable.

(*Id.*, PageID.20.) Plaintiff contends that the placement of such references in his medical file violates prison policy, and he contends that officers are able misuse the MDOC database and communications system to view such statements. He argues that this potential for abuse demonstrates that supervisory officials are well aware of his litigation.

Plaintiff next alleges that, on August 4, 2014, a woman named Zoe Keller mailed Plaintiff a copy of his complaint in *Annabel v. Mich. Dep't of Corr. et al.*, No. 1:14-cv-756 (W.D. Mich.). Defendant D. Christiansen allegedly withheld the mail until October 20, 2014 and that, during the intervening period, many of the Defendants read the mail. On August 8, 2014, a first-shift sergeant told Plaintiff that the inspector was investigating Plaintiff for using the mail to smuggle drugs. On August 14, 2014, Plaintiff attempted to mail an expedited discovery request to

the attorney in *Annabel v. Heyns et al.*, No. 2:12-cv-13590 (E.D. Mich.), but it was discarded. Plaintiff sent the request again in November, at which time the attorney informed Plaintiff that he had not received the original August mailing.

Plaintiff alleges that, on October 20, 2014, unspecified Defendants destroyed without delivering an order denying leave to amend in *Annabel v. Frost et al.*, No. 2:14-cv-10244 (E.D. Mich.). On February 17, 2015, unspecified Defendants allegedly destroyed without delivering a report and recommendation issued in the same case. The case was dismissed on March 30, 2015, after Plaintiff failed to file objections to the report and recommendation. Plaintiff asserts that the repeated interferences with his mail demonstrate that Defendants participated in a common plan organized by a central agent, such as Defendant Heyns.[3]

Plaintiff alleges that, between June 9, 2014 and June 17, 2014, Defendants W. Smith, Norwood and Huss employed prisoner Joseph Halton to harass and threaten Plaintiff by instructing their subordinates to give immunity to Halton for any harassment. Plaintiff recites the following examples of the alleged scheme to allow harassment: Halton screamed vulgarities at Plaintiff on Halton's first morning in the yard and threatened to attack Plaintiff, but staff did not issue a misconduct; Halton made attempts to incite gangs against Plaintiff; on June 17, 2014, Halton made more threats against Plaintiff as Halton left the unit that were condoned by an unnamed African-American officer, causing Plaintiff to "preemptively str[ike] Halton with a bare ink pen" (ECF No. 1, PageID.23). Halton was moved to Segregation Unit 2 on August 4, 2014, where he continued

[3]The Court notes that, after Plaintiff demonstrated that he had not received the Report and Recommendation, the case was reopened and Plaintiff was granted an extension of time to file objections, . *See Annabel v. Frost et al.*, No. 2:14-cv-10244 (E.D. Mich. June 23, 2015) (Ord, ECF No. 51). After reviewing Plaintiff's objections, the Court again granted summary judgment to Defendants on January 22, 2016. *See id.* (Ord. & J., ECF No. 59-60).

to harass Plaintiff with false statements and allegations. On August 4, 2014, Halton returned from an interview with a sergeant, bragging that he had testified against Plaintiff. Plaintiff contends that Defendants Smith, Norwood and Huss were the only officials who could authorize Halton's new cell assignment. Plaintiff raised all but the last of these allegations about Halton in *Annabel v. Mich. Dep't of Corr. et al.*, No. 1:14-cv-756 (W.D. Mich.), and the Court dismissed the issue against these Defendants on the grounds that the allegations failed to state a claim.

Plaintiff alleges that he arrived in Segregation Unit 2 on the afternoon of June 17, 2014. On June 18, 2014, at 9:30 p.m., Plaintiff damaged a sprinkler to protest staff's failure to provide him bedding and his legal material, well beyond the time authorized under MDOC policy. Plaintiff contends that Defendants denied his psychotropic medications to destabilize him and cause him harm and to cause him to be placed in segregation. This issue was raised in *Annabel v. Mich. Dep't of Corr. et al.*, No. 1:14-cv-756 (W.D. Mich.), and the claim was dismissed for failure to state a claim.

Plaintiff next alleges that Defendants W. Smith, Norwood and Huss frequently acted in concert with Defendant Novak to deny Plaintiff's requests for law library materials and photocopies. He alleges that the denial of photocopies resulted in the dismissal of his complaint in *Annabel v. Mich. Dep't of Corr.*, No. 1:14-cv-756 (W.D. Mich.). Plaintiff contends that Defendants use prisoner law clerks to retaliate, having them provide only a few cases, marking those cases with "pitchfork gang signs," and marking most requests as "Out: Re-Order." (ECF No. 1, PageID.25.) Plaintiff alleges that, after he confronted unspecified Defendants and Defendant Christiansen in December 2014 and January 2015, the retaliation increased. Defendant Norwood placed Plaintiff on a law book restriction, allegedly without adequate proof of the misuse of books.

Plaintiff also alleges that Defendants used prisoner-porter Jason to attempt to extort fees and sexual favors. Plaintiff complained to Defendant Novak on February 10, 2015. In April 2015, Plaintiff received a misconduct ticket for making false allegations that interfered with the administration of rules. Plaintiff claims that unspecified Defendants frequently used prisoner Jason to enter cells in Segregation Unit 1, so that Jason could pack up or destroy other prisoners' property.

Plaintiff alleges that, on July 9, 2012, he engaged in discussions to settle a civil action, *Annabel v. Caruso et al.*, No. 1:09-cv-176 (W.D. Mich.). Plaintiff signed the settlement agreement on July 18, 2012, in which he obtained a small cash amount and an agreement to provide him a Kosher diet. Plaintiff alleges that Defendants have all acted to impede his rights under that settlement agreement. Between June 17 and July 2, 2014, Plaintiff became afraid of food tampering and refused to accept all meals. During that time, Defendant Kronk allegedly failed to ensure he received timely medical evaluations in compliance with prison policies, and Defendants Yee and Apol allegedly examined him for only a few minutes on a later date. On June 18, Plaintiff was threatened with food loaf, followed by one week in which Defendant Zwiker brought him "special delivery duty" meals, consisting of unsealed Kosher meal trays. (ECF No. 1, PageID.26.) Zwiker allegedly denigrated Plaintiff's religion and mockingly described the delicious food. Defendant Zwiker also allegedly withheld legal mail from Plaintiff on three occasions during this period. Plaintiff discovered a staple in his scalloped potatoes on July 7, 2014. Plaintiff also complained about the uncovered food trays. Defendant RUM E. Smith advised Plaintiff in a memorandum that the Kosher trays were never wrapped in cellophane, as it presented a security concern. Plaintiff disputes the truth of that response. On June 24, 2014, Defendants Yee and Apol began forcibly

medicating Plaintiff with Thorazine, allegedly in order to prevent Plaintiff from effectively litigating his claims.

On July 9, 2014, Plaintiff's hot tray was mockingly marked with the name "Adiline." Plaintiff demanded to speak with Sergeant Zwiker and took his food tray hostage. Defendant Vannortrick wrote a misconduct against Plaintiff, in which he allegedly defamed Plaintiff by saying that Plaintiff had stated that his "'hemorr[h]oids were inflamed and felt like they were about to set his cell on fire!!'" (ECF No. 1, PageID.27.) Plaintiff alleges that Vannortrick thereby intentionally revealed Plaintiff's embarassing health condition, which, Plaintiff alleges, implied that Plaintiff was a homosexual. Defendant Vannortrick read aloud the statement to an audience of nearly 40 prisoners. Defendant Rykse found Plaintiff guilty of the misconduct on July 21, 2014.

On July 10, 2014, Plaintiff's food tray was mockingly labeled "Alleshia."[4] (*Id.*, PageID.28.) On July 13, 2014, Plaintiff received ketchup packets with his breakfast, instead of jelly. On July 30, 2014 Plaintiff's breakfast tray was missing the powdered soy milk. Plaintiff complained to Defendants Scott and Norwood, neither of whom corrected the problems. On August 12, 2014, his dinner tray held only a peanut butter and jelly sandwich and a half-cup of potatoes.

Plaintiff told Defendant Apol on August 19, 2014 that he had filed a lawsuit against Apol. In response, Apol allegedly berated Plaintiff.

On August 27, 2014, after allegedly being denied photocopies and expedited legal mail by Defendants Grandy, Zwiker, and E. Smith, Plaintiff held his food slot hostage. He was sprayed with chemical agents, and he was hogtied. Defendants left a noose hanging inside his rear

[4]Plaintiff suggests that the unknown Defendants' use of the names "Adiline" and "Alleshia" on his food trays were motivated by Defendants' erroneous belief that the names were Jewish. Plaintiff cites no basis for his allegation, and the names on their face suggest that the individuals involved were mocking Plaintiff's name, "Annabel."

window, low enough for Plaintiff to put the noose around his neck. Defendants Zwiker, Berrington, Bennett, and Scott all observed the noose around Plaintiff's neck for five hours, but they refused to release him, simply writing him false misconduct tickets for disobeying a direct order. At about 10:15 p.m., Officer Braman called the third-shift lieutenant to remove both the noose and the chains.

The following day, Plaintiff again held his food slot hostage to protest alleged tampering with his breakfast tray and denial of legal access. Defendants Grandy, Eyer, Burns, and Jensen hogtied Plaintiff again. Later that day, Plaintiff asked King to loosen the belly chain, but King refused, hissing, "You're a piece of shit. In three days I hope you die in those chains." (*Id.*, PageID. 32.) Defendants Zwiker, Berrington, Bennett, and Kronk also denied pleas to loosen the chains and denied Plaintiff's requests for water. Plaintiff alleges that he was hogtied in his cell for seven days, from August 28 to September 1, 2014, during which time Defendants Grandy, Eyer, Burns, Zwiker, Bennett, Scott, Berrington, and King all denied Plaintiff meals. Grandy told Plaintiff that Defendant Willie Smith said that Plaintiff needed to stop filing grievances and lawsuits so that he would not have the problems. When the chains were finally removed on September 4, 2014, Plaintiff dropped to the floor screaming, because the removal of the belly chain tore off skin and scabs. Plaintiff also had sores on his ankles, wrists, and knees. All requests for medical care were denied, and no Defendant documented Plaintiff's injuries. Plaintiff eventually showed his scars to Defendants Sleight and Davis, but they refused to report that Plaintiff had been abused.

Plaintiff was placed on suicide observation status from August 28 through October 10, 2014, and most of the meals he received were non-Kosher finger food or foodloaf. Plaintiff alleges that the deprivations violated his settlement agreement. Plaintiff was told that Defendant

Cheney had removed him from the Kosher menu. Cheney did not respond to Plaintiff's complaints. On September 25, 2014, Defendant Scott allegedly forced Plaintiff to accept a non-Kosher foodloaf, and Scott told Plaintiff that he did not care about the Jews. Defendant Zwiker made derogatory remarks about Plaintiff being a child molester and denigrated Plaintiff's mother and his religion. On October 29, 2014, Plaintiff discovered a pea-size stone in his Kosher dinner, and the Islamic crescent moon was marked on his dinner tray. Plaintiff complained to Daugherty, who found Plaintiff's grievances to be factually unsupported.

On November 6, 2014, Plaintiff concluded that Defendants would not be honest, so he sent Defendant Cheney "an accusing kite to end Kosher trays." (*Id.*, PageID.31.) On November 17, 2014, Defendant Daugherty "scorned" Plaintiff in a notice that Plaintiff was being removed from Kosher meals. (*Id.*)

Plaintiff contends that Plaintiff's poor mental health treatment and the poor treatment of others, as evidenced by the four suicides, demonstrate that Defendant Heyns is deliberately indifferent to the quality of prisoner medical care, that Heyns wrongfully diverts funds from medical care to weapons, and that Heyns orchestrated the retaliatory punishment of mentally ill prisoners. Plaintiff also alleges that the long history of staff abuse is well known and condoned by Defendants Heyns, Willie Smith, Norwood and Huss. In addition, he contends that Heyns, W. Smith, Norwood and Huss maintain their corrupt system by promoting the worst offenders: Defendants Christiansen, Woods, King, Zwiker, Rykse and Grandy.

Further, Plaintiff alleges that all Defendants conspired to deny Plaintiff grievance forms and Step-II appeals, refused to deliver or process those grievances, or placed Plaintiff on modified grievance access.

Plaintiff contends that all Defendants have violated his rights under the First Amendment by denying him access to the courts, interfering with his mail, interfering with his religious exercise, and retaliating against him for filing grievances and lawsuits. In addition, Plaintiff contends that Defendants violated his rights under the Fourteenth Amendment (as well as the First Amendment) by repeatedly harassing him on the basis of his religion and coercing him to forfeit his religion and religious diet. He also contends that all Defendants have been deliberately indifferent to his serious medical and mental health needs and to his risks of harm from known staff and prisoner attacks. Further, he argues that the MDOC has denied him the benefits of mental health programs and legal research materials because of his mental illness, ostensibly in violation of the ADA , the RA, and the Fourteenth Amendment. Moreover, Plaintiff alleges that Defendants have violated RICO by their multiple illegal actions taken against Plaintiff. Finally, Plaintiff complains that Defendants have violated a variety of state laws.

Plaintiff seeks declaratory and injunctive relief and specific performance of his settlement agreement, together with compensatory and punitive damages.

II. Sovereign Immunity

Plaintiff alleges that the MDOC violated his rights under the Equal Protection Clause by not providing for his mental health needs and by not allowing prisoners like himself, who remain in segregation for extended periods of time, the same access to computer-aided legal research services as other prisoners not housed in segregation. Regardless of the form of relief requested, the states and their departments are immune under the Eleventh Amendment from suit in the federal courts, unless the state has waived immunity or Congress has expressly abrogated Eleventh Amendment immunity by statute. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89,

98-101 (1984); *Alabama v. Pugh*, 438 U.S. 781, 782 (1978); *O'Hara v. Wigginton*, 24 F.3d 823, 826 (6th Cir. 1993). Congress has not expressly abrogated Eleventh Amendment immunity by statute, *Quern v. Jordan*, 440 U.S. 332, 341 (1979), and the State of Michigan has not consented to civil rights suits in federal court. *Abick v. Michigan*, 803 F.2d 874, 877 (6th Cir. 1986). In numerous unpublished opinions, the Sixth Circuit has specifically held that the MDOC is absolutely immune from suit under the Eleventh Amendment. *See, e.g., McCoy v. Michigan*, 369 F. App'x 646, 653-54 (6th Cir. 2010); *Turnboe v. Stegall*, No. 00-1182, 2000 WL1679478, at *2 (6th Cir. Nov. 1, 2000). In addition, the State of Michigan (acting through the Michigan Department of Corrections) is not a "person" who may be sued under § 1983 for money damages. *See Lapides v. Bd. of Regents*, 535 U.S. 613 (2002) (citing *Will v. Mich. Dep't of State Police*, 491 U.S. 58 (1989)).

Plaintiff alleges that the MDOC violated the ADA and the RA by not adequately treating his mental illness and by not allowing him access to computer-aided legal research, because his mental illness causes him to be frequently confined to segregation. The Supreme Court has held that Title II of the ADA applies to state prisons and inmates. *Penn. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 210-12 (1998) (noting that the phrase "services, programs, or activities" in § 12132 includes recreational, medical, educational, and vocational prison programs). The proper defendant under a Title II claim is the public entity or an official acting in his official capacity. *Carten v. Kent State Univ.*, 282 F.3d 391, 396–97 (6th Cir. 2002). Plaintiff has named the MDOC as a Defendant and Defendants Heyns in his official capacity.

The State of Michigan (acting through the MDOC) is not necessarily immune from Plaintiff's claims under the ADA. The ADA "validly abrogates state sovereign immunity" for "conduct that *actually* violates the Fourteenth Amendment[.]" *United States v. Georgia*, 546 U.S.

151, 159 (2006); *see also Mingus v. Butler*, 591 F.3d 474, 482 (6th Cir. 2010). If conduct violates the ADA but not the Fourteenth Amendment, then the Court must determine whether the ADA validly abrogates state sovereign immunity. *Id.* At this stage of the proceedings, the Court will presume that the ADA validly abrogates state sovereign immunity for Plaintiff's ADA claims. However, Title II of the ADA does not provide for suit against a public official acting in his or her individual capacity. *Everson v. Leis*, 556 F.3d 484, 501 n.7 (6th Cir. 2009). Thus, Plaintiff properly brings his ADA claims against the MDOC and the remaining Defendants in their official capacities.

The requirements for stating a claim under the RA are substantially similar to those under the ADA, except that the RA specifically applies to programs or activities receiving federal financial assistance. By accepting these funds, states waive sovereign immunity from claims under the RA. *Nihiser v. Ohio EPA*, 269 F.3d 626, 628 (6th Cir. 2001). For purposes of this opinion, the Court will assume that the MDOC receives federal assistance for the prison programs and activities at issue. As a consequence, the MDOC and its agents acting in their official capacities are not immune from suit under the ADA and RA.

III. Merits Review

A complaint may be dismissed for failure to state a claim if it fails "'to 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) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). While a complaint need not contain detailed factual allegations, a plaintiff's allegations must include more than labels and conclusions. *Twombly*, 550 U.S. at 555; *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). The court must determine whether the complaint contains "enough facts to state

a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 679. Although the plausibility standard is not equivalent to a "'probability requirement,' . . . it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'show[n]' – that the pleader is entitled to relief." *Iqbal*, 556 U.S. at 679 (quoting FED. R. CIV. P. 8(a)(2)); *see also Hill v. Lappin*, 630 F.3d 468, 470-71 (6th Cir. 2010) (holding that the *Twombly/Iqbal* plausibility standard applies to dismissals of prisoner cases on initial review under 28 U.S.C. §§ 1915A(b)(1) and 1915(e)(2)(B)(i)).

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege the violation of a right secured by the federal Constitution or laws and must show that the deprivation was committed by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Street v. Corr. Corp. of Am.*, 102 F.3d 810, 814 (6th Cir. 1996). Because § 1983 is a method for vindicating federal rights, not a source of substantive rights itself, the first step in an action under § 1983 is to identify the specific constitutional right allegedly infringed. *Albright v. Oliver*, 510 U.S. 266, 271 (1994).

Moreover, a claim may be dismissed as frivolous if "it lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Brown v. Bargery*, 207 F.3d 863, 866 (2000); *Lawler v. Marshall*, 898 F.2d 1196, 1198 (6th Cir. 1990). Claims that lack an arguable or rational basis in law include claims for which the defendants are clearly entitled to immunity and

claims of infringement of a legal interest which clearly does not exist; claims that lack an arguable or rational basis in fact describe fantastic or delusional scenarios. *Neitzke*, 490 U.S. at 327-28; *Lawler*, 898 F.2d at 1199. The Court has the "unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless." *Id.*, 490 U.S. at 327. "A finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible, whether or not there are judicially noticeable facts available to contradict them." *Denton v. Hernandez*, 504 U.S. 25, 32 (1992). Examples of claims lacking rational facts include a prisoner's assertion that Robin Hood and his Merry Men deprived prisoners of their access to mail or that a genie granted a warden's wish to deny prisoners any access to legal texts. *See Neitzke*, 490 U.S. at 327-28; *Lawler*, 898 F.2d at 1198-99. An *in forma pauperis* complaint may not be dismissed, however, merely because the court believes that the plaintiff's allegations are unlikely. *Id.*

A. Overarching Conspiracy

Plaintiff's complaint involves numerous allegations against even more numerous Defendants, which occurred over a one-year period. In an attempt to join his otherwise unrelated claims in a single action, Plaintiff broadly alleges that all Defendants have engaged in an overarching conspiracy, led by Defendant Heyns, to subject him to retaliation, deny his religious rights, physically punish/torture him, deny his access to the courts, reject his mail, destroy his property, contaminate his food, deprive him of necessary medication, forcibly medicate him, harass him, defame him, and violate his settlement agreement.

A civil conspiracy under § 1983 is "an agreement between two or more persons to injure another by unlawful action." *See Hensley v. Gassman*, 693 F.3d 681, 695 (6th Cir. 2012)

(quoting *Hooks v. Hooks*, 771 F.2d 935, 943-44 (6th Cir. 1985)). The plaintiff must show the existence of a single plan, that the alleged coconspirator shared in the general conspiratorial objective to deprive the plaintiff of a federal right, and that an overt action committed in furtherance of the conspiracy caused an injury to the plaintiff. *Hensley*, 693 F.3d at 695; *Bazzi v. City of Dearborn*, 658 F.3d 598, 602 (6th Cir. 2011). Moreover, a plaintiff must plead a conspiracy with particularity, as vague and conclusory allegations unsupported by material facts are insufficient. *Twombly*, 550 U.S. at 565 (recognizing that allegations of conspiracy must be supported by allegations of fact that support a "plausible suggestion of conspiracy," not merely a "possible" one); *Fieger v. Cox*, 524 F.3d 770, 776 (6th Cir. 2008); *Spadafore v. Gardner*, 330 F.3d 849, 854 (6th Cir. 2003); *Gutierrez v. Lynch*, 826 F.2d 1534, 1538 (6th Cir. 1987).

Plaintiff's allegations of an overarching conspiracy are wholly conclusory, speculative, and baseless. His allegations, even viewed in the light most favorable to Plaintiff, describe a number of discrete incidents that occurred over the course of a year, involving numerous individual officers and two different facilities. Plaintiff suggests that, because so many incidents occurred, the then-Director of the MDOC, Defendant Heyns, must have orchestrated a global conspiracy to injure Plaintiff. Plaintiff has provided no allegations establishing a link between Defendant Heyns and any other Defendant, and he has alleged facts suggesting that Defendant Heyns entered into any agreement with any other Defendant. He relies entirely on an attenuated inference from the mere fact that each of the Defendants have taken one or more actions against him (e.g., retaliated against him for filing grievances and lawsuits; denied him adequate mental-health treatment; disciplined him; interfered with his mail; deprived him of his property; harassed him; etc.) to conclude that all Defendants must have been acting pursuant to a common scheme. As the

Supreme Court has held, such allegations, while hinting at a "possibility" of conspiracy, do not contain "enough factual matter (taken as true) to suggest that an agreement was made." *Twombly*, 550 U.S. at 556. Instead, the Court has recognized that although parallel conduct may be consistent with an unlawful agreement, it is insufficient to state a claim where that conduct "was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed . . . behavior." *Iqbal*, 556 U.S. at 680. Plaintiff therefore utterly fails to state a plausible claim of overarching conspiracy.

Moreover, considering Heyns' position, the number of individuals involved in incidents in at least two prisons, and the length of time during which the conspiracy allegedly existed (especially in light of Plaintiff's prefatory allegations beginning in 2009, which deems a "[b]ackground [n]arrative" to set the context for his overarching conspiracy (PageID.7)), such allegations are so unsupported as to be frivolous. Further, to the extent that Plaintiff alleges a conspiracy led by Heyns in relation to actions preceding July 2014, Plaintiff's claims were previously rejected in *Annabel v. Mich. Dep't of Corr. et al.*, No. 1:14-cv-756 (W.D. Mich. Aug. 21, 2014) (No. 1:14-cv-756, PageID.170-171). As a result, Plaintiff's decision to raise the claim again in this action was wholly frivolous.

B. Previously Litigated Claims

In addition to his prior conclusory and frivolous claim of conspiracy, Plaintiff previously raised his claims about the actions leading up to his transfer to ICF on May 16, 2014, and those claims previously were decided against him. *See Annabel v. Mich. Dep't of Corr. et al.*, No. 1:14-cv-756 (W.D. Mich. Aug. 21, 2014) (No. 1:14-cv-756, PageID.180-181). In addition, Plaintiff previously raised his claim that was being denied his ability to practice his "business" as

a prison paralegal, and that claim was adjudicated against him. (No. 1:14-cv-756, PageID.172-173.) Further, Plaintiff earlier raised his claims that Defendant Heyns and two ARF officials interfered with his legal mail between March 24, 2014 and April 10, 2014, and that Defendant Zwiker interfered with delivery of his incoming mail between June 17 and July 2, 2014, denying him access to the courts; both claims were adjudicated against him. (No. 1:14-cv-756, PageID.174-176.) Plaintiff also previously alleged that Defendant MDOC violated his rights under the ADA and the RA by not adequately treating his mental illness and forcibly medicating him, and his claim was dismissed for failure to state a claim. (No. 1:14-cv-756, PageID.190-191) Moreover, Plaintiff previously alleged that Defendants' violations of his constitutional rights also amounted to violations of RICO, a claim the court summarily dismissed. (No. 1:14-cv-756, PageID.191-192.) Further, Plaintiff previously alleged that Defendants Smith, Norwood, and Huss retaliated against him for filing suit by having Prisoner Halton harass Plaintiff, and Plaintiff's claim was denied with prejudice as conclusory. (No. 1:14-cv-756, PageID.179-180.) Plaintiff also previously asserted and the court previously rejected a claim that Defendant Zwiker had violated Plaintiff's First Amendment religious rights by mocking his kosher diet and by regularly uncovering his food tray and saying how delicious the food looked. (No. 1:14-cv-756, PageID.183-184.) In addition, the court previously concluded that Plaintiff's had failed to state a claim against Defendant Heyns arising from the alleged denial of medical care to Plaintiff by Defendants Apol and Yee. (No. 1:14-cv-756, PageID.185-186.) Moreover, the court previously held that Plaintiff's claims that Defendants denied him grievance forms and placed him on modified grievance access in retaliation for his exercise of his First Amendment rights did not state a retaliation claim. (No. 1:14-cv-756, PageID.178.)

Upon review of the prior denials of the listed claims and a comparison of the allegations in the two complaints, the court concludes that Plaintiff is barred from relitigating these claims in this action by the doctrine of res judicata.

> Res judicata is often analyzed further to consist of two preclusion concepts: "issue preclusion" and "claim preclusion." Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided. . . . This effect also is referred to as direct or collateral estoppel. Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit. Claim preclusion therefore encompasses the law of merger and bar.

Migra v. Warren City School District Board of Education, 465 U.S. 75, 77 n. 1 (1984) (citation omitted). The doctrine of claim preclusion provides that, if an action results in a judgment on the merits, that judgment operates as an absolute bar to any subsequent action on the same cause between the same parties or their privies, with respect to every matter that was actually litigated in the first case, as well as every ground of recovery that might have been presented. *Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573, 582 (6th Cir. 1994); *see Kremer v. Chem. Const. Corp.*, 456 U.S. 461, 467 n.6 (1982); *see also Bowen v. Gundy*, No. 96-2327, 1997 WL 778505, at * 1 (6th Cir. Dec. 8, 1997). Claim preclusion operates to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and by preventing inconsistent decisions, encourage reliance on adjudication. *Allen v. McCurry*, 449 U.S. 90, 94 (1980). In order to apply the doctrine of claim preclusion, the court must find that (1) the previous lawsuit ended in a final judgment on the merits; (2) the previous lawsuit was between the same parties or their privies; and (3) the previous lawsuit involved the same claim or cause of action as the present case. *Allen*, 449 U.S. at 94; *accord Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981).

Both issue and claim preclusion are applicable here. In most cases, the Defendants named in this action were named in the earlier action, in relation to the claims discussed. The issues were actually litigated and decided against Plaintiff in the earlier action in relation to those Defendants. Issue preclusion therefore bars relitigation of the claims here. Moreover, to the extent that Plaintiff now names additional possible Defendants on some of the issues raised and denied in the earlier action, his claims should have been advanced in that case and so are barred by the doctrine of claim preclusion.

As a consequence, the following issues were frivolously brought in this action, because they are barred by res judicata: Plaintiff's conspiracy claim preceding July 2014, Plaintiff's claims involving his transfer to ICF on May 16, 2014; the claims involving Plaintiff's inability to practice his "business" as a prison paralegal; Plaintiff's claims that Defendant Heyns and two ARF officials interfered with his legal mail between March 24, 2014 and April 10, 2014, and that Defendant Zwiker interfered with delivery of his incoming mail between June 17 and July 2, 2014; Plaintiff's claim that Defendant MDOC violated his rights under the ADA and the RA by not adequately treating his mental illness and forcibly medicating him; Plaintiff's RICO claims; Plaintiff's allegations that Defendants Smith, Norwood, and Huss retaliated against him for filing suit by having Prisoner Halton harass Plaintiff; Plaintiff's claim that Defendant Zwiker violated Plaintiff's First Amendment religious rights by mocking his kosher diet by regularly uncovering his food tray and saying how delicious the food looked; Plaintiff's claim against Defendant Heyns participated in the denial of medical care to Plaintiff by Defendants Apol and Yee; and Plaintiff's claims that Defendants denied him grievance forms and placed him on modified grievance access in retaliation for his exercise of his First Amendment rights.

C. Misjoinder

As discussed, Plaintiff's complaint sweepingly collects all of his complaints related to his confinement over the period of one year. The only thing linking those claims was his wholly insufficient claim of a universal conspiracy, which was both previously litigated in this Court and frivolous. Absent such an overarching claim linking Plaintiff's other claims, the Court must consider which of Plaintiff's many claims are properly joined in this action. The Court concludes that a frivolous claim of conspiracy is insufficient to create a basis for joining the remaining claims. *See Grooms v. Tencza*, 2010 WL 1489983, at *3 (N.D.Ill. Apr.13, 2010) (finding conclusory conspiracy allegation insufficient to join multiple unrelated defendants in single suit); *see also Srivastava v. Daniels*, No. , 2010 WL 2539451, at * 5 (N.D. Ind. June 14, 2010) (finding that frivolous RICO claim could not authorize joinder of otherwise "buckshot" complaint of unrelated claims).

Federal Rule of Civil Procedure 20(a) limits the joinder of parties in single lawsuit, whereas Federal Rule of Civil Procedure 18(a) limits the joinder of claims. Rule 20(a)(2) governs when multiple defendants may be joined in one action: "[p]ersons . . . may be joined in one action as defendants if: (A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all defendants will arise in the action." Rule 18(a) states: "A party asserting a claim . . . may join, as independent or alternative claims, as many claims as it has against an opposing party."

Courts have recognized that, where multiple parties are named, as in this case, the analysis under Rule 20 precedes that under Rule 18:

> Rule 20 deals solely with joinder of parties and becomes relevant only when there is more than one party on one or both sides of the action. It is not concerned with joinder of claims, which is governed by Rule 18. Therefore, in actions involving multiple defendants Rule 20 operates independently of Rule 18. . . .
>
> Despite the broad language of Rule 18(a), plaintiff may join multiple defendants in a single action only if plaintiff asserts at least one claim to relief against each of them that arises out of the same transaction or occurrence and presents questions of law or fact common to all.

7 CHARLES ALLEN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE CIVIL § 1655 (3d ed. 2001), *quoted in Proctor v. Applegate*, 661 F. Supp. 2d 743, 778 (E.D. Mich. 2009), and *Garcia v. Munoz*, No. 08-1648, 2007 WL 2064476, at *3 (D.N.J. May 14, 2008); *see also Neitzke v. Williams*, 490 U.S. 319, 328 (1989) (joinder of defendants is not permitted by Rule 20 unless both commonality and same transaction requirements are satisfied).

Therefore, "a civil plaintiff may not name more than one defendant in his original or amended complaint unless one claim against each additional defendant is transactionally related to the claim against the first defendant and involves a common question of law or fact." *Proctor*, 661 F. Supp. 2d at 778. When determining if civil rights claims arise from the same transaction or occurrence, a court may consider a variety of factors, including, "the time period during which the alleged acts occurred; whether the acts . . . are related; whether more than one act . . . is alleged; whether the same supervisors were involved, and whether the defendants were at different geographical locations." *Id.* (quoting *Nali v. Michigan Dep't of Corrections*, 2007 WL 4465247, *3 (E.D. Mich. December 18, 2007)).

Permitting the improper joinder in a prisoner civil rights action also undermines the purpose of the PLRA, which was to reduce the large number of frivolous prisoner lawsuits that were being filed in the federal courts. *See Riley v. Kurtz*, 361 F. 3d 906, 917 (6th Cir. 2004). Under the

PLRA, a prisoner may not commence an action without prepayment of the filing fee in some form. *See* 28 U.S.C. § 1915(b)(1). These "new fee provisions of the PLRA were designed to deter frivolous prisoner litigation by making all prisoner litigants feel the deterrent effect created by liability for filing fees." *Williams v. Roberts*, 116 F. 3d 1126, 1127-28 (5th Cir. 1997). The PLRA also contains a "three-strikes" provision requiring the collection of the entire filing fee after the dismissal for frivolousness, etc., of three actions or appeals brought by a prisoner proceeding in forma pauperis, unless the statutory exception is satisfied. 28 U.S.C. § 1915(g). The "three strikes" provision was also an attempt by Congress to curb frivolous prisoner litigation. *See Wilson v. Yaklich*, 148 F. 3d 596, 603 (6th Cir. 1998).

The Seventh Circuit has explained that a prisoner like Plaintiff may not join in one complaint all of the defendants against whom he may have a claim, unless the prisoner satisfies the dual requirements of Rule 20(a)(2):

> Thus multiple claims against a single party are fine, but Claim A against Defendant 1 should not be joined with unrelated Claim B against Defendant 2. Unrelated claims against different defendants belong in different suits, not only to prevent the sort of morass that [a multi]-claim, [multi]-defendant suit produced but also to ensure that prisoners pay the required filing fees-for the Prison Litigation Reform Act limits to 3 the number of frivolous suits or appeals that any prisoner may file without prepayment of the required fees. 28 U.S.C. § 1915(g) . . . .
>
> A buckshot complaint that would be rejected if filed by a free person -- say, a suit complaining that A defrauded the plaintiff, B defamed him, C punched him, D failed to pay a debt, and E infringed his copyright, all in different transactions -- should be rejected if filed by a prisoner.

George v. Smith, 507 F.3d 605, 607 (7th Cir. 2007); *see also Wheeler v. Wexford Health Sources, Inc.*, 689 F.3d 680, 683 (7th Cir. 2012) ("A litigant cannot throw all of his grievances, against dozens of different parties, into one stewpot."); *Brown v. Blaine*, 185 F. App'x 166, 168-69 (3rd

Cir. 2006) (allowing an inmate to assert unrelated claims against new defendants based on actions taken after the filing of his original complaint would have defeated the purpose of the three strikes provision of PLRA); *Patton v. Jefferson Correctional Center*, 136 F.3d 458, 464 (5th Cir. 1998); *Shephard v. Edwards*, 2001 WL 1681145, * 1 (S.D. Ohio Aug[.] 30, 2001) (declining to consolidate prisoner's unrelated various actions so as to allow him to pay one filing fee, because it "would improperly circumvent the express language and clear intent of the 'three strikes' provision"); *Scott v. Kelly*, 107 F. Supp. 2d 706, 711 (E.D. Va. 2000) (denying prisoner's request to add new, unrelated claims to an ongoing civil rights action as an improper attempt to circumvent the PLRA's filing fee requirements and an attempt to escape the possibility of obtaining a "strike" under the "three strikes" rule). To allow Plaintiff to proceed with these improperly joined claims and defendants in a single action would permit him to circumvent the PLRA's filing fee provisions and allow him to avoid having to incur a "strike[,"] for purposes of § 1915(g), should any of his claims turn out to be frivolous.

Under Rule 21 of the Federal Rules of Civil Procedure, "[m]isjoinder of parties is not a ground for dismissing an action." Instead, Rule 21 provides two remedial options: (1) misjoined parties may be dropped on such terms as are just; or (2) any claims against misjoined parties may be severed and proceeded with separately. *See DirecTV, Inc. v. Leto*, 467 F.3d 842, 845 (3d Cir. 2006); *Carney v. Treadeau*, No. 07-cv-83, 2008 WL 485204, at *2 (W.D. Mich. Feb. 19, 2008); *Coal. to Defend Affirmative Action v. Regents of Univ. of Mich.*, 539 F. Supp. 2d 924, 940 (E.D. Mich. 2008); *see also Michaels Bldg. Co. v. Ameritrust Co., N.A.*, 848 F.2d 674, 682 (6th Cir. 1988) ("Parties may be dropped . . . by order of the court . . . of its own initiative at any stage of the action and on such terms as are just."). "Because a district court's decision to remedy misjoinder

by dropping and dismissing a party, rather than severing the relevant claim, may have important and potentially adverse statute-of-limitations consequences, the discretion delegated to the trial judge to dismiss under Rule 21 is restricted to what is 'just.'" *DirecTV*, 467 F.3d at 845.

At least three judicial circuits have interpreted "on such terms as are just" to mean without "gratuitous harm to the parties." *Strandlund v. Hawley*, 532 F.3d 741, 745 (8th Cir. 2008) (quoting *Elmore v. Henderson*, 227 F.3d 1009, 1012 (7th Cir. 2000)); *see also DirecTV, Inc.*, 467 F.3d at 845. Such gratuitous harm exists if the dismissed parties lose the ability to prosecute an otherwise timely claim, such as where the applicable statute of limitations has lapsed, or the dismissal is with prejudice. *Strandlund*, 532 F.3d at 746; *DirecTV*, 467 F.3d at 846-47; *Michaels Building Co.*, 848 F.2d at 682.

In this case, Plaintiff brings his claims largely under 42 U .S.C. § 1983. For civil rights suits filed in Michigan under § 1983, the statute of limitations is three years. *See Wilson v. Garcia*, 471 U.S. 261, 268-69 (1985) (holding that, because no statute of limitations is expressly provided, state statutes of limitations and tolling principles for related types of cases are borrowed to determine the timeliness of claims asserted under 42 U.S.C. § 1983); MICH. COMP. LAWS § 600.5805(10); *Carroll v. Wilkerson*, 782 F.2d 44 (6th Cir. 1986) (per curiam); *Stafford v. Vaughn*, No. 97-2239, 1999 WL 96990, at *1 (6th Cir. Feb. 2, 1999). Furthermore, "Michigan law provides for tolling of the limitations period while an earlier action was pending which was later dismissed without prejudice." *Kalasho v. City of Eastpointe*, 66 F. App'x 610, 611 (6th Cir. 2003).

Plaintiff also raises claims under the ADA and the RA, as well as under RICO. The statute of limitations under Title II of the ADA also is governed by the borrowing principle of *Wilson*, 471 U.S. at 268-69. *See McCormick v. Miami University*, 693 F.3d 654, 663-64 (6th Cir.

2012). As a result, in Michigan, the statute of limitations for such claims is three years. For RICO claims, the statute of limitations is longer: four years. *See Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 156 (1987).

The actions about which Plaintiff complains occurred in 2014 and 2015, well within the three-year or four-year period of limitations. As a result, no claim raised in the complaint is at risk of being time-barred. As a result, dismissal of any improperly joined claims would not be unjust.

Because Plaintiff's complaint contains no central claim, the Court must look to Plaintiff's first named Defendant and first set of factual allegations in determining which portion of the action should be considered related. Defendant MDOC is the first Defendant named in the action. Plaintiff alleges that the MDOC and the MDOC alone violated his rights under the Equal Protection Clause, the ADA, and the RA.

As earlier discussed in this opinion, the MDOC is immune from suit for Plaintiff's equal protection claim under § 1983. In addition, as also discussed, Plaintiff's principal ADA and RA claim against the MDOC – that the MDOC violated his rights under the ADA and RA when it denied adequate medical care – was previously decided against Plaintiff and therefore is barred by res judicata.

Title II of the ADA provides, in pertinent part, that no qualified individual with a disability shall, because of that disability, "be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." *Mingus v. Butler*, 591 F.3d 474, 481-82 (6th Cir. 2010) (citing 42 U.S.C. § 12132). In order to state a claim under Title II of the ADA, Plaintiff must show: (1) that he is a qualified individual with a disability;

(2) that defendants are subject to the ADA; and (3) that he was denied the opportunity to participate in or benefit from defendants' services, programs, or activities, or was otherwise discriminated against by defendants, by reason of his disability. *See Tucker v. Tennessee*, 539 F. 3d 526, 532-33 (6th Cir. 2008); *see also Jones v. City of Monroe*, 341 F.3d 474, 477 (6th Cir. 2003). The term "qualified individual with a disability" includes "an individual with a disability who, with or without . . . the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2). *See Tucker v. Tennessee*, 539 F.3d 526, 532-33 (6th Cir. 2008). The ADA defines the term "disability" as follows: "[1] a physical or mental impairment that substantially limits one or more of the major life activities of such individual; [2] a record of such an impairment; or [3] being regarded as having such an impairment." 42 U.S.C. § 12102(2). Similarly, Section 504 of the Rehabilitation Act protects any "otherwise qualified individual" from "be[ing] excluded from the participation in, be[ing] denied the benefits of, or be[ing] subjected to discrimination" under specified programs "solely by reason of her or his disability." 29 U.S.C. § 794(a).

Assuming that Plaintiff's mental illness constitutes a disability under the ADA and RA, Plaintiff does not allege that he has been discriminated against, or that he has been unable to participate in or receive the benefit of a service, program, or activity available to other inmates by reason of that disability. Instead, Plaintiff alleges that he has not received library access akin to prisoners in the general population because he has been in segregation. And, he contends, his mental illness makes it more likely that he will be placed in segregation because of his conduct.

Plaintiff's own allegations fail to support a conclusion that his periodic denials of access to electronic legal research were due to his disability, as is necessary to state a claim under

the ADA and the RA. Instead, according to his own allegations, he was placed in segregation as a result of his repeated misconduct tickets. As a result, his ADA and RA claims are both wholly conclusory, *see Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 555, and belied by his own factual allegations. He therefore fails to state an ADA or RA claim against the MDOC.

Because the MDOC is immune from Plaintiff's § 1983 claims and because Plaintiff fails to state an ADA or RA claim against the MDOC, the MDOC will be dismissed as a Defendant in this action. Plaintiff makes no allegations against any other Defendant that are related to his claims against the MDOC. As a result, no claim against any of the other Defendants is properly joined under FED. R. CIV. P. 20(a).

In determining relatedness, the Court also will look at Plaintiff's first set of allegations. Plaintiff expressly alleges that he intends to raise all of the claims that occurred between March 2, 2014 and April 24, 2015. (ECF No. 1, PageID.7.) However, because of the litany of claims recited in the complaint that precede those dates, the first claims actually alleged in the complaint appear to be set forth on page eleven of the complaint, shortly after Plaintiff begins the section entitled, "Principle Facts Supporting Claims." (*Id.*, PageID.10.) On page eleven, Plaintiff makes allegations about harassing actions, including the decision to transfer Plaintiff to ICF, that were taken by certain ARF officials. As previously discussed, these first claims were resolved against Plaintiff in *Annabel v. Mich. Dep't of Corr. et al.*, No. 1:14-cv-756 (W.D. Mich. Aug. 21, 2014). They therefore are barred by res judicata. Moreover, according to Plaintiff's own complaint, those claims involved ARF Defendants, none of whom is a Defendant in this action. They therefore fail to state a claim against any Defendant. As a result, none of the claims against

the Defendants actually sued in this action are transactionally related to the first claims in his complaint.

In sum, because no claims were made against Defendant MDOC acting in conjunction with another official, and because Plaintiff's remaining claims are not transactionally related to his first claim, Plaintiff's remaining claims against the other Defendants are improperly joined under Rules 18 and 20 of the Federal Rules of Civil Procedure. *See Proctor*, 661 F. Supp. 2d at 778; *Garcia*, 2007 WL 2064476, at *3; *see also Neitzke v. Williams*, 490 U.S. 319, 328 (1989); *George*, 507 F.3d at 607. As a consequence, all of Plaintiff's claims, other than those against the MDOC and those that were previously decided against Plaintiff in an earlier action, will be dismissed without prejudice because they were improperly joined in his complaint.

D. Future Filings

Plaintiff is a frequent litigator in this Court and in the Eastern District of Michigan. In several of Plaintiff's actions, Plaintiff has operated much as he has in this action – by filing a complaint naming numerous Defendants, most of whom were unrelated and including Defendant Heyns or his predecessor, Patricia Caruso, as responsible parties for the conduct of other individuals. *See, e.g., Annabel v. Mich. Dep't of Corr. et al.*, No. 1:14-cv-756 (W.D. Mich.); *Annabel v. Heyns et al.*, No. 2:14-cv-11337 (E.D. Mich.); *Annabel v. Heyns et al.*, No. 2:12-cv-13590 (E.D. Mich. Aug. 7, 2013) (Rep. & Recommendation (R&R), Doc #34, PageID.586); *Annabel v. Caruso et al.*, No. 1:09-cv-176 (W.D. Mich.). After having a complaint against Defendant Heyns first dismissed because his allegations were based on supervisory liability, *see Annabel v. Heyns et al.*, No. 14-11337 (E.D. Mich. July 31, 2015) (R&R adopted on September 21, 2015), Plaintiff began to add allegations, as he did in this case, that all Defendants are linked by

a conspiracy "orchestrated by Defendant Heyns, to deprive petitioner of his constitutional rights in retaliation for a prior lawsuit filed against Heyns and other prison officials and in retaliation for various grievances." *Annabel v. Heyns et al.*, No. 2:12-cv-13590 (E.D. Mich. Aug. 7, 2013) (Rep. & Rec., Doc #34, PageID.586); *see also Annabel v. Mich. Dep't of Corr. et al.*, No. 1:14-cv-756 (W.D. Mich. Aug. 21, 2014) (No. 1:14-cv-756, PageID.170-171). Those allegations have routinely been held not to state a claim. *Id.*

The instant 40-page complaint constitutes an abusive amalgam of improperly joined claims in a single action, including claims that had been raised and rejected in earlier complaints. When viewed against Plaintiff's litigation history, the filing of the instant misjoined complaint borders on conduct that would warrant the imposition of restrictions on future filings. *See Shepard v. Marbley*, 23 F. App'x 491, 493 (6th Cir. 2001) (discussing the court's inherent authority "to impose pre-filing restrictions on an individual with a history of repetitive or vexatious litigation") (citing *Feathers v. Chevron U.S.A., Inc.*, 141 F.3d 264, 269 (6th Cir. 1998), and *Ortman v. Thomas*, 99 F.3d 807, 811 (6th Cir. 1996)). That said, the Court will not impose such restrictions at this time. Plaintiff is hereby notified, however, that any future attempt to file a blunderbuss complaint like the one filed in this case will be met with an order restricting Plaintiff from filing any complaint longer than ten pages or any complaint arising out of more than one transaction or occurrence.

Conclusion

Having conducted the review required by the Prison Litigation Reform Act, the Court determines that Defendant MDOC will be dismissed with prejudice on grounds of immunity and failure to state a claim, pursuant to 28 U.S.C. §§ 1915(e)(2) and 1915A(b), and 42 U.S.C. § 1997e(c). Plaintiff's claim of conspiracy is dismissed on the grounds that it is both frivolous and

fails to state a claim. Further, Plaintiff's claims that were previously adjudicated against him (regarding his transfer to ICF on May 16, 2014; his inability to practice his "business" as a prison paralegal; interference with his legal mail between March 24, 2014 and April 10, 2014, and with delivery of his incoming mail between June 17 and July 2, 2014; his RICO claims; his claim against Defendants Smith, Norwood, and Huss for encouraging Prisoner Halton harass Plaintiff; his claim that Defendant Zwiker mocked his kosher diet; his supervisory liability claim against Defendant Heyns for denying him medical care; and his due process and retaliation claims about being denied grievance forms and being placed on modified grievance) will be dismissed with prejudice as frivolous. His remaining claims will be dismissed without prejudice for improper joinder.[5]

The Court must next decide whether an appeal of this action would be in good faith within the meaning of 28 U.S.C. § 1915(a)(3). *See McGore v. Wrigglesworth*, 114 F.3d 601, 611 (6th Cir. 1997). For the same reasons that the Court dismisses the action, the Court discerns no good-faith basis for an appeal. Should Plaintiff appeal this decision, the Court will assess the $505.00 appellate filing fee pursuant to § 1915(b)(1), *see McGore*, 114 F.3d at 610-11, unless Plaintiff is barred from proceeding *in forma pauperis*, e.g., by the "three-strikes" rule of § 1915(g). If he is barred, he will be required to pay the $505.00 appellate filing fee in one lump sum.

A Judgment consistent with this Opinion will be entered.

Dated: October 14, 2016

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge

[5]In light of the Court's disposition, Plaintiff's motion seeking preliminary injunctive relief (ECF No. 6) will be denied as moot.

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT WAYNE ANNABEL, II,

Plaintiff,

v.

MICHIGAN DEPARTMENT OF CORRECTIONS et al.,

Defendants.
/

Case No. 1:16-cv-543

Honorable Paul L. Maloney

JUDGMENT

In accordance with the Opinion filed this date:

IT IS ORDERED that Plaintiff's action against Defendant MDOC be DISMISSED WITH PREJUDICE on grounds of immunity and failure to state a claim, pursuant to 28 U.S.C. §§ 1915(e)(2) and 1915A(b), and 42 U.S.C. § 1997e(c).

IT IS FURTHER ORDERED that Plaintiff's claim of conspiracy be DISMISSED WITH PREJUDICE on the grounds that it is both frivolous and fails to state a claim.

IT IS FURTHER ORDERED that Plaintiff's claims that were previously adjudicated against him (regarding his transfer to ICF on May 16, 2014; his inability to practice his "business" as a prison paralegal; interference with his legal mail between March 24, 2014 and April 10, 2014, and with delivery of his incoming mail between June 17 and July 2, 2014; his RICO claims; his claim against Defendants Smith, Norwood, and Huss for encouraging Prisoner Halton to harass Plaintiff; his claim that

APPENDIX C:

Order Denying Petition for Rehearing En Banc

No. 16-2532

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
May 11, 2018
DEBORAH S. HUNT, Clerk

ROBERT ANNABEL, II,

Plaintiff-Appellant,

v.

MICHIGAN DEPARTMENT OF CORRECTIONS, ET AL.,

Defendants-Appellees.

ORDER

BEFORE: KEITH, SILER, and STRANCH, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX D:

United States District Court Opinion/Judgment

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT WAYNE ANNABEL,

Plaintiff,

Case No. 1:14-cv-756

Honorable Paul L. Maloney

v.

MICHIGAN DEPARTMENT OF CORRECTIONS et al.,

Defendants.
/

OPINION

This is a civil rights action brought by a state prisoner pursuant to 42 U.S.C. § 1983, the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq., the Rehabilitation Act (RA), 29 U.S.C. § 794, and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964. The Court has granted Plaintiff leave to proceed *in forma pauperis*.[1] Under the Prison Litigation Reform Act, PUB. L. NO. 104-134, 110 STAT. 1321 (1996), the Court is required to dismiss any prisoner action brought under federal law if the complaint is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant immune from such relief. 28 U.S.C. §§ 1915(e)(2), 1915A; 42 U.S.C. § 1997e(c). The Court must read Plaintiff's *pro se* complaint indulgently, *see Haines v. Kerner*, 404 U.S. 519, 520 (1972), and accept Plaintiff's

[1]Plaintiff is a frequent litigant in this Court and in the Eastern District of Michigan. Plaintiff previously has filed at least three actions that were dismissed because they were frivolous, malicious, failed to state a claim, or sued defendants who were immune from suit. As a consequence, Plaintiff has three strikes within the meaning of 28 U.S.C. § 1915(g). However, upon initial review, the Court has concluded that Plaintiff is not barred from proceeding *in forma pauperis* by the three-strikes rule of § 1915(g), because he alleges facts that, if believed, are sufficient to show that he is in imminent danger of serious bodily injury.

allegations as true, unless they are clearly irrational or wholly incredible. *Denton v. Hernandez*, 504 U.S. 25, 33 (1992). Applying these standards, the Court will dismiss Plaintiff's complaint for failure to state a claim against Defendants Michigan Department of Corrections, Heyns, Campbell, Smith, Huss, Norwood, Zwiker, and Nichols. The Court will serve the complaint against Defendants Yee, Gerlach, and Apol.

Discussion

I. Factual allegations

Plaintiff Robert Wayne Annabel presently is incarcerated with the Michigan Department of Corrections (MDOC) at the Ionia Correctional Facility (ICF), though some of his claims arose while he was housed at the Gus Harrison Correctional Facility (ARF). He sues the MDOC and its Director, Daniel Heyns, together with the following employees at ARF and ICF: ARF Deputy Warden Sherman Campbell; ARF Assistant Resident Unit Supervisor Ronald Nichols; ICF Warden Willie O. Smith; ICF Deputy Wardens Erica Huss and Nanette Norwood; ICF Sergeant (unknown) Zwiker; ICF Social Worker James Apol; ICF Psychiatrist (unknown) Yee; and ICF Doctor (unknown) Gerlach.

Plaintiff's complaint broadly alleges a sweeping conspiracy among MDOC employees at multiple facilities over many years. Plaintiff references his extensive litigation history between 2009 and the present. *See Annabel v. Heyns et al.*, No. 2:12-cv-13590 (E.D. Mich.); *Annabel v. Eaton et al.*, No. 4:14-cv-11429 (E.D. Mich.); *Annabel v. Heyns et al.*, No. 2:14-cv-11337 (E.D. Mich.); *Annabel v. Frost et al.*, No. 2:14-cv-10244 (E.D. Mich.); *Annabel v. Armstrong et al.*, No. 1:09-cv-796 (W.D. Mich.); *Annabel v. Caruso et al.*, No. 1:09-cv-176 (W.D. Mich.); *Annabel v. Gendernalik et al.*, No. 1:08-cv-15328 (E.D. Mich.); *Annabel v. Shertz et al.*, No. 2:07-cv-30 (W.D.

Mich.); *Annabel v. Eyke et al.*, No. 2:05-cv-209 (W.D. Mich.). The majority of Plaintiff's allegations serve as mere background for the present complaint and as the basis for other complaints; the Court therefore will not recite those facts in detail. Additional allegations in the complaint concern the suicides of two prisoners who had been housed near Plaintiff and whom Plaintiff had assisted with litigation; the Court will not fully describe the alleged harassment of those prisoners. Instead, the Court will discuss only those allegations that apply to Plaintiff's current complaint and to the Defendants in this action.

Plaintiff alleges that all Defendants retaliated against him for filing his many grievances and lawsuits. According to the complaint,

> On April 30, 2014 three extreme occurrences coincidently took place while Plaintiff was at the Gus Harrison Correctional Facility, in Unit 4: (1) Annabel, II v. Heyns, et al., Case No. 2:12-cv-13590 was dismissed; (2) Prisoner Abkedya Boyd #702008 committed a successful "suicide"; and (3) Sherman Campbell transferred the only Unit 4 prionser unit representative, Nolan #603761, to Unit 5 consistent with Cambell's intent to have removed Plaintiff from that same position in Annabel, II v. Frost, et al., Case No. 2:14-cv-10244.

(Compl. ¶ 21, docket #1, Page ID#9 (verbatim).) Plaintiff contends that he had been assisting Boyd with a grievance appeal, and that Defendant Heyns must have identified Plaintiff has a proficient litigator. On May 1, 2014, when Plaintiff left his unit to go to lunch, an unknown tall officer mocked Plaintiff about assisting other prisoners to prepare affidavits.

On May 13, 2014, Plaintiff told his RTP primary therapist, Mr. Dixon, that Plaintiff was requesting discharge from RTP to avoid further retaliation by ARF administrative employees, including Defendants Campbell and Nichols and two individuals not named in this action, James Eaton and Christine Hemry. That same day, after Plaintiff had expressed his desire to leave the RTP program at ARF (a Level IV facility), Plaintiff was transferred to an outpatient treatment program

(OTP) at ICF (a Level V facility). The transfer form was signed by Defendant Campbell, and Plaintiff assumes that Defendant Nichols helped Campbell prepare the forms. Plaintiff alleges that he has since received a copy of the May 5, 2014, security classification screening form prepared by Nichols, which Plaintiff claims inaccurately counted a Class I misconduct ticket that had been dismissed. Plaintiff nevertheless acknowledges that his classification security screenings routinely have qualified him for Level V placement, though he sometimes has been placed in Level IV facilities, notwithstanding the scoring. He contends that he can be managed without Level V confinement.

When he was transferred to ICF, ARF officials attached a "stun cuff" to his left ankle. (*Id.* ¶ 33, Page ID#13.) The cuff was removed when Plaintiff was turned over to transport officers at St. Louis, Michigan, who thereafter drove the bus to ICF. Plaintiff complains that, if deployed, the cuff would have transmitted 80,000 volts, and he contends that use of the cuff was unnecessary.

Plaintiff claims that he experienced staff abuse at ICF in 2008 and briefly in 2011. As the result of these past abuses, Plaintiff claims to fear for his safety at ICF. Plaintiff also asserts that, because he filed lawsuits about those earlier abuses, the 2014 transfer was undoubtedly retaliatory. In addition, because of the incidents in 2008, Plaintiff initially refused both his food and medication at ICF, until roughly May 20, 2014, because he feared that unknown officials would contaminate both.

On May 16, 2014, shortly after his arrival at ICF, Plaintiff was interviewed by OPT social worker Apol. Plaintiff complains that Defendant Apol was hostile and critical of Plaintiff and made insulting statements about Plaintiff. Apol showed Plaintiff his nametag and told Plaintiff to

spell his name correctly if he sued him. Defendant Apol warned Plaintiff that, if he continued to refuse his psychotropic medications, Apol would initiate forced medication proceedings.

On May 20, 2014, Plaintiff was interviewed by Defendant psychiatrist Dr. Yee. Plaintiff claims that Yee believes that bipolar diagnoses are best treated by a holistic approach, rather than standard psychotropic medication. Defendant Yee implied that Plaintiff's hunger strike was an attempt to obtain a transfer, and he expressed no concern about Plaintiff's weight, as he would not be underweight until he reached 130 pounds. Plaintiff agreed that he would start accepting both food and medication.

On May 24, 2014, after Plaintiff had resumed his meals and medication, both his psychotropic medication and his iron supplement were discontinued. Defendant Yee apparently discontinued the psychotropic medication, and Defendant Gerlach reportedly discontinued the iron supplement. Plaintiff alleges that the iron supplement is essential to treat his hereditary microcytic hypochromic anemia; without the supplements, Plaintiff could require a transfusion.

Plaintiff attended an OPT meeting conducted by Defendant Apol on May 27, 2014. Also present at the meeting were an unknown female professional and a male doctor (possibly Dr. Eric Lanes). Defendant Apol reviewed two medical kites filed by Plaintiff about the discontinuation of his medications. Defendant Apol told Plaintiff that the medications would not be resumed until Plaintiff seriously injured himself. Apol continued, saying that Plaintiff would not be transferred from ICF, even if he did injure himself. The male doctor advised Defendant Apol that he remembered Plaintiff from before, and he recommended resuming the medications because Plaintiff seemed much improved. Apol refused to resume the medications. Plaintiff contends that he has a liberty interest in his mental health and a property interest in his necessary medications.

Plaintiff next complains that, since 2005, he has invested thousands of dollars in legal books and materials, in order to develop a business as a paralegal. He complains that the mental instability and lethargy caused by the termination of his medications is diminishing his capacity to function as a litigator and fully enjoy the property interests of his books and documents. He also alleges that he is severely depressed, paranoid, and fatigued, and he entertains homicidal and suicidal thoughts. According to Plaintiff, Defendants are well aware that, when he is not adequately medicated, he is likely to act violently and commit felonies. Plaintiff insists that Defendants intend to cause so much psychological stress to Plaintiff that he, like prisoner Boyd, commits suicide.

In his next set of allegations, Plaintiff complains that unnamed Defendants interfered with his legal mail between March 24, 2014, and April 10, 2014. As a result, Plaintiff did not receive a copy of a report and recommendation issued in *Annabel v. Heyns et al.*, No 2:12-cv-13590 (E.D. Mich. Mar. 24, 2014). Because Plaintiff failed to file objections to the report and recommendation, his case was dismissed on April 30, 2014. He asserts that the interference with his mail was retaliatory and violated his right to access the courts. In his summary of claims, Plaintiff alleges that Defendants Heyns, Campbell and Nichols are responsible for interference with his mail.

Plaintiff next complains that, since March 24, 2014, when he was placed on modified grievance access,[2] he has not been allowed to file a single grievance or grievance appeal. Plaintiff contends that Defendants prevented him from filing grievances in retaliation for his litigation.

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[2] Under Michigan Department of Corrections policy, a prisoner is placed on modified access for filing "an excessive number of grievances which are frivolous, vague, duplicative, non-meritorious, raise non-grievable issues, or contain prohibited language. . .or [are] unfounded . . . ." MICH. DEP'T OF CORR., Policy Directive 03.02.130, ¶ HH. (eff. July 9, 2007). The modified access period is ninety days and may be extended an additional thirty days for each time the prisoner continues to file a prohibited type of grievance. *Id.* While on modified access, the prisoner only can obtain grievance forms through the Step I coordinator, who determines whether the issue is grievable and otherwise meets the criteria under the grievance policy. *Id.*, ¶ KK.

In addition, Plaintiff alleges that Defendants Smith, Norwood and Huss retaliated against him by employing prisoner Halton to harass and repeatedly threaten Plaintiff. According to Plaintiff, on Halton's first morning in the yard, Halton screamed vulgarities and threats into Plaintiff's open cell window. Halton told the guards that he planned to physically attack Plaintiff, but he was not issued a misconduct ticket. Plaintiff alleges that Halton also attempted to incite gang bangers against Plaintiff. On June 17, 2014 at 2:15 p.m., Halton and Plaintiff left the unit to a library call-out.. On the way, an unknown officer stopped Plaintiff, and Halton repeated his threats against Plaintiff. In the law library, Halton glared at Plaintiff from behind a bookcase. Because he was stressed and unmedicated, Plaintiff "was coerced" into attacking Halton with a "bare ink pen." (*Id.* ¶ 56, Page ID#22.) Plaintiff was taken to segregation, where he was denied bedding until 9:30 p.m. on June 18, 2014, after Plaintiff had broken a sprinkler head. Plaintiff was not given hygiene items or other property from June 17 to July 3, 2014.

On June 19, 2014, Defendant Zwiker met with Plaintiff to review a Class I misconduct ticket for possession of a weapon. Zwiker allegedly mocked Plaintiff, telling him that he would be prosecuted on a weapons charge. Plaintiff claims that Zwiker denied him due process by withholding the Class I misconduct report, preventing Plaintiff from receiving 24-hour notice of the hearing. Zwiker allegedly mocked Plaintiff by saying, "Too bad, I gave you your due process." (*Id.* ¶ 59, Page ID#23.) Later that same day, Zwiker allegedly mocked Plaintiff's Christian religion by appearing at Plaintiff's door with a copy of the Qu'ran and the Talmud.

From June 17 through July 2, 2014, Plaintiff refused his Kosher meal trays, fearing staff tampering. For nearly every dinner meal of the last week of that period, Zwiker personally offered Plaintiff an uncovered food tray, saying how delicious the food looked and mocking Plaintiff.

Plaintiff alleges that Zwiker violated prison policy by uncovering the food tray. He also alleges that Zwiker acted in retaliation for Plaintiff's successful settlement of a prior lawsuit, in which Plaintiff, as a Judaic Christian, claimed entitlement under the First Amendment and the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1(a), to a kosher diet. *See Annabel v. Caruso et al.*, 1:09-cv-176 (W.D. Mich.) (Ord. of Dismissal July 19, 2012).

In addition, during the same two-week period, Defendant Zwiker and two unknown others allegedly withheld Plaintiff's legal mail. On July 2, 2014, Assistant Resident Unit Supervisor Lemke delivered three items: (1) unspecified rules and forms from the Sixth Circuit; (2) an order granting leave to amend a complaint in *Annabel v. Frost et al.*, 2:14-cv-10244 (E.D. Mich. June 23, 2014); and (3) the MDOC defendants' motion for summary judgment in the same case, which was filed on June 27, 2014.

Plaintiff next complains that Defendants Apol and Yee violated MDOC policy by not offering him a psychological evaluation until five days after he began his hunger strike, rather than after three days, as prescribed under the rule. They also only offered the evaluation four times between June 17 and July 2, 2014. On June 24, 2014, Defendants Apol and Yee completed paperwork for a panel hearing to forcibly medicate Petitioner. The paperwork contained numerous verbatim quotes from Plaintiff, demonstrating that Defendants had made audio recordings of Plaintiff. Plaintiff contends, however, that the paperwork omitted many things and misrepresented others. According to Plaintiff, he would not need to be forcibly medicated if Defendants had not been hostile and untrustworthy, causing Plaintiff to fear taking his medications. He claims that the injections of medication have caused him pain and physical injury and have interfered with his ability to function.

In addition, Plaintiff claims that Defendant Heyns is directly involved in the denial of Plaintiff's appropriate mental health treatment, because he has cut the budget for such treatment, resulting in the "warehousing [of] mentally ill prisoners who have become self-injurious or psychotically disruptive . . . ." (*Id.* ¶ 68, Page ID#26.) Plaintiff alleges that Defendant Heyns has discriminated against him and deliberately destabilized him by allowing him to be confined in segregation, where he has been denied the full services of the law library, as, while he was in segregation, he only had access to secured mini-law-library rooms. Plaintiff argues that he was denied access to hygiene supplies from June 17 to July 2, 2014, while he was in segregation. He also alleges that he has never been provided toothpaste containing fluoride.

According to Plaintiff, his post-traumatic stress disorder has been aggravated to the point that he experiences frequent nightmares, severe paranoia, thoughts of suicide and self-injury, weight loss, extreme depression, anger, rage and fear. He alleges that all Defendants have conspired to retaliate against him in violation of the First Amendment; that all Defendants have discriminated against him in violation of the RA, the ADA, and the Equal Protection Clause on the basis of his mental disability and anemia; that all Defendants have been and continue to be deliberately indifferent to his serious medical and psychological needs; that Defendants Smith, Norwood, Huss and Zwiker have violated his rights under the Free Exercise and Establishment Clauses of the First Amendment; that Defendants Smith, Norwood, Huss and Zwiker violated his Eighth Amendment rights by not giving him hygiene supplies and cleaning supplies while he was in segregation; and that Defendants Heyns, Campbell, and Nichols violated his right of access to the courts when they interfered with the delivery of the March 24, 2014 report and recommendation, causing dismissal of Case No. 2:12-cv-13590.

Plaintiff seeks declaratory and injunctive relief, together with compensatory and punitive damages.

II. Immunity

Plaintiff may not maintain a § 1983 action against the MDOC. Regardless of the form of relief requested, the states and their departments are immune under the Eleventh Amendment from suit in the federal courts, unless the state has waived immunity or Congress has expressly abrogated Eleventh Amendment immunity by statute. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98-101 (1984); *Alabama v. Pugh*, 438 U.S. 781, 782 (1978); *O'Hara v. Wigginton*, 24 F.3d 823, 826 (6th Cir. 1993). Congress has not expressly abrogated Eleventh Amendment immunity by statute, *Quern v. Jordan*, 440 U.S. 332, 341 (1979), and the State of Michigan has not consented to civil rights suits in federal court. *Abick v. Michigan*, 803 F.2d 874, 877 (6th Cir. 1986). In numerous unpublished opinions, the Sixth Circuit has specifically held that the MDOC is absolutely immune from suit under the Eleventh Amendment. *See, e.g., McCoy v. Michigan*, 369 F. App'x 646, 653-54 (6th Cir. 2010); *Turnboe v. Stegall*, No. 00-1182, 2000 WL1679478, at *2 (6th Cir. Nov. 1, 2000). In addition, the State of Michigan (acting through the Michigan Department of Corrections) is not a "person" who may be sued under § 1983 for money damages. *See Lapides v. Bd. of Regents*, 535 U.S. 613 (2002) (citing *Will v. Mich. Dep't of State Police*, 491 U.S. 58 (1989)). Therefore, the Court dismisses Plaintiff's § 1983 claim against the MDOC.

Plaintiff also sues the MDOC and the remaining Defendants in their official capacities under the ADA and the RA. The Supreme Court has held that Title II of the ADA applies to state prisons and inmates. *Penn. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 210-12 (1998) (noting that the

phrase "services, programs, or activities" in § 12132 includes recreational, medical, educational, and vocational prison programs). The proper defendant under a Title II claim is the public entity or an official acting in his official capacity. *Carten v. Kent State Univ.*, 282 F.3d 391, 396–97 (6th Cir. 2002). Plaintiff has named the MDOC as a Defendant and Defendants Heyns in his official capacity.

The State of Michigan (acting through the MDOC) is not necessarily immune from Plaintiff's claims under the ADA. The ADA "validly abrogates state sovereign immunity" for "conduct that *actually* violates the Fourteenth Amendment[.]" *United States v. Georgia*, 546 U.S. 151, 159 (2006); *see also Mingus v. Butler*, 591 F.3d 474, 482 (6th Cir. 2010). If conduct violates the ADA but not the Fourteenth Amendment, then the Court must determine whether the ADA validly abrogates state sovereign immunity. *Id.* At this stage of the proceedings, the Court will presume that the ADA validly abrogates state sovereign immunity for Plaintiff's ADA claims. However, Title II of the ADA does not provide for suit against a public official acting in his or her individual capacity. *Everson v. Leis*, 556 F.3d 484, 501 n.7 (6th Cir. 2009). Thus, Plaintiff properly brings his ADA claims against the MDOC and the remaining Defendants in their official capacities.

The requirements for stating a claim under the RA are substantially similar to those under the ADA, except that the RA specifically applies to programs or activities receiving federal financial assistance. By accepting these funds, states waive sovereign immunity from claims under the RA. *Nihiser v. Ohio EPA*, 269 F.3d 626, 628 (6th Cir. 2001). For purposes of this opinion, the Court will assume that the MDOC receives federal assistance for the prison programs and activities at issue. As a consequence, the MDOC and its agents acting in their official capacities are not immune from suit.

III. Failure to state a claim

A complaint may be dismissed for failure to state a claim if it fails "'to 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) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). While a complaint need not contain detailed factual allegations, a plaintiff's allegations must include more than labels and conclusions. *Twombly*, 550 U.S. at 555; *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). The court must determine whether the complaint contains "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 679. Although the plausibility standard is not equivalent to a "'probability requirement,' . . . it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'show[n]' – that the pleader is entitled to relief." *Iqbal*, 556 U.S. at 679 (quoting FED. R. CIV. P. 8(a)(2)); *see also Hill v. Lappin*, 630 F.3d 468, 470-71 (6th Cir. 2010) (holding that the *Twombly/Iqbal* plausibility standard applies to dismissals of prisoner cases on initial review under 28 U.S.C. §§ 1915A(b)(1) and 1915(e)(2)(B)(i)).

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege the violation of a right secured by the federal Constitution or laws and must show that the deprivation was committed by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Street v. Corr.*

Corp. of Am., 102 F.3d 810, 814 (6th Cir. 1996). Because § 1983 is a method for vindicating federal rights, not a source of substantive rights itself, the first step in an action under § 1983 is to identify the specific constitutional right allegedly infringed. *Albright v. Oliver*, 510 U.S. 266, 271 (1994).

A. Conspiracy

Although Plaintiff repeatedly alleges that all Defendants were engaged in a conspiracy to retaliate against him for his litigation history, his factual allegations do not support such a claim. A civil conspiracy under § 1983 is "an agreement between two or more persons to injure another by unlawful action.'" *See Hensley v. Gassman*, 693 F.3d 681, 695 (6th Cir. 2012) (quoting *Hooks v. Hooks*, 771 F.2d 935, 943-44 (6th Cir. 1985)). The plaintiff must show the existence of a single plan, that the alleged co-conspirator shared in the general conspiratorial objective to deprive the plaintiff of a federal right, and that an overt action committed in furtherance of the conspiracy caused an injury to the plaintiff. *Hensley*, 693 F.3d at 695; *Bazzi v. City of Dearborn*, 658 F.3d 598, 602 (6th Cir. 2011). Moreover, a plaintiff must plead a conspiracy with particularity, as vague and conclusory allegations unsupported by material facts are insufficient. *Twombly*, 550 U.S. at 565 (recognizing that allegations of conspiracy must be supported by allegations of fact that support a "plausible suggestion of conspiracy," not merely a "possible" one); *Fieger v. Cox*, 524 F.3d 770, 776 (6th Cir. 2008); *Spadafore v. Gardner*, 330 F.3d 849, 854 (6th Cir. 2003); *Gutierrez v. Lynch*, 826 F.2d 1534, 1538 (6th Cir. 1987).

Plaintiff's allegations of conspiracy are conclusory and speculative. His allegations, even viewed in the light most favorable to Plaintiff, describe a number of discrete events that occurred over a period of years involving numerous individual officers at multiple prisons. Plaintiff has provided no allegations establishing a link between the alleged conspirators or any agreement

between them. He relies entirely on a highly attenuated inference from the mere fact that he has been subjected to treatment with which he disagrees by a variety of prison officials in various circumstances. As the Supreme Court has held, such allegations, while hinting at a "possibility" of conspiracy, do not contain "enough factual matter (taken as true) to suggest that an agreement was made." *Twombly*, 550 U.S. at 556. Instead, the Court has recognized that although parallel conduct may be consistent with an unlawful agreement, it is insufficient to state a claim where that conduct "was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed . . . behavior." *Iqbal*, 556 U.S. at 680. In light of the far more likely possibility that the various incidents occurring over the long history of Plaintiff's incarceration were unrelated, Plaintiff fails to state a plausible claim of conspiracy.

B. Claims of Others

Plaintiff complains that Defendant Campbell transferred prisoner Nolan, a Unit 4 representative to the Warden's Forum, to Unit 5, just as he had transferred Plaintiff in a claim he raised in *Annabel v. Frost et al.*, No. 2:14-cv-10244 (E.D. Mich.). He also alleges that, on April 30, 2014, prisoner Boyd, whom Plaintiff previously had assisted in litigation, committed suicide, ostensibly because of staff harassment. Plaintiff witnessed Boyd's suicide, and he had witnessed the suicide of another prisoner in September 2013, who also was mistreated by staff. Although Plaintiff's claims are unclear, he appears to be challenging the treatment of other prisoners by unidentified state actors.

Plaintiff lacks standing to assert the constitutional rights of other prisoners. *Newsom v. Norris*, 888 F.2d 371, 381 (6th Cir. 1989); *Raines v. Goedde*, No. 92-3120, 1992 WL 188120, at *2 (6th Cir. Aug. 6, 1992). As a layman, Plaintiff may only represent himself with respect to his

individual claims, and may not act on behalf of other prisoners. *See O'Malley v. Brierley*, 477 F.2d 785 (3d Cir. 1973); *Lutz v. LaVelle*, 809 F. Supp. 323, 325 (M.D. Pa. 1991); *Snead v. Kirkland*, 462 F. Supp. 914, 918 (E.D. Pa. 1978).

C. Employment

Plaintiff contends that he has invested thousands of dollars in legal books and materials, from which he developed a business as a prisoner paralegal. He asserts that, by depriving him of necessary medications and injecting forced medications, Defendants caused him to become seriously mentally ill and unable to exercise his liberty and property interest in his employment.

"Without a protected liberty or property interest, there can be no federal procedural due process claim." *Experimental Holdings, Inc. v. Farris*, 503 F.3d 514, 519 (6th Cir. 2007) (citing *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 579 (1972)). Contrary to his assertions, Plaintiff does not have a federally cognizable liberty or property interest in acting as a paralegal.

The Sixth Circuit consistently has found that prisoners have no constitutionally protected liberty interest in prison employment under the Fourteenth Amendment. *See, e.g., Dellis v. Corr. Corp. of Am.*, 257 F.3d 508, 511 (6th Cir. 2001) (district court properly dismissed as frivolous the plaintiff's claim that he was fired from his prison job); *Newsom v. Norris*, 888 F.2d 371, 374 (6th Cir. 1989) (no constitutional right to prison employment); *Ivey v. Wilson*, 832 F.2d 950, 955 (6th Cir. 1987) ("[N]o prisoner has a constitutional right to a particular job or to any job"); *Carter v. Tucker*, No. 03-5021, 2003 WL 21518730, at *2 (6th Cir. July 1, 2003) (same). Morever, "as the Constitution and federal law do not create a property right for inmates in a job, they likewise do not create a property right to wages for work performed by inmates." *Carter*, 2003 WL 21518730 at *2 (citing *Williams v. Meese*, 926 F.2d 994, 997 (10th Cir. 1991), and *James v. Quinlan*, 866 F.2d

627, 629-30 (3d Cir. 1989)). Under these authorities, Plaintiff fails to state a due process claim arising from any interference with his prison employment.[3]

D. Access to the Courts

Plaintiff alleges that Defendants Heyns, Campbell and Nichols are responsible for the fact that he did not receive his legal mail between March 24, 2014 and April 10, 2014, resulting in his failure to receive a copy of the March 24, 2014 report and recommendation issued in *Annabel v. Heyns*, No. 2:12-cv-13590 (E.D. Mich.), recommending that Defendants' motion for summary judgment be granted. Because he did not receive the report and recommendation, Plaintiff filed no objections, and the case was dismissed on April 30, 2014. *Id.* In addition, Plaintiff alleges that Defendant Zwiker interfered with the delivery of his incoming legal mail between June 17 and July 2, 2014.

It is well established that prisoners have a constitutional right of access to the courts. *Bounds v. Smith*, 430 U.S. 817, 821 (1977). The principal issue in *Bounds* was whether the states must protect the right of access to the courts by providing law libraries or alternative sources of legal information for prisoners. *Id.* at 817. The Court further noted that in addition to law libraries or alternative sources of legal knowledge, the states must provide indigent inmates with "paper and pen to draft legal documents, notarial services to authenticate them, and with stamps to mail them." *Id.* at 824-25. The right of access to the courts also prohibits prison officials from erecting barriers that

[3]Moreover, Michigan prisoners are expressly "prohibited from directly or indirectly charging or receiving compensation in any form, including in money, goods, or services, for providing legal services to, or obtaining legal services from, another prisoner. MICH. DEP'T OF CORR., Policy Directive 05.03.116 ¶ N (eff. July 21, 2008). The possession of money or other negotiable instrument is punishable as a Class II misconduct. MICH. DEP'T OF CORR., Policy Directive 03.03.105, Attach. B (eff. Apr. 9, 2012). Similarly, the possession of property belonging to another prisoner is contraband. *See* MICH. DEP'T OF CORR., Policy Directive 04.07.112 ¶¶ CC-FF (eff. Dec. 12, 2013). Possession of unauthorized, non-dangerous contraband is a Class III misconduct. *See* MICH. DEP'T OF CORR., Policy Directive 03.03.105, Attach. C (eff. Apr. 9, 2012).

may impede the inmate's accessibility to the courts. *See Knop v. Johnson*, 977 F.2d 996, 1009 (6th Cir. 1992).

An indigent prisoner's constitutional right to legal resources and materials is not, however, without limit. In order to state a viable claim for interference with his access to the courts, a plaintiff must show "actual injury." *Lewis v. Casey*, 518 U.S. 343, 349 (1996); *see also Talley-Bey v. Knebl*, 168 F.3d 884, 886 (6th Cir. 1999); *Knop*, 977 F.2d at 1000. In other words, a plaintiff must plead and demonstrate that the shortcomings in the prison legal assistance program or lack of legal materials have hindered, or are presently hindering, his efforts to pursue a nonfrivolous legal claim. *Lewis*, 518 U.S. at 351-53; *see also Pilgrim v. Littlefield*, 92 F.3d 413, 416 (6th Cir. 1996).

In addition, the Supreme Court squarely has held that "the underlying cause of action . . . is an element that must be described in the complaint, just as much as allegations must describe the official acts frustrating the litigation." *Christopher v. Harbury*, 536 U.S. 403, 415 (2002) (citing *Lewis*, 518 U.S. at 353 & n.3). "Like any other element of an access claim, the underlying cause of action and its lost remedy must be addressed by allegations in the complaint sufficient to give fair notice to a defendant." *Id.* at 416.

1. Heyns, Cambell, & Nichols

As discussed, Plaintiff complains that Defendants Heyns, Campbell and Nichols interfered with the delivery of his legal mail, thereby preventing him from receiving and timely objecting to a report and recommendation issued in one of Plaintiff's federal lawsuits. Because Plaintiff failed to object, his case was dismissed.

While Plaintiff's allegation of actual injury likely is sufficient to support an access-to-the-courts claim, Plaintiff fails to allege facts suggesting that Defendants Heyns, Campbell and

Nichols were actively involved in that deprivation. Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of respondeat superior or vicarious liability. *Iqbal*, 556 U.S. at 676; *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 691(1978); *Everson v. Leis*, 556 F.3d 484, 495 (6th Cir. 2009). A claimed constitutional violation must be based upon active unconstitutional behavior. *Grinter v. Knight*, 532 F.3d 567, 575 (6th Cir. 2008); *Greene v. Barber*, 310 F.3d 889, 899 (6th Cir. 2002). The acts of one's subordinates are not enough, nor can supervisory liability be based upon the mere failure to act. *Grinter*, 532 F.3d at 575; *Greene*, 310 F.3d at 899; *Summers v. Leis*, 368 F.3d 881, 888 (6th Cir. 2004). Moreover, § 1983 liability may not be imposed simply because a supervisor denied an administrative grievance or failed to act based upon information contained in a grievance. *See Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999). "[A] plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Iqbal*, 556 U.S. at 676.

Plaintiff has failed to allege that Defendants Heyns, Campbell or Nichols engaged in any active unconstitutional behavior with respect to his legal mail. Indeed, Defendant Heyns is the Director of the MDOC and would have had no access to legal mail at ARF, and Defendant Campbell is the Deputy Warden at ARF and is highly unlikely to be involved in mail delivery. Moreover, no facts link any of the three Defendants to any disruption in Plaintiff's legal mail. Because he fails to allege any facts about the involvement of Defendants Heyns, Campbell and Nichols in the alleged mail disruption, Plaintiff fails to state an access-to-the-courts claim against them.

2. Zwiker & Unknown Others

Plaintiff next alleges that Defendant Zwiker and two unknown others withheld his legal mail while he was in segregation between June 17 and July 2, 2014. On July 2, 2014, Officer

Lemke finally delivered the following mail items: (1) rules and forms from the Sixth Circuit; (2) an order granting leave to amend a complaint, which was issued on June 23, 2014; and (3) defendant's motion for summary judgment in *Annabel v. Frost et al.*, 2:14-cv-10244 (E.D. Mich. June 27, 2014).

Plaintiff fails entirely to allege any actual injury caused by Zwiker or any unnamed others because of a delay in the receipt of his mail. He alleges no deadline that he missed as a result of the delay in his receiving orders. Moreover, he actually received the motion for summary judgment within a reasonable mailing time after it was issued (three business days). His time for responding therefore could not have been impaired. Because he alleges no actual injury, *see Lewis*, 518 U.S. at 349, he fails to state an access-to-the-courts claim against Defendant Zwiker or the unknown officers.

E. First Amendment – Retaliation

Plaintiff alleges that all Defendants engaged in retaliation against him for filing his lawsuits. Plaintiff complains that he has been prevented from filing or appealing prison grievances since March 24, 2014, ostensibly in retaliation for his exercise of his First Amendment rights. He contends that Defendant Campbell signed the order transferring him to ICF, in retaliation for Plaintiff's complaints and litigation. He also alleges that Nichols must have been involved in the transfer decision, because Nichols inaccurately screened his security risk on May 5, 2014, by improperly counting a dismissed misconduct ticket. Plaintiff complains that unknown ARF officers attached a stun cuff to his left ankle during transfer, though they did not use it. He contends that Defendant Apol made hostile and insulting remarks about Plaintiff's litigation history, threatened to initiate forced-medication proceedings if Plaintiff refused to take his medication, refused to reinstate the medications terminated by Defendant Yee, and ultimately initiated proceedings to

authorize the forced administration of medications to Plaintiff. He also alleges that Defendant Yee retaliated by terminating his ongoing medication and by working with Apol to authorize forced medication. In addition, he asserts that Defendants generally have refused to allow him to file any grievance or grievance appeal since March 24, 2014, ostensibly in retaliation for his litigation efforts. Further, he alleges that Defendants Smith, Norwood and Huss retaliated against him by employing prisoner Halton to harass Plaintiff. He alleges that Defendant Zwiker retaliated by mocking Plaintiff, delivering his kosher meals uncovered, and failing to deliver his legal mail between June 17 and July 3, 2014.

Retaliation based upon a prisoner's exercise of his or her constitutional rights violates the Constitution. *See Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) (en banc). In order to set forth a First Amendment retaliation claim, a plaintiff must establish that: (1) he was engaged in protected conduct; (2) an adverse action was taken against him that would deter a person of ordinary firmness from engaging in that conduct; and (3) the adverse action was motivated, at least in part, by the protected conduct. *Id.* Moreover, a plaintiff must be able to prove that the exercise of the protected right was a substantial or motivating factor in the defendant's alleged retaliatory conduct. *See Smith v. Campbell*, 250 F.3d 1032, 1037 (6th Cir. 2001) (citing *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)).

The filing of a federal civil rights complaint undoubtedly is conduct protected by the First Amendment. Plaintiff's many allegations of retaliation, however, fail the remaining prongs of the retaliation test.

1. Modified Access

To the extent that Plaintiff alleges that he is being denied grievance forms and the ability to file grievances since March 24, 2014, in retaliation for exercising his right to petition government, he fails to state a claim. The Sixth Circuit repeatedly has held that placement on modified access does not constitute an adverse action for purposes of a retaliation claim. *See, e.g., Jackson v. Madery*, 158 F. App'x 656, 660 (6th Cir. 2005) (per curiam); *Walker v. Mich. Dep't of Corr.*, 128 F. App'x 441, 446 (6th Cir. 2005). Title 42 United States Code, § 1997e(a) requires prisoners to exhaust "such administrative remedies as are available" prior to filing suit in federal court. If a prisoner has been placed on modified access to the grievance procedure and attempts to file a grievance which is deemed to be non-meritorious, he has exhausted his "available" administrative remedies as required by § 1997e(a). Because placement on modified access cannot prevent Plaintiff from filing claims in federal court, it is not sufficiently adverse to state an access-to-the-courts claim. *Kennedy v. Tallio*, 20 F. App'x 469, 471 (6th Cir. Sept. 26, 2001).

2. Stun Cuff

Plaintiff next alleges that unknown officers placed him in a stun cuff during transport from ARF to St. Louis, Michigan, in retaliation for his litigation efforts. Plaintiff makes no allegation that any Defendant either threatened or used force against him. Mere placement in a stun cuff for a short period does not constitute action that is sufficiently adverse to deter a reasonable person from exercising his rights. Moreover, Plaintiff alleges no fact suggesting that the decision to place him in a stun cuff was in any way related to his protected conduct. Plaintiff therefore fails to allege facts suggesting either adverse action or retaliatory motive.

3. Denial of Hygiene Supplies & Bedding

Plaintiff complains that from the time he arrived in segregation on June 17 to July 2, 2014, Defendants failed to give him hygiene supplies. In addition, he complains that the prison has never provided fluoride toothpaste. Further, he vaguely complains that, while in segregation, he and other prisoners are not allowed the supplies they need to maintain clean cells. He also complains that he was denied bedding between June 17, 2014, at 2:30 p.m. to June 18, 2014, at 9:30 p.m., a total of 31 hours.

The Court assumes without deciding that the denial of necessary hygiene items for a substantial period of time would rise to the level of adverse action. Plaintiff, however, fails to identify the individual Defendants responsible for his brief derprivations, and he fails entirely to allege facts suggesting that any Defendant was motivated to deprive him of the items because of Plaintiff's protected conduct. Plaintiff's wholly conclusory allegations therefore fail to state a claim.

4. Smith, Norwood & Huss

Plaintiff contends that Defendants Smith, Norwood, and Huss hired prisoner Halton to harass him. It is well recognized that "retaliation" is easy to allege and that it can seldom be demonstrated by direct evidence. *See Harbin-Bey v. Rutter*, 420 F.3d 571, 580 (6th Cir. 2005); *Murphy v. Lane*, 833 F.2d 106, 108 (7th Cir. 1987); *Vega v. DeRobertis*, 598 F. Supp. 501, 506 (C.D. Ill. 1984), *aff'd*, 774 F.2d 1167 (7th Cir. 1985). "[A]lleging merely the ultimate fact of retaliation is insufficient." *Murphy*, 833 F.2d at 108. "[C]onclusory allegations of retaliatory motive 'unsupported by material facts will not be sufficient to state . . . a claim under § 1983.'" *Harbin-Bey*, 420 F.3d at 580 (quoting *Gutierrez*, 826 F.2d at 1538-39); *see also Iqbal*, 556 U.S. at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements,

do not suffice."); *Skinner v. Bolden*, 89 F. App'x 579, 579-80 (6th Cir. 2004) (without more, conclusory allegations of temporal proximity are not sufficient to show a retaliatory motive).

Plaintiff merely alleges the ultimate fact of retaliation in this action. He has not presented any facts to support his conclusion that Defendants either hired Halton or intended to retaliate against Plaintiff because he filed a grievances and lawsuits against these or other MDOC employees. At most, Plaintiff alleges that some officer failed to discipline Halton for yelling at and threatening Plaintiff. Such allegations fall short of adverse action. Accordingly, Plaintiff's speculative allegation fail to state a claim against Defendants Smith, Norwood and Huss.

5. Campbell & Nichols

Plaintiff alleges that Defendants Campbell authorized his transfer from ACF to ICF on May 13, 2014, and he "presume[s]" that Defendant Nichols was involved. (Compl., Page ID#12.) In his summary of claims, Plaintiff asserts that Nichols completed a security classification screening form on May 5, 2014, in which Nichols mistakenly counted a misconduct that was dismissed. Plaintiff broadly asserts that the actions were taken in retaliation for his lawsuits and grievances.

Plaintiff's allegations of retaliation are wholly conclusory. In fact, they conflict with admissions made by Plaintiff in other portions of his complaint. Plaintiff does not allege that any scoring error by Nichols affected his security classification level. In fact, he admits that he consistently has been scored at a level high enough to be placed in a Level V facility. In addition, Plaintiff admits that he himself requested transfer out of the RTP on May 13, 2014, prior to Campbell's authorization of his transfer. In the face of these admitted facts, Plaintiff fails to identify facts suggesting that either Campbell or Nichols acted to retaliate against Plaintiff for any particular instance of protected conduct. Plaintiff's conclusory allegations of a retaliatory motive therefore are

insufficient to demonstrate a causal connection between his protected conduct and his transfer. *See Iqbal*, 556 U.S. at 678; *Harbin-Bey*, 420 F.3d at 580; *Gutierrez*, 826 F.2d at 1538-39.

6. Defendant Zwiker

Plaintiff alleges that Defendant Zwiker retaliated against him for having favorably settled a lawsuit granting him a Kosher diet in the pursuit of his Judaic Christian religion. Defendant Zwiker allegedly mocked Plaintiff's Christianity by, on one occasion, appearing at his cell door with a copy of the Qu'ran and the Talmud. Also, for two weeks between June 17 and July 2, 2014, Zwiker also regularly opened Plaintiff's kosher meal tray before giving it too him, saying how delicious the food looked.

The law is clear that such minor verbal harassment is not an adverse action that would deter a person of ordinary firmness from exercising his rights. *See Thaddeus-X*, 175 F.3d at 398) (stating that "certain threats or deprivations are so de minimis that they do not rise to the level of being constitutional violations"); *see also Smith v. Craven*, 61 F. App'x 159, 162 (6th Cir. 2003) (mere verbal harassment and minor threats to not constitute adverse action); *Carney v. Craven*, 40 F. App'x 48, 50 (6th Cir. 2002) (same). Plaintiff therefore fails to state a retaliation claim against Zwiker for his alleged religious harassment.

Moreover, Plaintiff fails to state a retaliation claim against Defendant Zwiker and other unknown officers[4] for delaying his receipt of legal mail for two weeks. It is far from clear that a two-week delay in receiving legal mail, absent other consequences, is sufficiently adverse to support a retaliation claim. That is particularly true where, as here, the materials that were delayed were either inconsequential or delayed for a shorter period than two weeks. For example, the only

[4]Plaintiff has not named the unknown officers as parties in the action, who would also be entitled to dismissal.

item delay for two weeks was a copy of unspecified rules and forms of the Sixth Circuit. Such a delay clearly is a de minimis deprivation within the meaning of *Thaddeus-X*. Moreover, the court order granting leave to amend was not mailed until July 23, 2014, and the motion for summary judgment was not filed until July 27, 2014. Given reasonable mailing times, the delay on these items was small to none. As a consequence, Plaintiff fails to allege an adverse action related to his mail.

For all these reasons, Plaintiff fails to state a retaliation claim against Defendant Zwiker.

7. Defendants Apol, Yee & Gerlach

Upon review, the Court concludes that Plaintiff's allegations against Defendants Apol and Yee are sufficient to warrant service on his claim that they deprived him of medical care in order to retaliate against him for filing complaints and lawsuits.

Plaintiff's allegations against Defendant Gerlach are extremely limited. Plaintiff alleges only that Gerlach terminated Plaintiff's iron supplement, which Plaintiff claims could cause him serious physical injury from his microcytic hypochromic anemia. Plaintiff alleges no facts suggesting that Defendant Gerlach was named in any of Plaintiff's prior lawsuits or, if so, whether the litigation was even temporally connected to Gerlach's action to terminate the iron supplement. In addition, beyond Plaintiff's global conspiracy theory, no facts suggest that Gerlach would have had a reason to retaliate for grievances and lawsuits filed against others. In the absence of any facts suggesting retaliatory motive, Plaintiff fails to state a retaliation claim against Defendant Gerlach.

F. First Amendment – Religion Clauses

Plaintiff complains that Defendants Smith, Norwood, Huss, and Zwiker demonstrated hostility to his religion by mocking his religion and harassing him, thereby depriving him of his right to enjoy the practice of his faith. Plaintiff's factual allegations about the alleged harassment are extremely limited. He contends that, on June 19, 2014, Zwiker mocked his Judaic Christian religion by appearing at his door with a copy of the Qu'ran and the Talmud. During Plaintiff's confinement in segregation between June 17 and July 2, 2014, Zwiker also ostensibly mocked his kosher diet by regularly uncovering Plaintiff's food tray and saying how delicious the food looked. He makes no allegations about the actions of Defendants Smith, Norwood or Huss.

While "lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights," inmates clearly retain the First Amendment protection to freely exercise their religion. *See O'Lone v. Shabazz*, 482 U.S. 342, 348 (1987) (citations omitted). To establish that this right has been violated, Plaintiff must establish that: (1) the belief or practice he seeks to protect is religious within his own "scheme of things," (2) that his belief is sincerely held, and (3) Defendant's behavior infringes upon this practice or belief. *Kent v. Johnson*, 821 F.2d 1220, 1224-25 (6th Cir. 1987); *see also, Flagner v. Wilkinson*, 241 F.3d 475, 481 (6th Cir. 2001) (same); *Bakr v. Johnson*, No. 95-2348, 1997 WL 428903, at *2 (6th Cir. July 30, 1997) (noting that "sincerely held religious beliefs require accommodation by prison officials").

Plaintiff's allegations fail to demonstrate that Defendant Zwiker's allegedly harassing comments and conduct were sufficient to infringe upon Plaintiff's religious rights. Courts routinely have rejected claims of constitutional violations based solely on verbal harassment. *See, e.g., Shuaib v. Siddum*, No. 88-86126, 1988 WL 86126, at *1 (6th Cir. 1988) (holding that prison officials'

refusal to address prisoners by their newly adopted legal names does not violated the religion clauses of the First Amendment) (citing *Ivey v. Wilson*, 832 F.2d 950, 954-55 (6th Cir. 1987) (holding that verbal harassment is insufficient to support an Eighth Amendment claim)); *Hailes v. Collier*, No. 2:12-cv-687, 2014 WL 2515581, at *5 (S.D. Ohio June 3, 2014) (holding that verbal harassment is insufficient to state a claim under § 1983 for violation of any constitutional amendment, including the First Amendment religion clauses) (citing *Siggers v. Renner*, 37 F. App'x 138, 141 (6th Cir. 2002, and *Wingo v. Tenn. Dep't of Corr.*, 499 F. App'x 453, 455 (6th Cir. 2012)); *Mizori v. Miller*, No. 5:09-cv-10824, 2009 WL 777640, at *2 (E.D. Mich. Mar. 20, 2009) (holding that verbal harassment was insufficient to support a claim of religious discrimination under the First Amendment). Especially in light of the minimal nature of the harassment alleged, Plaintiff fails to state a claim for violation of his religious rights under the First Amendment.

G. Eighth Amendment

Plaintiff alleges a variety of claims under the Eighth Amendment. He alleges that he witnessed a suicide that unknown custody officers encouraged, and he contends that he experienced post-traumatic stress from the incident. He also alleges that Defendants Apol, Yee and Gerlach have deprived him of adequate mental and physical health care services, deliberately ignored his medical history, taken him off his previously prescribed psychotropic medication and iron supplement, and instituted forced medication, all of which caused him significant harm. Plaintiff complains that Defendant Heyns is responsible for his inadequate medical treatment, because Heyns cut the budget for medical care. In addition, Plaintiff complains that he was kept in his segregation cell for 31 hours without bedding, that he was denied hygiene items for two weeks, and that he was given inadequate cleaning supplies. He also argues that the MDOC has not provided fluoride toothpaste for years.

Further, Plaintiff complains that Defendants Smith, Norwood and Huss encouraged routine staff abuse, mistreatment, and harassment of prisoners. Finally, he alleges that unknown officers placed him in a stun cuff during his transfer from ARF to St. Louis, Michigan.

The Eighth Amendment imposes a constitutional limitation on the power of the states to punish those convicted of crimes. Punishment may not be "barbarous" nor may it contravene society's "evolving standards of decency." *Rhodes v. Chapman*, 452 U.S. 337, 345-46 (1981). The Amendment, therefore, prohibits conduct by prison officials that involves the "unnecessary and wanton infliction of pain." *Ivey v. Wilson*, 832 F.2d 950, 954 (6th Cir. 1987) (per curiam) (quoting *Rhodes*, 452 U.S. at 346). The deprivation alleged must result in the denial of the "minimal civilized measure of life's necessities." *Rhodes*, 452 U.S. at 347; *see also Wilson v. Yaklich*, 148 F.3d 596, 600-01 (6th Cir. 1998). The Eighth Amendment is only concerned with "deprivations of essential food, medical care, or sanitation" or "other conditions intolerable for prison confinement." *Rhodes*, 452 U.S. at 348 (citation omitted). Moreover, "[n]ot every unpleasant experience a prisoner might endure while incarcerated constitutes cruel and unusual punishment within the meaning of the Eighth Amendment." *Ivey*, 832 F.2d at 954.

1. Mental and Physical Health Claims

Plaintiff contends that Defendants Apol, Yee, and Gerlach have denied him necessary physical and mental health treatment. Upon initial review, the Court concludes that Plaintiff's allegations are sufficient to state a claim. The Court therefore will order service of Plaintiff's Eighth Amendment claims on Defendants Apol, Yee and Gerlach.

Plaintiff's allegations against Defendant Heyns, however, are wholly conclusory. Nothing in the facts alleged by Plaintiff suggests that the actions of Defendants Apol, Yee and

Gerlach were in any way affected by budgetary concerns. Plaintiff therefore fails to state an Eighth Amendment claim against Defendant Heyns arising out of his medical care.

2. Hygiene Items and Cell Conditions

In order for a prisoner to prevail on an Eighth Amendment claim, he must show that he faced a sufficiently serious risk to his health or safety and that the defendant official acted with "'deliberate indifference' to [his] health or safety." *Mingus v. Butler*, 591 F.3d 474, 479-80 (6th Cir. 2010) (citing *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (applying deliberate indifference standard to medical claims); *see also Helling v. McKinney*, 509 U.S. 25, 35 (1993) (applying deliberate indifference standard to conditions of confinement claims)).

Allegations about temporary inconveniences, e.g., being deprived of a lower bunk, subjected to a flooded cell, or deprived of a working toilet, do not demonstrate that the conditions fell beneath the minimal civilized measure of life's necessities as measured by a contemporary standard of decency. *Dellis*, 257 F.3d at 511; *see also J.P. v. Taft*, 439 F. Supp. 2d 793, 811 (S.D. Ohio 2006) ("[M]inor inconveniences resulting from the difficulties in administering a large detention facility do not give rise to a constitutional claim." (internal citation omitted)). *But see Flanory v. Bonn*, 604 F.3d 249, 255-56 (6th Cir. 2010) (holding that, while limited periods of deprivation were mere inconveniences, allegations that an inmate was deprived of toothpaste for 337 days and experienced dental health problems did not constitute a temporary inconvenience and were sufficient to state an Eighth Amendment claim).

Plaintiff's complaint about the 31-hour delay in receiving bedding is far too minor and short-lived an inconvenience to amount to an Eighth Amendment violation. *See Stephens v. Carter Cnty. Jail*, No. 86-5565, 1987 WL 36997, at * (6th Cir. Apr. 10, 1987) (dismissing prisoner's

claim that having been kept in a holding cell for 20 hours without food, water, sheets, a blanket, a shower and a bunk-bed violated the Eighth Amendment); *Hawk v. Richland Cnty. Jail*, No. 1:12-cv-326, 2012 WL 2742550, at *3 (N.D. Ohio Jul. 9, 2012) (holding that being locked in a cell overnight without bedding is a temporary inconvenience that falls short of an Eighth Amendment violation). Moreover, courts have recognized that the deprivation of other hygiene items for two weeks does not rise to the level of an Eighth Amendment claim. *See, e.g., Griffin v. Womack*, No. 1:12CV-P195-R, 2013 WL 28669, at *4 (W.D. Ky. Jan. 2, 2013) (holding that the deprivation of hygiene items such as a towel, toothbrush, toothpowder, comb and soap for 34 days did not amount to an Eighth Amendment violation); *Crump v. Janz*, No. 1:10–cv–583, 2010 WL 2854266, at *4 (W.D. Mich. July 19, 2010) (holding that lack of hygiene items and other personal property for 35 days did not establish an Eighth Amendment violation); *Gilland v. Owens*, 718 F. Supp. 665, 685 (W.D. Tenn. 1989) ("Short term deprivations of toilet paper, towels, sheets, blankets, mattresses, toothpaste, toothbrushes and the like do not rise to the level of a constitutional violation.").

Further, while the courts have recognized that the deprivation of basic hygiene items like soap, a toothbrush, and toothpaste are minimal civilized necessities, the court is aware of no case indicating that the Eighth Amendment requires that prisoners have access to toothpaste that is fluoridated. Plaintiff's allegation about the lack of fluoridated toothpaste therefore fails entirely to demonstrate an objectively serious need entitled to constitutional protection.

Finally, although Plaintiff broadly complains that he and other segregation prisoners are given insufficient supplies to clean their cells as often or as thoroughly as Plaintiff would like, he makes no factual allegations about the actual sanitary conditions of his cell or the particular Defendants responsible for the alleged deprivation. As a consequence, Plaintiff falls well short of

pleading sufficient facts to state a plausible claim under the Eighth Amendment. *See Iqbal*, 556 U.S. at 679.

3. Smith, Norwood & Huss

Plaintiff alleges that Defendants Smith, Norwood and Huss had an extensive history of encouraging abuse, mistreatment and harassment, because they failed to discipline their subordinates and even promoted some subordinates who had been targeted with verbal abuse. As previously discussed, government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of respondeat superior or vicarious liability. *Iqbal*, 556 U.S. at 676; *Monell*, 436 U.S. at 691; *Everson*, 556 F.3d at 495. A plaintiff must allege that a defendant, through his own individual actions, violated the constitution. *Iqbal*, 556 U.S. at 676. Plaintiff fails entirely to demonstrate that Defendants Smith, Norwood and Huss personally engaged in conduct violating the Eighth Amendment.

4. Stun Cuff

Plaintiff alleges that his placement in a stun cuff during his transfer from ARF amounted to cruel and unusual punishment. He contends that the stun cuff was capable of delivering 80,000 volts of shock, which, if used, would have amounted to cruel and unusual punishement. Because Plaintiff was neither threatened with the cuff's use nor experienced a shock, his mere placement in the cuff for a few hours by an unknown party is insufficient to state a claim of deliberate indifference by any named Defendant.

H. Equal Protection

Plaintiff complains that he was denied equal protection on the basis of his mental and physical disabilities. Plaintiff makes no specific allegations of discrimination; he merely claims that

Defendants discriminated against him, apparently in the delivery of medical and psychiatric care, because of his disabilities.

The Equal Protection Clause of the Fourteenth Amendment provides that a state may not "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike. U.S. CONST., amend. XIV, § 1; *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. A state practice generally will not require strict scrutiny unless it interferes with a fundamental right or discriminates against a suspect class of individuals. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976). The Supreme Court repeatedly has recognized that disability status is not a fundamental right subject to strict scrutiny. *See Tennessee v. Lane*, 541 S. Ct. 509, 540 (2004) (citing *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 366-68 (2001), and *Cleburne*, 473 U.S. at 439). As a consequence, Plaintiff's claim must be reviewed under the rational basis standard. *Club Italia Soccer & Sports Org., Inc. v. Charter Twp. of Shelby*, 470 F.3d 286, 298 (6th Cir. 2006).

"Under rational basis scrutiny, government action amounts to a constitutional violation only if it 'is so unrelated to the achievement of any combination of legitimate purposes that the court can only conclude that the government's actions were irrational.'" *Id.* (quoting *Warren v. City of Athens*, 411 F.3d 697, 710 (6th Cir. 2005)). To prove his equal protection claim, Plaintiff must demonstrate "intentional and arbitrary discrimination" by the state; that is, he must demonstrate that he "has been intentionally treated differently from others similarly situated and that there is no

rational basis for the difference in treatment." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

Plaintiff provides no specific factual allegations to support his contention that he was subjected to discrimination, and he identifies no similarly situated individuals without a disability who were treated differently. Conclusory allegations of unconstitutional conduct without specific factual allegations fail to state a claim under § 1983. *See Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 555.

I. Violations of the ADA and RA

Plaintiff alleges that he was deprived of his rights under the ADA and the RA, because he was subjected to discrimination because of his mental disability and anemia.

Title II of the ADA provides, in pertinent part, that no qualified individual with a disability shall, because of that disability, "be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." *Mingus v. Butler*, 591 F.3d 474, 481-82 (6th Cir. 2010) (citing 42 U.S.C. § 12132). In order to state a claim under Title II of the ADA, Plaintiff must show: (1) that he is a qualified individual with a disability; (2) that defendants are subject to the ADA; and (3) that he was denied the opportunity to participate in or benefit from defendants' services, programs, or activities, or was otherwise discriminated against by defendants, by reason of his disability. *See Tucker v. Tennessee*, 539 F. 3d 526, 532-33 (6th Cir. 2008); *see also Jones v. City of Monroe*, 341 F.3d 474, 477 (6th Cir. 2003). The term "qualified individual with a disability" includes "an individual with a disability who, with or without . . . the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or participation in programs or activities provided by a public entity." 42

U.S.C. § 12131(2). *See Tucker v. Tennessee*, 539 F.3d 526, 532-33 (6th Cir. 2008). The ADA defines the term "disability" as follows: "[1] a physical or mental impairment that substantially limits one or more of the major life activities of such individual; [2] a record of such an impairment; or [3] being regarded as having such an impairment." 42 U.S.C. § 12102(2). Similarly, Section 504 of the Rehabilitation Act protects any "otherwise qualified individual" from "be[ing] excluded from the participation in, be[ing] denied the benefits of, or be[ing] subjected to discrimination" under specified programs "solely by reason of her or his disability." 29 U.S.C. § 794(a).

Assuming that Plaintiff's mental illness and blood disorder constitute disabilities under the ADA and RA, Plaintiff does not allege that he has been discriminated against, or that he has been unable to participate in or receive the benefit of a service, program, or activity available to other inmates by reason of that disability. Instead, Plaintiff alleges that he has not received necessary medical treatment, and he alleges that Defendants' failure to treat him was motivated by a desire to punish him for exercising his right to petition government. He does not, however, allege facts showing that the asserted denials were due to his disability, as is necessary to state a claim under the ADA and the RA. In sum, his ADA and RA claims are wholly conclusory and therefore fail to state a claim under § 1983. *See Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 555. Because there are no other claims against the MDOC, it will be dismissed as a Defendant in this action.

J. RICO Claims

Plaintiff claims generally that all Defendants' conduct constitutes racketeering in violation of RICO. *See*18 U.S.C. § 1962. Section 1964(c) of RICO, the provision upon which Plaintiffs' claim apparently is founded, creates a private cause of action, as follows:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. § 1964(c)(1982) (emphasis added). Section 1962 makes it illegal to engage in a pattern of racketeering activity. 18 U.S.C. § 1962(c)(1982). "Racketeering activity" is defined in section 1961(1) in terms of a long list of federal and state crimes, including mail fraud, 18 U.S.C. § 1341, and wire fraud, 18 U.S.C. § 1343. A "pattern of racketeering activity" requires at least two acts of racketeering activity within a ten year period, 18 U.S.C. 1961(5), generally referred to as the "predicate acts" or "predicate offenses" underlying the RICO claim.

The Sixth Circuit and other federal courts consistently have rejected RICO claims concerning prison conditions. *See, e.g.*, *Hyland v. Martin*, No. 00-1269, 2000 WL 1647952, at *1 (6th Cir. Oct. 25, 2000) (affirming dismissal of prisoner RICO conspiracy claim regarding restrictions imposed on photocopying credit card); *see also Jenkins v. C.S.C./C.C.C.F. Corr. Servs. Corp.*, No. 99-1518, 2000 WL 1179772, at *1 (10th Cir. Aug. 21, 2000) (dismissing prisoner RICO claim alleging embezzlement from inmate accounts); *Petersen v. Shanks*, 149 F.3d 1140, 1145 (10th Cir. 1998) (affirming dismissal of RICO claims alleging warden accepted bribes from prison food services company); *Taylor v. Ornoski*, 2006 WL 1646148 (N.D. Cal. June 14, 2006) (dismissing prisoner RICO claims seeking to challenge regulations restricting vendors who provide telephone service to inmates). In *Ziegler v. McGinnis*, 32 F. App'x 697 (6th Cir. 2002), the Sixth Circuit rejected a claims brought by state prisoners under § 1983 and RICO concerning the MDOC telephone policy. The court held that the prisoners had no RICO claim based upon the MDOC's

telephone policy because they did not allege injury to business or property, a requirement under § 1964(c). *Id.* at 699.

Plaintiff alleges that Defendants' actions have interfered with his property by causing him mental distress that diminishes his ability to run his legal-writing business. Such allegations are wholly conclusory and therefore fail to establish predicate acts upon which to base a RICO claim. *See Iqbal*, 129 S. Ct. at 1949-50. Moreover, Plaintiffs' RICO claim fails to state a claim for relief because he cannot demonstrate any injury to business or property, which is a prerequisite to a successful civil RICO claim. *See* 18 U.S.C. § 1964(c); *Ziegler*, 32 F. App'x at 699; *see also Lee v. Michigan Parole Bd.*, 104 F. App'x 490, 493 (6th Cir. 2004); *Looper v. Gibson*, 63 F. App'x 877, 878 (6th Cir. 2003). As previously discussed, Plaintiff has no right to maintain a business in prison, and he therefore has no legitimate claim to property he may have acquired through the pursuit of that business. For both reasons, Plaintiffs' RICO claim will be dismissed.

K. Violations of MDOC Policy

Plaintiff alleges that Defendants violated MDOC policies in a variety of ways: (1) they failed to provide bedding until the day after Plaintiff was placed in segregation, rather than following policy and custom to deliver bedding the same day; (2) Zwiker opened his meal trays, in violation of policy; (3) Defendants improperly resolved his grievances under MDOC policy; (4) Defendants improperly placed him on modified grievance access and denied him grievance forms and appeals; and (5) when Plaintiff was on hunger strike, Defendants Apol and Yee did not evaluate his condition within the precise times provided under MDOC policy.

Section 1983 does not provide redress for a violation of a state law or policy. *Pyles v. Raisor*, 60 F.3d 1211, 1215 (6th Cir. 1995); *Sweeton v. Brown*, 27 F.3d 1162, 1166 (6th Cir.

1994). Plaintiff's assertions that Defendants violated MDOC policies therefore fail to state a claim under § 1983.

Moreover, to the extent that Plaintiff seeks to invoke this Court's supplemental jurisdiction over his state-law claims against Defendants Heyns, Campbell, Smith, Huss, Norwood, Zwiker and Nichols, the Court declines to exercise jurisdiction. In determining whether to retain supplemental jurisdiction, "[a] district court should consider the interests of judicial economy and the avoidance of multiplicity of litigation and balance those interests against needlessly deciding state law issues." *Landefeld v. Marion Gen. Hosp., Inc.*, 994 F.2d 1178, 1182 (6th Cir. 1993). Ordinarily, where a district court has exercised jurisdiction over a state-law claim solely by virtue of supplemental jurisdiction and the federal claims are dismissed prior to trial, the court will dismiss the remaining state-law claims. *Id.* Dismissal, however, remains "purely discretionary." *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 639 (2009) (citing 28 U.S.C. § 1367(c)); *Orton v. Johnny's Lunch Franchise, LLC*, 668 F.3d 843, 850 (6th Cir. 2012). Here, the balance of the relevant considerations weighs against the continued exercise of supplemental jurisdiction. Accordingly, Plaintiff's state-law claim against Defendant Heyns, Campbell, Smith, Huss, Norwood, Zwiker, and Nichols will be dismissed without prejudice.

Conclusion

Having conducted the review required by the Prison Litigation Reform Act, the Court determines that Plaintiff's complaint against Defendants Michigan Department of Corrections, Heyns, Campbell, Smith, Huss, Norwood, Zwiker, and Nichols will be dismissed on grounds of immunity and failure to state a claim pursuant to 28 U.S.C. §§ 1915(e)(2) and 1915A(b), and 42 U.S.C. § 1997e(c). The Court also will dismiss Plaintiff's First Amendment retaliation claim against

Defendant Gerlach. Plaintiff's state-law claims against Defendants Heyns, Campbell, Smith, Huss, Norwood, Zwiker, and Nichols will be dismissed without prejudice. The Court will serve the remainder of the complaint against Defendants Apol, Yee and Gerlach.

An Order consistent with this Opinion will be entered.

Dated: August 21, 2014

/s/ Paul L. Maloney
Paul L. Maloney
Chief United States District Judge

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT WAYNE ANNABEL,

Plaintiff,

v.

MICHIGAN DEPARTMENT OF CORRECTIONS et al.,

Defendants.
/

Case No. 1:14-cv-756

Honorable Paul L. Maloney

ORDER FOR PARTIAL DISMISSAL and PARTIAL SERVICE

In accordance with the Opinion filed this date:

IT IS ORDERED that Plaintiff's federal claims against Defendants Michigan Department of Corrections, Heyns, Campbell, Smith, Huss, Norwood, Zwiker, and Nichols be DISMISSED WITH PREJUDICE on grounds of immunity and failure to state a claim upon which relief may be granted, pursuant to 28 U.S.C. §§ 1915(e) and 1915A, and 42 U.S.C. § 1997e(c).

IT IS FURTHER ORDERED that Plaintiff's retaliation claim against Defendant Gerlach be DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that Plaintiff's state-law claims against Defendants Heyns, Campbell, Smith, Huss, Norwood, Zwiker, and Nichols be DISMISSED WITHOUT PREJUDICE.

IT IS FURTHER ORDERED that in accordance with Administrative Order No. 03-029, the Clerk shall return to Plaintiff with a copy of this order one copy of the complaint and any exhibits.

IT IS FURTHER ORDERED that immediately upon receipt of this order, Plaintiff shall request that the prison make three (3) copies of the complaint and exhibits for service upon Defendants Apol, Yee and Gerlach. Plaintiff is responsible for the cost of the copies. If Plaintiff does not have sufficient funds to pay for the copies, the Michigan Department of Corrections provides loans for legal copies. *See* Mich. Dep't of Corr., Policy Directive 05.03.116.

IT IS FURTHER ORDERED that within fourteen (14) days of this order, Plaintiff shall file with the Court the requisite number of copies of the complaint and exhibits along with a copy of this order OR an affidavit explaining why Plaintiff is unable to provide the requested copies within the fourteen-day period. Should the Court find that the prison failed to make copies upon Plaintiff's request, the Court will direct the Clerk to make such copies as may be necessary and to charge the Michigan Department of Corrections for the cost of copying at the Court's usual rate of $.50 per page.

IT IS FURTHER ORDERED that Plaintiff's failure to submit the requested copies within the time provided by the Court or an affidavit explaining why Plaintiff is unable to provide the requested copies may result in the dismissal of his action without prejudice by the Court.

IT IS FURTHER ORDERED that upon receipt of the copies required by this order, the Clerk shall forward the complaint to the U.S. Marshals Service, which is authorized to mail a request for waiver of service to Defendants Apol, Yee and Gerlach in the manner prescribed by Fed.

R. Civ. P. 4(d)(2). If waiver of service is unsuccessful, summons shall issue and be forwarded to the U.S. Marshals Service for service under 28 U.S.C. § 1915(d).

IT IS FURTHER ORDERED that the remaining Defendants shall file an appearance of counsel (individual Defendants may appear *pro se* if they do not have counsel) within 21 days of service or, in the case of a waiver of service, 60 days after the waiver of service was sent. Until so ordered by the Court, no Defendant is required to file an answer or motion in response to the complaint, and no default will be entered for failure to do so. *See* 42 U.S.C. § 1997e(g)(1). After a Defendant has filed an appearance, proceedings in this case will be governed by the Court's Standard Case Management Order in a Prisoner Civil Rights Case.

Dated: August 21, 2014

/s/ Paul L. Maloney
Paul L. Maloney
Chief United States District Judge