

UNPUBLISHED**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 19-6780

DMITRY PRONIN,

Plaintiff - Appellant,

v.

CHARLES WRIGHT, "Chuck"; NEAL URCH; L. BLACKWELL,

Defendants - Appellees,

and

ASHLEY MCCANN,

Defendant.

Appeal from the United States District Court for the District of South Carolina, at
Orangeburg. Henry M. Herlong, Jr., Senior District Judge. (5:16-cv-03635-HM)

Submitted: October 23, 2019

Decided: November 15, 2019

Before NIEMEYER, MOTZ, and KING, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Dmitry Pronin, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Dmitry Pronin appeals the district court's order accepting the recommendation of the magistrate judge and denying relief on his 42 U.S.C. § 1983 (2012) complaint. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *Pronin v. Wright*, No. 5:16-cv-03635-HMH (D.S.C. May 13, 2019). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ORANGEBURG DIVISION

Dmitry Pronin,)	
)	
Plaintiff,)	C.A. No. 5:16-3635-HMH-KDW
)	
vs.)	
)	OPINION & ORDER
Charles Wright, Neal Urch, and)	
L. Blackwell,)	
)	
Defendants.)	

This matter is before the court with the Report and Recommendation of United States Magistrate Judge Kaymani D. West, made in accordance with 28 U.S.C. § 636(b) and Local Civil Rule 73.02 of the District of South Carolina.¹ Dmitry Pronin ("Pronin"), a federal prisoner proceeding pro se, brings this action alleging claims under 42 U.S.C. § 1983. Defendants Charles Wright, Neal Urch, and L. Blackwell (collectively "Defendants"), filed a motion for summary judgment. In her Report and Recommendation, Magistrate Judge West recommends granting Defendants' motion for summary judgment.

I. FACTUAL AND PROCEDURAL HISTORY

Pronin is a federal prisoner currently serving a ten-year sentence for armed bank robbery, in violation of 18 U.S.C. § 2113(a) and (d), and brandishing a firearm during a crime of violence,

¹ The recommendation has no presumptive weight, and the responsibility for making a final determination remains with the United States District Court. See Mathews v. Weber, 423 U.S. 261, 270 (1976). The court is charged with making a de novo determination of those portions of the Report and Recommendation to which specific objection is made. The court may accept, reject, or modify, in whole or in part, the recommendation made by the magistrate judge or recommit the matter with instructions. 28 U.S.C. § 636(b)(1) (2006).

in violation of 18 U.S.C. § 924(c)(1)(A)(ii).² United States v. Pronin, Cr. No. 1:11-33-LPS (D. Del. 2011).³ From June 27, 2016 to August 22, 2016, Pronin was housed at Spartanburg County Detention Center ("SCDC") on a writ of habeas corpus ad testificandum. (Mot. Summ. J. 5, ECF No. 174-1.) Pronin alleges that he experienced severe undernourishment while at SCDC and that the three meals served each day contained less than 2,000 calories. (Am. Compl. 2, ECF No. 92.) Pronin alleges that he weighed 165 pounds when he arrived at SCDC on June 27, 2016, lost 27 pounds as a result of the food served by SCDC, and weighed 138 pounds when he left SCDC on August 22, 2016. (Objs. Ex. 1 (V.S. Disputed Facts ¶ 1(a)), ECF No. 199-1.) Pronin brings this action pursuant to § 1983 and submits that these events constitute deliberate indifference to his health under the Eighth Amendment. (Am. Compl., ECF No. 92.)

Pronin filed an amended complaint on November 13, 2017. (Id., ECF No. 92.) Defendants filed a motion for summary judgment on September 28, 2018. (Mot. Summ. J., ECF No. 174.) After receiving an extension, Pronin filed his response in opposition on October 29, 2018.⁴ (Resp. Opp'n Mot. Summ. J., ECF No. 183.) Defendants filed their reply on November 8, 2018. (Reply, ECF No. 184.) Pronin filed a sur reply on November 15, 2018. (Sur Reply, ECF No. 185.) The magistrate judge issued the Report and Recommendation on April 2, 2019, and recommends granting Defendants' motion for summary judgment because

² Pronin is currently housed at Sheriff Al Cannon Detention Center in Charleston, South Carolina "on a writ." (Not. Req. Protection Ct. Appearance, ECF No. 192.)

³ This court may take judicial notice of the prior case. Aloe Creme Labs., Inc. v. Francine Co., 425 F.2d 1295, 1296 (5th Cir. 1970); see also Colonial Penn Ins. Co. v. Coil, 887 F.2d 1236, 1239 (4th Cir. 1989) ("We note that 'the most frequent use of judicial notice is in noticing the content of court records.'").

⁴ Houston v. Lack, 487 U.S. 266 (1988).

there is no genuine issue of material fact as to Pronin's alleged weight loss at SCDC. (R&R 4-5, ECF No. 193.) Pronin filed objections to the Report and Recommendation on May 3, 2019.⁵ (Objs., ECF No. 199.) This matter is now ripe for review.

II. DISCUSSION OF THE LAW

A. Summary Judgment Standard

Summary judgment is appropriate only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In deciding whether a genuine issue of material fact exists, the evidence of the non-moving party is to be believed and all justifiable inferences must be drawn in his favor. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). However, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

A litigant "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another." Beale v. Hardy, 769 F.2d 213, 214 (4th Cir. 1985). "[W]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, disposition by summary judgment is appropriate." Monahan v. Cty. of Chesterfield, Va., 95 F.3d 1263, 1265 (4th Cir. 1996) (internal quotation marks and citation omitted). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that

⁵ Id.

there be no *genuine* issue of *material* fact.” Ballenger v. N.C. Agric. Extension Serv., 815 F.2d 1001, 1005 (4th Cir. 1987) (internal quotation marks and citation omitted).

B. Objections

Objections to the Report and Recommendation must be specific. Failure to file specific objections constitutes a waiver of a party’s right to further judicial review, including appellate review, if the recommendation is accepted by the district judge. See United States v. Schronce, 727 F.2d 91, 94 & n.4 (4th Cir. 1984). In the absence of specific objections to the Report and Recommendation of the magistrate judge, this court is not required to give any explanation for adopting the recommendation. See Camby v. Davis, 718 F.2d 198, 199 (4th Cir. 1983). Upon review, the court finds that many of Pronin’s objections are non-specific, unrelated to the dispositive portions of the magistrate judge’s Report and Recommendation, or merely restate his claims. However, the court was able to glean one specific objection. Pronin objects to the magistrate judge’s conclusion that there is no genuine issue of material fact regarding Pronin’s alleged injury. (Objs. 12, ECF No. 199.)

Pronin submits that he has provided sufficient evidence to create a genuine issue of material fact regarding his alleged weight loss at SCDC. (Id., ECF No. 199.) Although Pronin disputes Defendants’ records that he weighed 138 pounds upon his arrival to SCDC, he has failed to provide any evidence, apart from his own assertions, that he weighed 165 pounds upon his arrival to SCDC. In fact, to the contrary, one of Pronin’s grievances submitted while he was housed at SCDC states, “I AM UNDERWEIGHT [sic] - 6' 1, AND ONLY 138 POUNDS AT THE INTAKE[.]” (Mot. Summ. J. Ex. A (Freeman Aff. Ex. B (July 17, 2016 Grievance at 68)), ECF No. 174-2.) Thus, Pronin acknowledged that he weighed 138 pounds when he arrived at SCDC.

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19-6781(DW)⁴

[Handwritten signature/initials]

Further, Pronin has only provided evidence regarding his weight while in federal custody in 2015, prior to his arrival at SCDC, and his weight on September 1, 2016, after his transfer from SCDC. (Resp. Opp'n Mot. Summ. J. Attach. 3 (Supp. Docs. 12-15), ECF No. 183-3.) Accordingly, Pronin's assertion that he lost 27 pounds during his confinement at SCDC is unsupported by the evidence. Thus, Pronin's objection is without merit.

Therefore, after a thorough review of the magistrate judge's Report and the record in this case, the court adopts the Report and Recommendation and incorporates it herein.

It is therefore

ORDERED that Defendants' motion for summary judgment, docket number 174, is granted. It is further

ORDERED that Pronin's motion to protect from court appearances, docket number 200, is dismissed as moot.

IT IS SO ORDERED.

s/Henry M. Herlong, Jr.
Senior United States District Judge

Greenville, South Carolina
May 13, 2019

NOTICE OF RIGHT TO APPEAL

The Plaintiff is hereby notified that he has the right to appeal this order within sixty (60) days from the date hereof, pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Dmitry Pronin,)	C/A No.: 5:16-3635-HMH-KDW
)	
Plaintiff,)	
)	
v.)	REPORT AND RECOMMENDATION
)	
Charles Wright; Neal Urch; and L.)	
Blackwell,)	
)	
Defendants.)	
)	

Dmitry Pronin ("Plaintiff"), proceeding pro se, filed this amended complaint pursuant to 42 U.S.C. § 1983 alleging violations of his constitutional rights while housed at the Spartanburg County Detention Center ("SCDC").¹ This matter is before the court on Defendants' Motion for Summary Judgment filed on September 28, 2018. ECF No. 174. As Plaintiff is proceeding pro se, the court entered a *Roseboro*² order on September 28, 2018, advising Plaintiff of the importance of such motions and of the need for him to file an adequate response. ECF No. 175. After being granted an extension, Plaintiff filed a Response to the Motion on November 1, 2018. ECF No. 183. This motion having been fully briefed ECF Nos. 184, 185, it is ripe for disposition.

This case was referred to the undersigned United States Magistrate Judge for all pretrial proceedings pursuant to the provisions of 28 U.S.C. § 636(b)(1)(A) and (B) and Local Rule 73.02(B)(2)(d) and (e), D.S.C. Because this motion is dispositive, a Report and Recommendation is entered for the court's review. For the reasons that follow, the undersigned recommends Defendants' Motion for Summary Judgment be granted.

Appendix C

¹ Plaintiff is currently incarcerated at Sheriff Al Cannon Detention Center.

² *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975) (requiring the court provide explanation of dismissal/summary judgment procedures to pro se litigants).

IN THE UNITED STATES DISTRICT COURT
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Dmitry Pronin,)	C/A No.: 5:16-3635-HMH-KDW
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Plaintiff,)	
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Charles Wright; Neal Urch; and L.)	
Blackwell,)	
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Defendants.)	
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Dmitry Pronin ("Plaintiff"), proceeding pro se, filed this amended complaint pursuant to 42 U.S.C. § 1983 alleging violations of his constitutional rights while housed at the Spartanburg County Detention Center ("SCDC").¹ This matter is before the court on Defendants' Motion for Summary Judgment filed on September 28, 2018. ECF No. 174. As Plaintiff is proceeding pro se, the court entered a *Roseboro*² order on September 28, 2018, advising Plaintiff of the importance of such motions and of the need for him to file an adequate response. ECF No. 175. After being granted an extension, Plaintiff filed a Response to the Motion on November 1, 2018. ECF No. 183. This motion having been fully briefed ECF Nos. 184, 185, it is ripe for disposition.

This case was referred to the undersigned United States Magistrate Judge for all pretrial proceedings pursuant to the provisions of 28 U.S.C. § 636(b)(1)(A) and (B) and Local Rule 73.02(B)(2)(d) and (e), D.S.C. Because this motion is dispositive, a Report and Recommendation is entered for the court's review. For the reasons that follow, the undersigned recommends Defendants' Motion for Summary Judgment be granted.

Appendix C

¹ Plaintiff is currently incarcerated at Sheriff Al Cannon Detention Center.

² *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975) (requiring the court provide explanation of dismissal/summary judgment procedures to pro se litigants).

I. Factual and Procedural Background

Plaintiff claims he experienced severe undernourishment while he was housed at SCDC from June 27 to August 22, 2016. ECF No. 92 at 2; ECF No. 174-2 at 7-8. Plaintiff states he was served three food trays daily but claims the trays' total calories were less than 2000 calories, which is the bare minimum and national standard. ECF No. 92 at 2. Plaintiff contends he normally weighs 165 pounds, but he weighed approximately 138 pounds while at SCDC. *Id.*

II. Standard of Review

The court shall grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant bears the initial burden of demonstrating that summary judgment is appropriate; if the movant carries its burden, then the burden shifts to the non-movant to set forth specific facts showing that there is a genuine issue for trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). If a movant asserts that a fact cannot be disputed, it must support that assertion either by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials;" or "showing . . . that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1).

In considering a motion for summary judgment, the evidence of the non-moving party is to be believed and all justifiable inferences must be drawn in favor of the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). However, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry

of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.” *Id.* at 248. Further, while the federal court is charged with liberally construing a complaint filed by a pro se litigant to allow the development of a potentially meritorious case, *see, e.g., Cruz v. Beto*, 405 U.S. 319 (1972), the requirement of liberal construction does not mean that the court can ignore a clear failure in the pleadings to allege facts that set forth a federal claim, nor can the court assume the existence of a genuine issue of material fact when none exists. *Weller v. Dep’t of Soc. Servs.*, 901 F.2d 387 (4th Cir. 1990).

III. Analysis

A. Failure to Exhaust

Defendants argue Plaintiff’s amended complaint should be dismissed because he failed to exhaust his administrative remedies before filing this action. ECF No. 174-1 at 10–11. 42 U.S.C. Section 1997e provides that “[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” This requirement “applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong.” *Porter v. Nussle*, 534 U.S. 516, 532 (2002). To satisfy this requirement, a plaintiff must avail himself of all available administrative review. *See Booth v. Churner*, 532 U.S. 731 (2001). Those remedies “need not meet federal standards, nor must they be ‘plain, speedy, and effective.’” *Porter*, 534 U.S. at 524 (quoting *Booth*, 532 U.S. at 739).

Satisfaction of the exhaustion requirement requires “using all steps that the agency holds out and doing so properly.” *Woodford v. Ngo*, 548 U.S. 81, 90 (2006) (quoting *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002)). Thus, “it is the prison’s requirements, and not

the PLRA, that define the boundaries of proper exhaustion.” *Jones v. Bock*, 549 U.S. 199, 218 (2007). Defendants have the burden of establishing that a plaintiff failed to exhaust his administrative remedies. *Anderson v. XYZ Corr. Health Servs., Inc.*, 407 F.3d 674, 683 (4th Cir. 2005). However, “[d]efendants may . . . be estopped from raising non-exhaustion as an affirmative defense when prison officials inhibit an inmate’s ability to utilize grievance procedures.” *Stenhouse v. Hughes*, C/A No. 9:04-23150-HMH-BHH, 2006 WL 752876, at *2 (D.S.C. Mar. 21, 2006) (quoting *Abney v. McGinnis*, 380 F.3d 663, 667 (2d Cir. 2004)).

Defendants argue Plaintiff filed one grievance regarding the food at SCDC, and multiple grievances demanding Ensure, but he did not appeal any of the findings of the Director/Major/Designee or medical department as required by SCDC’s grievance system. ECF No. 174-1 at 11. Accordingly, Defendants contend Plaintiff’s Complaint should be dismissed. *Id.*

In response, Plaintiff argues SCDC does not have appeal forms or provide instructions on how to file an appeal. ECF Nos. 183 at 3. Plaintiff attests he asked several SCDC employees about the appeal process and no one could describe the process or tell him how to obtain appeal forms. ECF No. 183-3 at 3–7. In reply, Defendants state SCDC’s grievance process is outlined in the SCDC inmate handbook which is available to all inmates. ECF No. 184 at 2–3.

Viewing the evidence in the light most favorable to Plaintiff, the undersigned finds there is a question of fact whether Plaintiff’s ability to use the grievance system was inhibited by a failure to inform him how to appeal the grievance and medical decisions. Although Defendants contend the grievance process is described in the SCDC inmate handbook, they have not produced any evidence Plaintiff was provided a copy of this document. “[A]n administrative remedy is not considered to have been available if a prisoner, through no fault of his own, was prevented from availing himself of it.” *Moore v. Bennette*, 517 F.3d 717, 725 (4th Cir. 2008); see also *Stenhouse*,

2006 WL 752876 at *2 (“[E]xhaustion may be achieved in situations where prison officials fail to timely advance the inmate’s grievance or otherwise prevent him from seeking his administrative remedies.”). The undersigned finds Defendants have not met their burden of showing “there is no genuine dispute as to any material fact” regarding Plaintiff’s failure to exhaust his administrative remedies. The undersigned recommends Defendants’ motion for summary judgment based on Plaintiff’s failure to exhaust be denied.

B. Deliberate Indifference to Health and Safety

Defendants argue Plaintiff has failed to show he suffered any serious or significant injury as a result of the food provided at SCDC, or that defendants acted with a sufficiently culpable state of mind. ECF No. 174-1 at 14. To establish a claim under the Eighth Amendment, a prisoner must satisfy two elements. First, the deprivation alleged must be, objectively, “sufficiently serious.” *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)) “Only extreme deprivations are adequate to satisfy the objective component of an Eighth Amendment claim regarding conditions of confinement.” *De’Lonta v. Angelone*, 330 F.3d 630, 634 (4th Cir. 2003). “[T]o demonstrate such an extreme deprivation, a prisoner must allege a serious or significant physical or emotional injury resulting from the challenged conditions or demonstrate a substantial risk of such serious harm resulting from the prisoner’s exposure to the challenged conditions.” *Id.* (internal quotation marks and citation omitted). Second, a prisoner must present evidence that the prison officials had a “sufficiently culpable state of mind.” *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (quoting *Wilson*, 501 U.S. at 297). When an inmate challenges the conditions of his confinement under the Eighth Amendment, the requisite “state of mind is one of deliberate indifference to inmate health or safety.” *Id.* (quotation and citation omitted). A prison official shows deliberate indifference if he “knows of and disregards an excessive risk to inmate health or safety; the official must both be

aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” *Id.* at 837. “In addition, prison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted. A prison official’s duty under the Eighth Amendment is to ensure reasonable safety.” *Id.* at 844 (internal quotation marks omitted).

Defendants argue they are entitled to summary judgment because: (1) Plaintiff did not lose any weight while at SCDC and (2) he has failed to show Defendants knew of and disregarded an actual excessive risk to Plaintiff’s health and safety. ECF No. 174-1 at 14. In support of their motion, Defendants offer Plaintiff’s medical records and affidavits from SCDC officers and medical staff. *See* ECF Nos. 174-3, 174-4, and 174-6. SCDC medical administrator Kathy White (“White”) attests that Plaintiff was weighed when he arrived at SCDC on June 27, 2016, and his weight was recorded as 138 pounds. ECF No. 174-3 at 1. White states in response to Plaintiff’s concerns about his weight and his July 15 and 17 requests for a medical examination and nutritional supplement, SCDC medical staff examined and weighed Plaintiff on July 19, 2016. *Id.* at 2. Plaintiff weighed 138 pounds. *Id.* Medical Staff advised Plaintiff they would monitor his weight weekly for four weeks before deciding whether to order him a dietary supplement. *Id.* Plaintiff was weighed on July 26 and August 2 and his weight was recorded at 140 and 141 pounds. *Id.* at 3. Former SCDC director of food services Larry Blackwell (“Blackwell”) attests that SCDC utilized a state licensed dietician who periodically reviewed and approved SCDC’s inmate daily menus. ECF No. 174-4 at 2. Blackwell states SCDC meals were properly and fully cooked and the portions provided were consistent with the portions set forth in the inmate menus. *Id.* Registered dietician Carole Mabry attests that she reviewed SCDC’s proposed menus of meals and the menus appeared

to have met the calorie and protein needs of the majority of the population being served. ECF No. 174-6 at 1.

In response, Plaintiff argues defendants knew about problems with feeding inmates. ECF No. 183 at 7-8. Plaintiff contends he weighed 168 pounds months before he arrived at SCDC and claims staff at a Federal Bureau of Prisons ("BOP") facility noted in his medical chart on September 1, 2016, that he had abnormal weight loss, unintentional. ECF Nos. 183 at 7; 183-3 at 12. Plaintiff also provides a copy of a June 25, 2015 BOP clinical encounter record that notes "No anorexia, or fatigue," and a BOP print out that states that he weighed 168 pounds in July and December 2015. ECF No. 183-3 at 13-15.

The undersigned has reviewed the record, including the parties' respective pleadings and affidavits, and Plaintiff's medical records, and finds Plaintiff has failed to furnish sufficient facts or evidence to survive summary judgment. Plaintiff has not offered any evidence, other than his own conjecture or speculation, to show that he suffered any injury from the meals he was served at SCDC from June to August 2016. In fact, the evidence is undisputed that Plaintiff weighed 138 pounds when he arrived at SCDC and he gained at least three pounds while he was housed there. Plaintiff has also not offered any evidence to contradict Defendants' contentions that the meals SCDC served while Plaintiff was housed there met the inmates' calorie and protein needs. The undersigned recommends Defendants be granted summary judgment.

C. Strike

Defendants request that the court impose a strike against Plaintiff based on "the frivolity of this suit." ECF No. 174-1 at 23. The undersigned finds Plaintiff's Complaint was not filed frivolously. Rather, Plaintiff simply was unable to prove he suffered any adverse effects from the

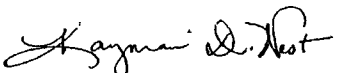
food served at SCDC. Accordingly, the undersigned recommends the district court deny Defendants' request to consider this action as a strike.

IV. Conclusion and Recommendation

For the foregoing reasons, the undersigned recommends Defendants' Motion for Summary Judgment, ECF No. 174, be granted.

IT IS SO RECOMMENDED.

April 2, 2019
Florence, South Carolina


Kaymani D. West
United States Magistrate Judge

**The parties are directed to note the important information in the attached
"Notice of Right to File Objections to Report and Recommendation."**