NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 19-1450

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHERUNDA LYNN FOX, Plaintiff-Appellant, v. UNITED STATES POSTAL SERVICE, Postmaster General - Headquarters; UNNAMED POSTAL EMPLOYEES, 1-20, Defendants-Appellees.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

ORDER

Before: SUHRHEINRICH, COOK, and READLER, Circuit Judges.

Cherunda Lynn Fox, a pro se Michigan resident, appeals the judgment of the district court dismissing her civil rights complaint and denying a motion for reconsideration. 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).

On March 19, 2018, Fox filed a complaint alleging that the United States Post Office ("USPS"), as well as twenty unnamed postal employees violated her civil rights. In particular, she claimed that her former in-laws used their positions at the USPS to direct postal employees to commit various forms of fraud, racketeering, arson, embezzlement, identify theft, and murder against Fox. She claimed that postal employees refused to deliver her mail, allegedly because of dogs on her property, but which she knew was a "cover up" and interfered with delivery of a ballot certification that impeded her ability to run for President of the United States in 2016. Finally,

Fox claimed that postal employees screamed at her about her house smelling and her being unclean when they delivered mail, in violation of her rights under the Americans with Disabilities Act ("ADA"). Fox requested damages of 2.7 trillion dollars.

The defendants filed a motion to dismiss on May 21, 2018, asserting that sovereign immunity precluded Fox's claims against the USPS and that there was no exception to immunity under the Federal Tort Claims Act ("FTCA"). The same day, Fox filed motions for default judgment, for judgment on the pleadings, and for summary judgment. All of Fox's motions alleged that the defendants had failed to file a responsive pleading to her complaint within sixty days as required by the Federal Rules of Civil Procedure and that she was entitled to judgment in her favor. The defendants filed a response, asserting that their motion to dismiss was timely.

A magistrate judge reviewed the pleadings and recommended that the defendants' motion to dismiss be granted, Fox's complaint be dismissed, and her motions be denied. In particular, the magistrate judge first determined that the defendants timely responded to Fox's complaint. Next, the magistrate judge agreed that Fox's tort claims regarding suspension and handling of her mail were barred by sovereign immunity and that the exceptions to the waiver of immunity created by the FTCA did not apply to Fox's allegations. Finally, the magistrate judge concluded that Fox's remaining claims alleging RICO violations, a violation of the ADA, violations of her civil and constitutional rights, and criminal claims against her former in-laws failed to state a claim upon which relief could be granted. Because the magistrate judge recommended dismissing all of Fox's federal claims, the magistrate judge also recommended dismissing any state law claims.

Fox filed objections. Aside from a statement objecting "to the magistrate's entire Report and Recommendation," her specific objections focused solely on the magistrate judge's finding that the defendants' motion to dismiss was timely. Primarily, Fox argued that the defendants were served on March 19, 2018, not only when she filed her complaint, but also when the complaint was scanned into the electronic filing system and when she personally delivered a copy to the defendants. Fox maintained that her case "ended" on May 18, 2018, sixty days after she filed her complaint and that anything filed by the defendants after that date was null and void, should be stricken, and precluded the magistrate judge from ruling on any of the defendants' pleadings.

The district court noted that Fox's objections all related to her belief that the motion to dismiss was filed too late and that she was entitled to default judgment. After consideration, the district court rejected Fox's argument that her personal delivery of her complaint effectuated service because (1) she was a party to the lawsuit and (2) she did not demonstrate that she gave the complaint to someone authorized to accept it. The court also rejected Fox's argument that the defendants were served when the complaint was electronically filed, concluding that the defendants could not waive personal service. Because service by certified mail was the only manner of service properly effected in this case and the defendants received the certified mail on March 26 and 27, their motion to dismiss was timely. The district court overruled all of Fox's objections relating to her motion for default judgment and the timeliness of the defendants' motion to dismiss, and determined that her objection to "the magistrate's entire Report and Recommendation" was too general to address. The district court accepted the magistrate judge's recommendation, granted the defendants' motion to dismiss, dismissed Fox's complaint, and denied Fox's motions for summary judgment, judgment on the pleadings, and default judgment.

Fox subsequently filed a "Motion for Recusal and Motion for Reconsideration of Judgment" asserting that she had paid five thousand dollars to redress her grievances and President Barack Obama selected "4 or more" judges on her behalf, but she has yet to receive favorable rulings. She requested that the magistrate judge and district court judge recuse themselves from this matter and the case be reconsidered. The district court denied the motion.

On appeal, Fox succinctly argues, "I served this case on 3-19-18. I won this case . . . on 5-18-18, based on the court record. A default needs to be issued." She reasserts her claims that service on the defendants was effected on March 19, 2018, the defendants' motion to dismiss was untimely, the district court lacked jurisdiction to rule on it, and she is entitled to default judgment.

The defendants first argue that Fox's appeal should be dismissed for an inadequate notice of appeal. Specifically, they assert that the notice of appeal fails to identify the order from which Fox seeks to appeal. Alternatively, they argue that the district court did not err by denying Fox's motion for default judgment or dismissing her complaint.

At the outset, we must address Fox's notice of appeal. Federal Rule of Appellate Procedure 3(c)(1) provides that a notice of appeal must: "(A) specify the party or parties taking the appeal"; "(B) designate the judgment, order, or part thereof being appealed"; and "(C) name the court to which the appeal is taken." "Although Rule 3(c) does suggest a form to be followed, there is no magic document called a Notice of Appeal." *McMillan v. Barksdale*, 823 F.2d 981, 983 (6th Cir. 1987). Any "document that clearly indicates an intent to appeal may suffice as notice, so long as it [is] filed within the [applicable time window] and contains most of the necessary elements required for a formal notice of appeal as specified in Rule 3 of the Federal Rules of Appellate Procedure." *United States v. Dotz*, 455 F.3d 644, 647 (6th Cir. 2006).

But you had no problem finding it

Although Fox's pleading titled "Notice of Appeal" did not identify the judgment or order being appealed, Fox filed a pleading on the same day titled "Motion for Reconsideration of Recusal and Motion for Reconsideration of Judgment and Notice of Appeal," which concluded with the statement: "I am appealing the 3/5/19 and 4/2/19 Judgment/Order in the above captioned case. This is my notice of appeal. I am appealing to the 6th Circuit." Given the liberal construction afforded to pro se litigants like Fox, *see Haines v. Kerner*, 404 U.S. 519, 520-21 (1972), we construe her "Motion for Reconsideration" as a notice of appeal. Accordingly, dismissal due to an inadequate notice of appeal is not appropriate.

Regarding the district court's dismissal of Fox's complaint, we note that Fox failed to specifically object to the magistrate judge's conclusions that: the court lacked jurisdiction over her allegations of mail suspension and mail destruction; she did not state a claim for relief in connection with her allegations that the defendants committed violations of RICO, violated her civil or constitutional rights, or committed a violation of the ADA; she failed to state a plausible claim that her in-laws were liable; and the district court should decline jurisdiction over any state law claims. By failing to file specific objections to the magistrate judge's report and recommendation, Fox has waived the right to appeal the district court's judgment on these issues. *See Thomas v. Arn*, 474 U.S. 140, 153-55 (1985); *Howard v. Sec'y of Health & Human Servs.*, 932 F.2d 505, 509 (6th Cir. 1991). Accordingly, we will only consider the propriety of the district court's denial of her motion for default judgment.

We review the district court's denial of Fox's motion for default judgment for an abuse of discretion. *Bank One of Cleveland, N.A. v. Abbe*, 916 F.2d 1067, 1073 (6th Cir. 1990). Our review of a district court's legal conclusions about the adequacy of service is de novo, but any relevant factual findings are reviewed for clear error. *See Bridgeport Music, Inc. v. Rhyme Syndicate Music*, 376 F.3d 615, 623 (6th Cir. 2004).

The district court did not clearly err by concluding that the defendants' motion to dismiss was not untimely filed. Federal Rule of Civil Procedure 4(i) prescribes process-serving requirements for actions against federal officials and employees. Rule 4(i) details service on the United States by requiring (1) personal or mail service of the summons and complaint on the United States Attorney in the district in which the action is filed, and (2) mailing a copy of the summons and complaint by registered or certified mail to the Attorney General of the United States at Washington, D.C. Fed. R. Civ. P. 4(i)(1). As the district court thoroughly explained, Fox's in-person delivery of the complaint to the United States Attorney on March 19, 2018, was ineffective because Fox served the complaint herself. Pursuant to Rule 4(c)(2), "[a]ny person who is at least 18 years old *and not a party* may serve a summons and complaint." (emphasis added).

Moreover, service was not effected on March 19, 2018, by virtue of the complaint being electronically filed. Although certain parties may waive service of a summons, neither the USPS nor the United States Attorney is the type of party that may do so. *See* Fed. R. Civ. P. 4(d) and 4(i).

Accordingly, only Fox's service of the complaint by certified mail was effective. As the district court recounted, the USPS received the certified mail on March 26 and the United States Attorney received it on March 27. The defendants therefore had sixty days after those dates within which to respond. Their motion to dismiss, filed on May 21, was filed within that period. As a result, the district court did not abuse its discretion by denying Fox's motion for default judgment.

Further, as the defendants argue on appeal, even if their motion to dismiss were late, default judgment would not have been appropriate for two reasons. First, Fox failed to apply first to the clerk for an entry of default, as required by Federal Rule of Civil Procedure 55(a). *See O.J. Distrib., Inc. v. Hornell Brewing Co.*, 340 F.3d 345, 352-53 (6th Cir. 2003). Although Fox argues

that she asked the clerk for such an entry, any verbal request would have been insufficient. Pursuant to Rule 55, a clerk must enter default only after a request by the plaintiff seeking default judgment and an affidavit showing the amount due. Fed. R. Civ. P. 55(b)(1). The docket in this case does not show that Fox filed any such affidavit or request until December 2018, after the magistrate judge's report and recommendation was issued.

Second, Rule 55 also requires that a default judgment may be entered "against the United States, its officers, or its agencies only if the claimant establishes a claim or right to relief by evidence that satisfies the court." Fed. R. Civ. P. 55(d). Fox's complaint alleged federal claims that the district court either lacked jurisdiction over or that failed to state a claim for relief. Under those circumstances, default judgment was not proper.

Finally, Fox's motion for recusal and reconsideration was properly denied. We review the district court's denial of a motion for reconsideration under Rule 59(e) for an abuse of discretion. *Kerr ex rel. Kerr v. Comm'r of Soc. Sec.*, 874 F.3d 926, 930 (6th Cir. 2017). A district court may alter or amend its judgment based on "(1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice." *Leisure Caviar, LLC v. U.S. Fish & Wildlife Serv.*, 616 F.3d 612, 615 (6th Cir. 2010) (quoting *Intera Corp. v. Henderson*, 428 F.3d 605, 620 (6th Cir. 2005)). Fox's motion, however, sets forth none of those circumstances. She merely claimed that she wanted her case heard by different judges, which was insufficient to warrant rehearing. Likewise, Fox set forth no support for her claims that the magistrate judge and district court judge should have recused themselves. For those reasons, the district court did not abuse its discretion in denying her motion.

We **AFFIRM** the judgment of the district court.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHERUNDA LYNN FOX, Plaintiff, v. U.S. POSTAL SERVICE and 20 UNNAMED POSTAL EMPLOYEES, Defendants.	Case No. 18-10901 Honorable Laurie J. Michelson

JUDGMENT

IT IS ORDERED AND ADJUDGED that pursuant to this Court's Opinion and Order dated March 5, 2019, Plaintiff's complaint is DISMISSED.

Dated at Detroit, Michigan this 5th Day of March 2019.

DAVID J. WEAVER
CLERK OF THE COURT

BY: s/William Barkholz
Deputy Clerk

APPROVED:

s/Laurie J. Michelson
LAURIE J. MICHELSON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHERUNDA LYNN FOX, Plaintiff, v. U.S. POSTAL SERVICE and 20 UNNAMED POSTAL EMPLOYEES, Defendants.	Case No. 18-cv-10901-LJM-SDD Honorable Laurie J. Michelson Magistrate Judge Stephanie Dawkins Davis

OPINION AND ORDER OVERRULING PLAINTIFF'S OBJECTIONS TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION AND GRANTING DEFENDANT'S MOTION TO DISMISS

Cherunda Fox maintains that her former in-laws used their positions at the United States Postal Service to destroy her mail, to commit credit-card fraud, and to stop mail delivery to her house (including medicine). Based on these and several other alleged wrongs, Fox filed this lawsuit against the United States Postal Service (or the Postmaster General of the United States) and 20 unnamed USPS employees. Fox invokes the civil-action provisions of the Racketeer Influenced and Corrupt Organizations Act, the Civil Rights Acts of 1866 and 1964, the Americans with Disabilities Act, the Federal Constitution, and the Michigan Constitution.

USPS has moved to dismiss Fox's complaint. (ECF No. 11.) Among Fox's several motions is a request for a default judgment. (ECF No. 12.)

The pending motions (indeed, all pretrial matters) have been referred to Magistrate Judge Stephanie Dawkins Davis. She recommends that this Court dismiss Fox's claims about mail suspension and mail destruction for lack of subject-matter jurisdiction. And, in the Magistrate Judge's view, Fox's allegations do not make it plausible that any defendant is liable under RICO,

ADA, the Civil Rights Acts, and the Federal Constitution. The same is true of any claims Fox has against her in-laws. Finally, the Magistrate Judge recommends that this Court decline to exercise jurisdiction over Fox's state-law claims. (*See generally* ECF No. 26.)

Fox objects. Although Fox's objections are numerous (at first 26, then another 10 via a reply brief), they all relate to her belief that USPS moved to dismiss her complaint too late. In other words, Fox believes that her motion for default judgment should be granted.

To better understand Fox's timeliness claim, the procedural history of this case is useful. Fox filed this lawsuit and summons were issued on March 19, 2018. That very day, Fox used certified mail to send the U.S. Attorney General, the United States Postal Service, and the United States Attorney for the Eastern District of Michigan copies of her complaint and summons. (*See* ECF Nos. 4, 5, 6; ECF No. 28, PageID.152; ECF No. 17, PageID.68.) A few days later, Fox noticed that her mail still had not been delivered (despite, she says, the United States Attorney's office in Detroit being only a "2 minute car drive" from the post office she used). So on March 22, 2018, Fox personally went to the United States Attorney's office with copies of her complaint. (ECF No. 28, PageID.153.) There, she allegedly spoke with an Assistant United States Attorney by the name of Roberta Sisko. (ECF No. 28, PageID.139.) In at least one place in her filings, Fox says that Sisko told her that "they were already *served* electronically when I filed with the court 3-19-1[8]." (ECF No. 28, PageID.139.) USPS did not file its motion to dismiss until May 21, 2018. That was 63 days after the day Fox filed suit and mailed out her complaint.

Federal Rule of Civil Procedure 12 sets out the time to respond to a complaint. In a suit against the United States, a United States agency, or a United States employee or officer in his or her official capacity, the time to respond to the complaint is "60 days after service on *the United States attorney*." Fed. R. Civ. P. 12(a)(2) (emphasis added). In a suit against a United States

employee or officer in his or her individual capacity, the time to respond to the complaint is "60 days after service on the officer or employee or service on *the United States attorney*, whichever is later." Fed. R. Civ. P. 12(a)(3) (emphasis added). Thus, under either provision, USPS (or, perhaps, the Postmaster General of the United States) had at least 60 days from "service on the United States attorney." *See also Conn v. United States*, 823 F. Supp. 2d 441, 444 (S.D. Miss. 2011).

Federal Rule of Civil Procedure 4 provides insight into when Fox "serv[ed] . . . the United States attorney." Rule 4(i)(2) and 4(i)(3) provide that to serve a "United States agency or corporation" or a "United States officer or employee," the plaintiff must "serve the United States." In turn, a party can only "serve the United States" by doing two things (the first of which can be accomplished in three ways): (1)(a) "deliver[ing] a copy of the summons and complaint to *the United States attorney* for the district where the action is brought," or (b) "deliver[ing] a copy of the summons and complaint . . . to an assistant United States attorney or clerical employee whom *the United States attorney* designates in a writing filed with the court clerk," or (c) "send[ing] a copy of [the summons and complaint] by registered or certified mail to the civil-process clerk at *the United States attorney*'s office" and (2) sending a copy of the summons and complaint to the U.S. Attorney General in Washington, D.C. *See* Fed. R. Civ. P. 4(i)(1) (emphases added).

Thus, although Rule 4 uses the words "deliver" and "send" rather than "serve," it appears that Fox had three ways to complete "service on the United States attorney" as that phrase is used in Rule 12: "deliver" a copy of the summons and complaint to the United States attorney for the Eastern District of Michigan, "deliver" those documents to the assistant United States attorney or clerical employee listed in a filing with the Clerk of Court for the Eastern District of Michigan, or "send" it via registered or certified mail to the "civil-process clerk at the United States Attorney's

office." Completing any of those three would have started Rule 12's 60-day clock. *See Constien v. United States*, 628 F.3d 1207, 1213 (10th Cir. 2010); *Hastings v. United States Postal Service*, No. 16CV1259, 2017 WL 2936781, at *4 (S.D. Cal. July 10, 2017); *Vargas v. Potter*, 792 F. Supp. 2d 214, 217 (D.P.R. 2011).

First consider the two "deliver[y]" methods. In her objections, Fox says that she hand delivered her complaint (and the Court can grant Fox that she had summonses with her too) to an Assistant United States Attorney named "Roberta Sisko" on March 22, 2018. (ECF No. 28, PageID.154, 158; ECF No. 31, PageID.178.) But if the 60-day clock started on March 22, then USPS' answer was not due until May 24, 2018; and USPS filed its motion to dismiss on May 21. So it *appears* that under the hand-delivery method of serving the United States Attorney, USPS' motion was timely by three days.

The Court used the word "appears" because USPS has complicated matters. Perhaps it was merely due to a misreading of one of Fox's filings, but, whatever the reason, USPS has stated that Fox hand delivered her complaint on March 19: "While not a part of the record, Fox, or someone acting on her behalf, personally delivered a copy of the summons and complaint to the Office of the United States Attorney for the Eastern District of Michigan on *March 19, 2018*. A copy of the summons bearing the date stamp and the notation 'hand RS' is attached as Exhibit A." (ECF No. 16, PageID.55 (emphasis added).) USPS also argues that 60 days from March 19, 2018 was May 19, 2018, which was a Saturday, so (under Rule 6) their response was due the following Monday, May 21, 2018. (ECF No. 16, PageID.58.) And that is the very date USPS filed its motion to dismiss. USPS even goes so far to say that Fox's assertion that its time was up on May 18 is "an error in the calculation."

By this Court's count, Fox is right—60 days from March 19 (day 1 being March 20) is May 18. And that was a Friday. So USPS was not entitled to wait until the following Monday, May 21, under Rule 6.

That said, the Court does not believe that Fox's hand delivery of her complaint started the 60-day clock. As USPS and the Magistrate Judge point out, Rule 4(c)(2) says that only a person who is "not a party" to the suit is eligible to personally serve the summons and complaint. Granted, as noted above, Rule 4 does not speak of service on the United States Attorney but instead "deliver[y]" and "send[ing]." But as stated before, when Rule 4 speaks of delivering and sending the complaint and summons to the United States Attorney it probably means "service" as that phrase is used in Rule 12. So Rule 4(c)(2)'s non-party rule probably does cover hand "deliver[y]" to the United States Attorney.

And even if that is wrong, Fox never clearly says to whom she gave her summons and complaint. Presumably, she gave them to Sisko. But there is no evidence that on March 19, 2018 Sisko was "the United States Attorney" or the "assistant United States attorney or clerical employee" on file with the Clerk of Court. In other words, even if Fox provided someone in the United States Attorney's Office with a copy of her complaint and summons on March 19, Rule 4 contemplates "deliver[y]" to specific persons. And Fox has not shown that she gave her papers to those specific persons.

That leaves the third route of serving the United States Attorney: "send[ing] a copy of [the summons and complaint] by registered or certified mail to the civil-process clerk at the United States attorney's office." Fox has not cleared at least two roadblocks on this route.

One is that her certificate of mailing indicates that she sent her complaint and summons to "United States Attorney E.D. Mi[ch]." (ECF No. 18, PageID.86.) But, again, Rule 4 contemplates

specific people. *See* Fed. R. Civ. P. 4(i)(1)(A)(ii). In fact, the committee note explaining the 1993 amendments to Rule 4 make the point explicit: "To assure proper handling of mail in the United States attorney's office, the authorized mail service must be specifically addressed to the civil process clerk of the office of the United States attorney."

The other reason that the certified mail route dead ends for Fox is that USPS filed timely under this scenario. USPS says that it did not *receive* Fox's mailing until March 26 or 27. If that is so, then its motion was timely by about a week. But Fox says that USPS' response clock started to run on the date she *sent* the complaint and summons, March 19. Assuming without deciding that dropping the complaint in the mailbox started the clock, it would be only fair if the USPS got the additional three days for service via mail. *See* Fed. R. Civ. P. 6(d). That means that USPS would have had 63 days to respond, or until May 22, 2018. Again, its motion was filed May 21.

That almost ends the inquiry into whether USPS filed its first responsive pleading on time. But Fox additionally argues waiver and estoppel. (ECF No. 28, PageID.154; ECF No. 31, PageID.177, 182.) Apparently, when she went to the United States Attorney's office, Sisko told her that they had already "received" her complaint via PACER or the Case Management/Electronic Case Files (CM/ECF) system. (ECF No. 28, PageID.154; ECF No. 31, PageID.177, 182.) Indeed, Fox even goes so far to say that Sisko told her that "they were already *served* electronically when I filed with the court 3-19-1[8]." (ECF No. 28, PageID.139 (emphasis added).) But the Federal Rules only explicitly provide for waiver of service for "individual[s], corporation[s], or association[s] that [are] subject to service under Rule 4(e), (f), or (h)." And USPS, the Postmaster General, or USPS employees sued for carrying out USPS business are not subject to service under Rule 4(e), (f), or (h). *See John v. Sec'y of Army*, 484 F. App'x 661, 666 (3d Cir. 2012); *Wagner v. McHugh*, No. 8:12CV174, 2013 WL 1148801, at *2 (D. Neb. Mar. 19, 2013). And even if the

United States Attorney's office can waive service, it is doubtful Sisko had that authority to do so or that her statement to Fox amounted to waiver.

In short, USPS cut it close. But, having looked at the issue completely from scratch, Fox has not shown that USPS filed its response to her complaint too late.

Moreover, even if USPS had filed its motion a day or two late, the Court would entertain (and in all likelihood grant) a motion to set aside the default. USPS has defended this case and any minor tardiness did not prejudice Fox. Nor did Fox properly obtain a default. "While the entry of default is a procedural formality, courts have held it is nevertheless a prerequisite to the issuance of a default judgment." *Sherrills v. Berryhill*, No 17-CV-00302017, U.S. Dist. LEXIS 58937, at *5 (N.D. Ohio Apr. 4, 2017) (citing Sixth Circuit and District Court cases)).

In sum, the Court overrules all of Fox's objections pertaining to her motion for default and the timeliness of USPS motion to dismiss. As that is all of Fox's objections (save for an all too-general "I object . . . the magistrate's entire Report and Recommendation"), the Court will accept the Magistrate Judge's recommendation.

* * *

For the reasons given, the Court ACCEPTS the Magistrate Judge's recommendation. While the Court questions whether Fox's claim against USPS or USPS employees under the Michigan Constitution is before a federal court on the basis of supplemental jurisdiction, neither party has objected to that determination. It follows that "defendants' motion to dismiss [is] GRANTED, that plaintiff's complaint [is] DISMISSED, and that plaintiff's motions [are] DENIED." (ECF No. 26, PageID.107; *see also* ECF No. 26, PageID.130.)

SO ORDERED.

s/Laurie J. Michelson
LAURIE J. MICHELSON

UNITED STATES DISTRICT JUDGE

Date: March 5, 2019

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon counsel of record and/or pro se parties on this date, March 5, 2019, using the Electronic Court Filing system and/or first-class U.S. mail.

s/William Barkholz
Case Manager

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHERUNDA LYNN FOX,

Plaintiff,

v.

U.S. POSTAL SERVICE & UNNAMED POSTAL EMPLOYEES,

Defendants.
_____/

Case No. 18-10901

Laurie J. Michelson
United States District Judge

Stephanie Dawkins Davis
United States Magistrate Judge

REPORT AND RECOMMENDATION ON DEFENDANTS' MOTION TO DISMISS (Dkt. 11) AND PLAINTIFF'S VARIOUS MOTIONS (Dkts. 12, 13, 14)

I. PROCEDURAL HISTORY

Plaintiff brought this action *pro se* alleging violation of various federal statutes and the United States and Michigan Constitutions. (Dkt. 1). District Judge Laurie J. Michelson referred all pretrial matters to the undersigned on April 20, 2018. (Dkt. 10). On May 21, 2018, defendants filed their motion to dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). (Dkt. 11). Plaintiff responded (Dkt. 17) and defendants replied (Dkt. 21). On the same day plaintiff filed her motions for judgment on the pleadings (Dkt. 12), for summary judgment (Dkt. 13), and for default judgment (Dkt. 14). Defendants responded.

For the reasons stated below, the undersigned **RECOMMENDS** that defendants' motion to dismiss be **GRANTED**, that plaintiff's complaint be **DISMISSED**, and that plaintiff's motions be **DENIED**.

II. PLAINTIFF'S COMPLAINT

Plaintiff sues the United States Postal Service and 20 unnamed postal employees claiming violations of the Civil Rights Act of 1866, the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), the Racketeer Influenced and Corrupt Organizations Act (RICO), Article II, Section 1 of the United States Constitution and the Thirteenth and Fourteenth Amendments thereto, as well as the Michigan Constitution.

Plaintiff claims that her former in-laws used their positions at the U.S. Postal Service (USPS) to have employees burn her identity, commit immigration and visa fraud, embezzlement, wire fraud, obstruct justice, commit bank fraud, credit card fraud, mortgage fraud, interfere with commerce, mail theft, pension and welfare fraud, arson, and genocide. (Dkt. 1, at Pg ID 6).

Plaintiff alleges that on January 8, 2018, a USPS manager gave her a piece of fraudulent mail and told her that the mail carriers would not deliver to her house because of her dogs. Plaintiff suspects that, because of this fraudulent mail (an unspecified reason), USPS was engaged in a cover-up, and that her dogs are not

the reason USPS stopped delivering her mail. (*Id.*). Her mail was suspended on February 19, 2018.

According to plaintiff, in 2016 four Royal Oak postal employees and managers were involved in the destruction of ballot certification material for the United States Presidential race. Plaintiff complained to usps.gov and an investigator and other employees went to her house and threatened her "regarding a [sic] act involving murder in violation of 18 U.S.C. 96 [sic] § 1961." Plaintiff contends that the inspector threatened her, violating her civil rights to vote and become a candidate; and violated the United States and Michigan Constitutions. (*Id.* at Pg ID 7).

Plaintiff alleges that when the carrier would deliver mail the carrier would tell plaintiff that she smelled, that her house smelled, or that "Bleach don't help." Plaintiff contends that these statements violated her ADA rights, although she does not name her disability.

III. ANALYSIS AND RECOMMENDATIONS

A. Standard of Review

1. Rule 12(b)(1)

As explained in *McQueary v. Colvin*, 2017 WL 63034, at *3 (W.D. Ky. Jan. 5, 2017), a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction "can challenge the sufficiency of the pleading itself (facial attack) or the factual

existence of subject matter jurisdiction (factual attack)" *Cartwright v. Garner*, 751 F.3d 752, 759 (6th Cir. 2014) (citing *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994)). "A facial attack is a challenge to the sufficiency of the pleading itself. On such a motion, the court must take the material allegations of the petition as true and construed in the light most favorable to the nonmoving party." *McQueary*, at *3 (quoting *Ritchie*, 15 F.3d at 598); *see also Cartwright*, 751 F.3d at 759 ("A facial attack goes to the question of whether the plaintiff has alleged a basis for subject matter jurisdiction, and the Court takes the allegations of the complaint as true for purposes of the Rule 12(b)(1) analysis"). "A factual attack, on the other hand, is not a challenge to the sufficiency of the pleading's allegations, but a challenge to the factual existence of subject matter jurisdiction." *McQueary*, at *3 (quoting *Ritchie*, 15 F.3d at 598). Defendants seek dismissal for lack of jurisdiction under the Federal Tort Claims Act (FTCA) for plaintiff's claims regarding the reinstatement of her mail and negligent transmittal of mail.

2. Rule 12(b)(6)

To survive a motion to dismiss under Rule 12(b)(6), a plaintiff must first comply with Rule 8(a)(2), which requires "'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007) (quoting *Conley v. Gibson*, 355 U.S.

41, 47 (1957)). A plaintiff is also obliged "to provide the grounds of his entitlement to relief," which "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Association of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545, 548 (6th Cir. 2007) (quoting *Twombly*, 550 U.S. at 555 (citations and internal quotation marks omitted)). In *Iqbal*, the Supreme Court explained that a civil complaint only survives a motion to dismiss if it "contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009). "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 678. And, while a complaint need not contain "detailed" factual allegations, its "[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true." *Id.* (quoting *Twombly*, 550 U.S. at 555 (citation and internal quotation marks omitted)); *see also League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007) (emphasis in original) (the factual allegations in a complaint need not be detailed but they "must do more than create speculation or suspicion of a legally cognizable cause of action; they must show *entitlement* to relief.").

A complaint filed by a *pro se* plaintiff must be "liberally construed" and "held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (citation omitted). Thus, when applying *Twombly*, except as to a claim of fraud, the Court must still read plaintiff's *pro se* complaint indulgently, *see Haines v. Kerner*, 404 U.S. 519 (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); *Erickson*, 551 U.S. at 93-94 (The Court of Appeals improperly departed "from the liberal pleading standards set forth by Rule 8(a)(2)" and failed to liberally construe" the *pro se* complaint at issue.).

In ruling on defendant's motion under Rule 12(b)(6), the Court may consider the pleadings of the parties, including copies of any written instrument(s) attached to a pleading as their attachment thereto renders them a part of the pleading under Fed.R.Civ. P. 10(c). *See also Commercial Money Center, Inc. v. Illinois Union Ins. Co.*, 508 F.3d 326, 335-336 (6th Cir. 2007) (Motion for judgment on the pleadings was not converted to motion for summary judgment by court's consideration of documents that were not attached to counterclaim, but were attached to the complaint and the answer to counterclaim). The undersigned also recognizes that generally if a court considers matters outside of the pleadings, the court must convert the motion into one for summary judgment under Rule 56.

However, "[w]hen a court is presented with a 12(b)(6) motion, it may consider the Complaint and any exhibits attached thereto, public records, items appearing in the record of the case and exhibits attached to defendant's motion to dismiss so long as they are referred to in the Complaint and are central to the claims contained therein." *Bassett v. Nat'l Coll. Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008); *see also Weiner v. Klais & Co.*, 108 F.3d 86, 89 (6th Cir. 1997) (noting that the Sixth Circuit has "held that 'documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to h[is] claim'") (quoting *Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir. 1993)). "[I]n general, a court may only take judicial notice of a public record whose existence or contents prove facts whose accuracy cannot reasonably be questioned." *Passa v. City of Columbus*, 123 Fed. Appx. 694, 697 (6th Cir. 2005).

B. Discussion

The undersigned begins by addressing plaintiff's argument that defendants did not timely respond to her complaint. Plaintiff raises this argument in her motion for judgment on the pleadings (Dkt. 12), motion for summary judgment (Dkt. 13), and motion for default judgment (Dkt. 14). She asserts that the defendants were served with the complaint by First Class mail on March 19, 2018, but did not file their response within 60 days of service. (Dkt. 12, Pg ID 48; Dkt.

13, Pg ID 50; Dkt. 14, Pg ID 51). The entirety of her summary judgment and default judgment arguments rest on the defendants' alleged untimely response.

Plaintiff filed certificates of service with the Court on March 19, 2018, showing that she mailed by certified mail the summons and complaint to the U.S. Attorney General, the U.S. Postal Service Postmaster General Headquarters, and the U.S. Attorney for the Eastern District of Michigan on March 19. (Dkts. 4, 5, 6). Plaintiff also states that she personally delivered a copy of the summons and complaint to the Office of the United States Attorney for the Eastern District of Michigan. (Dkt. Dkt. 17, Pg ID 68). The United States Attorney received the mailed copy on March 27, 2018, and the Postmaster General received the mailed copy on March 26. (Dkt. 16, Exhibits B and C).

Plaintiff's attempt at personal service is not in accordance with Federal Rule of Civil Procedure 4(c)(2), which provides that a person who is at least 18 years old and *not a party* may serve the summons and complaint. Because plaintiff is a party in this matter, her attempt at personal service was improper under the rules. Regarding the mailed service, plaintiff mistakenly counts defendants' time to respond from the day the documents were mailed. However, the time does not being to run until the documents are served. Fed. R. Civ. P. 12(a)(2) ("The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or

crossclaim *within 60 days after service* on the United States attorney.") (emphasis added). Defendants have demonstrated that they were served on March 26 and 27, 2018. When computing the time to respond, if the time period is stated in days, a party "excludes the day of the event that triggers the period." Fed. R. Civ. P. 6(a)(1)(A). If taking the earliest service date, March 26, the time to respond began to run March 27. Sixty days from March 27 is May 26, 2018, which a Saturday. Under Fed. R. Civ. P. 6(a)(1)(C), if the last day is a Saturday the period continues to run until the next day that is not a weekend day or legal holiday. The next day was Monday, May 28. Defendants filed the motion to dismiss on May 21, within the 60-day period. Therefore, the undersigned recommends denying plaintiff's motions for judgment on the pleadings, summary judgment and default judgment.[1]

1. Subject Matter Jurisdiction

Defendants bring the motion to dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). Defendants seek dismissal of the complaint under 12(b)(1) for plaintiff's claims which implicate sovereign immunity. Defendants seek sovereign immunity

[1] In addition, plaintiff's motion for default judgment should be denied for the reason that no default has been entered by the Clerk of the Court. "In order to obtain a default judgment against a party who has received service but failed to appear or plead in a case, the plaintiff must first seek an entry of default from the Clerk of the Court under Rule 55(a)." *Corsetti v. Hackel*, 2011 WL 2135184, *1 (E.D. Mich. 2011), citing 10A Charles A. Wright, Arthur Miller, & Mary Kay Kane, Federal Practice & Procedure § 2682 ("Prior to obtaining a default judgment under either Rule 55(b)(1) or Rule 55(b)(2), there must be an entry of default as provided by Rule 55(a)."). Here, no default has entered and thus, the motion for entry of default judgment should be denied.

for plaintiff's tort claims relating to the suspension of mail delivery and the handling of her mail.

a. Suspension of Plaintiff's Mail

Defendants do not dispute that the USPS suspended mail delivery to plaintiff's home in late 2017 because of her dogs. (Dkt. 11, at p. 9). However, defendants contend that the decision to suspend her mail is the kind of discretionary decision that removes the court's jurisdiction to review the decision under the Federal Tort Claims Act (FTCA). (*Id.* at p. 9-10); 28 U.S.C. § 1346. To the extent she is claiming error in the USPS's suspension of her mail due to her dogs, the Court lacks jurisdiction for such a claim.

Sovereign immunity generally bars claims against the United States without its consent. *See Montez ex rel. Estate of Hearlson v. United States*, 359 F.3d 392, 395 (6th Cir. 2004) (citing *United States v. Orleans,* 425 U.S. 807, 814 (1976)). The USPS enjoys sovereign immunity absent a waiver, and the FTCA applies to tort claims arising out of the activities of USPS. *Dolan v. United States Postal Service*, 546 U.S. 481, 483-84 (2006). Congress, through the FTCA, waived this governmental immunity for claims brought

> for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be

> liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1). There are exceptions to the waiver of immunity. One such exception is the discretionary function exception. The FTCA's waiver does not apply to "[a]ny claim ... based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." *Id.* § 2680(a). "If a claim falls within this exception, then federal courts lack subject-matter jurisdiction, and the claim must be dismissed." *Kohl v. United States*, 699 F.3d 935, 940 (6th Cir. 2012) (citing *Feyers v. United States,* 749 F.2d 1222, 1225 (6th Cir. 1984)).

Through a series of cases, the Supreme Court developed a two-part test to determine if a claim falls within this exception. *Rosebush v. United States*, 119 F.3d 438, 441 (6th Cir. 1997). The test requires that a court first determine "whether the challenged act or omission violated a mandatory regulation or policy that allowed no judgment or choice." *Id.* Such determination would be found if "a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive." *Berkovitz v. United States*, 486 U.S. 531, 536 (1988). If, on the other hand, there was room for judgment or choice in the decision made, then the challenged conduct was discretionary. *See Rosebush,* 119 F.3d at 441. In

such a case, the second step requires a court to determine whether the conduct is "of the kind that the discretionary function exception was designed to shield." *Id.* (quoting *United States v. Gaubert*, 499 U.S. 315, 322-23 (1991)). If the judgment used by the official involved "consideration of social, economic, or political policy, the exception applies." *In re Glacier Bay*, 71 F.3d 1447, 1450 (9th Cir. 1995).

The relevant USPS regulation is found at section 623.3. of the Postal Operations Manual (POM), entitled "Withdrawal of Delivery Service: Safety or Security." That section provides,

> Delivery service may be suspended when there is an immediate threat (including, but not limited to, threats due to loose animals) to the delivery employee, mail security, or postal property. Suspension of service should be limited to an area necessary to avoid the immediate threat. Postmasters should request corrective action from responsible parties and restore normal service as soon as appropriate.

United States Postal Service, Postal Operations Manual, Issue 9, § 623.3 (2002); *see Curiale v. Potter*, 147 Fed. Appx. 743, 744-45 (10th Cir. 2005) (citing the same POM section). This regulation is discretionary, not mandatory; it permits but does not mandate that delivery service be suspended in unsafe conditions. The undersigned must then consider whether the decision involved some policy

consideration. *See In re Glacier Bay*, 71 F.3d at 1450. In answering this question the Sixth Circuit stated,

> Although difficult to draw, there is a line between conduct "of the kind that the discretionary function exception was designed to shield," *Berkovitz,* 486 U.S. at 536, 108 S.Ct. 1954, and the sorts of run-of-the-mill torts, which, while tangentially related to some government program, are not sufficiently "grounded in regulatory policy" so as to be shielded from liability. *Gaubert,* 499 U.S. at 325 n. 7, 111 S.Ct. 1267; *see also Totten v. United States,* 806 F.2d 698, 700 (6th Cir.1986) (explaining that Congress, in the discretionary-function exception, "was drawing a distinction between torts committed in the course of such routine activities as the operation of a motor vehicle and those associated with activities of a more obviously governmental nature"). Where an act "cannot be said to be based on the purposes that the regulatory regime seeks to accomplish," the discretionary-function exception will not apply. *Gaubert,* 499 U.S. at 325 n. 7, 111 S.Ct. 1267. The *Gaubert* Court used negligent driving by a government actor on government business as an example of conduct that would not be shielded by the discretionary-function exception. *Id.* Driving a car, while it "requires the constant exercise of discretion," is not sufficiently connected to regulatory policy to fall within the discretionary-function exception. *Id.*

Kohl, 699 F.3d at 943. Further, "[w]e also consider the fact that '[w]hen established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion.'" *Kohl*, 699 F.3d at 940 (quoting *Sharp ex rel. Estate of Sharp v.*

United States, 401 F.3d 440, 443 (6th Cir.2005)). If the decision is susceptible to policy considerations, the discretionary function exception applies. *See Rosebush*, 119 F.3d at 444 (explaining that even if there is no indication "that policy concerns were the basis of a challenged decision, the discretionary function exception applies if the decision is susceptible to policy analysis").

The undersigned suggests that the decision to stop delivery due to plaintiff's dogs is a decision susceptible to policy considerations. As stated in *Kohl*, when the regulation allows an agent to exercise discretion, "it must be presumed that the agent's acts are grounded in policy when exercising that discretion." 699 F.3d at 940 (quoting *Sharp ex rel. Estate of Sharp v. United States,* 401 F.3d 440, 443 (6th Cir. 2005)). The USPS's decision to stop delivery appears to be based entirely on the purpose of the USPS regulation: to protect the safety of mail carriers. Plaintiff's conclusory assertions that the USPS did not stop delivery because of her dogs and that she "suspects a cover-up" are unsupported by factual development and do not alter the undersigned's determination that suspending delivery is a discretionary function under the FTCA.

Because both elements of the discretionary function exception are satisfied, the Court does not have jurisdiction to review the decision to stop delivery. Accordingly, the claim should be dismissed.

b. Ballot Certification Material Claim

Plaintiff claims that USPS personnel were involved in the destruction of ballot certification material. While not entirely clear, it appears that this claim is about the handling of her mail. This Court does not have jurisdiction to review this claim under the FTCA. Section 2680(b) states that "The provisions of this chapter and section 1346(b) of this title shall not apply to . . . [a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter." The Supreme Court explained this exception, stating: "[w]e think it more likely that Congress intended to retain immunity, as a general rule, only for injuries arising, directly or consequentially, because mail either fails to arrive at all or arrives late, in damaged condition, or at the wrong address." *Dolan v. United States Postal Service,* 546 U.S. 481, 488 (2006). This exception to the FTCA's waiver of immunity also applies to claims of *intentional* loss, delay, or theft of mail. *See Levasseur v. United States,* 543 F.3d 23 (1st Cir. 2008) (holding that the theft or concealment of mail falls within the exception of § 2680(b)); *Moreland v. U.S. Post Office Gen.*, 2015 WL 2372322, at *3 (E.D. Mich. May 18, 2015) (Borman, J.). Whether plaintiff's claim about the handling of her mail is a claim of negligent loss or destruction or intentional loss or destruction, the Court does not have jurisdiction to entertain the claim and the claim should be dismissed.

3. Failure to State a Claim

Defendants seek dismissal of plaintiff's remaining claims under Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

a. RICO

Plaintiff attempts to plead a civil RICO claim against USPS. She states that after submitting a complaint to usps.gov about destruction of ballot material, an inspector and other employees went to her house and threatened her in violation of 18 U.S.C. § 1961(5). (Dkt. 1, Pg ID 7). She also states that these employees were involved in a cover-up "evidencing a pattern of at least 2 racketeering activities."

Pursuant to 18 U.S.C. § 1964(c), RICO provides a private right of action for "[a]ny person injured in his business or property by reason of a violation of [18 U.S.C. §] 1962." To establish a violation of § 1962, a plaintiff must show: "(1) that there were two or more predicate offenses; (2) that an 'enterprise' existed; (3) that there was a nexus between the pattern of racketeering activity and the enterprise; and (4) that an injury to business or property occurred as a result of the above three factors." *VanDenBroeck v. Common Point Mortg. Co.*, 210 F.3d 696, 699 (6th Cir.2001), *abrogated on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008). A "pattern of racketeering activity" requires at least two acts of "racketeering activity" which are set forth in Section 1961(1). 18 U.S.C. § 1961(5).

Plaintiff's complaint is insufficient to state a RICO claim. Her conclusory statements that USPS employees engaged in racketeering activity are insufficient to plead the claim. "A civil Rico action does not require that there be a prior criminal conviction for the conduct forming the predicate act; however, the conduct used to support a civil RICO action must be indictable. Thus, the plaintiff must prove each prong of the predicate offense, or 'racketeering activity,' to maintain a civil action under the RICO statute." *Cent. Distribs. of Beer, Inc. v. Conn,* 5 F.3d. 181, 183–84 (6th Cir.1993) (internal citations omitted), *vacated on other grounds by Bridge v. Phoenix Bond & Indem. Co.,* 553 U.S. 639 (2008); *see also Craighead v. E.F. Hutton & Co., Inc.*, 899 F.2d 485, 494 (6th Cir. 1990) (holding that certain of plaintiffs' RICO claims failed because they did not plead the basic elements of the alleged predicate acts of mail fraud with sufficient particularity). Plaintiff alleges that she was threatened and "they've also used the name game to hire employees to commit RICO violations against" her. She did not plead the basic elements of any crime, and it is unclear what crimes she is alleging to constitute the two predicate offenses. (Dkt. 1, Pg ID 7). For this reason, plaintiff has failed to state a claim for relief under RICO.

Additionally, there are no allegations of an enterprise. To establish the existence of an "enterprise" plaintiff must show (1) that a group of persons formed "an ongoing organization with a framework or superstructure for making and

carrying decisions;" (2) that they functioned as a continuing unit; and (3) that the organization "was separate and distinct from the pattern of racketeering activity in which it engaged." *Ouwinga v. Benistar 419 Plan Servs., Inc.,* 694 F.3d 783, 793 (6th Cir. 2012) (citation omitted). Plaintiff made no such showing. Plaintiff also did not allege what injury she suffered due to the defendants' alleged RICO violations. She mentions that the defendants violated her rights to vote and become a candidate but does not allege that she was prevented from voting or becoming a candidate. Due to the deficiencies in the complaint, plaintiff fails to state a claim under RICO. *See Dey El ex rel. Ellis v. First Tennessee Bank*, 2013 WL 6092849, at *9 (W.D. Tenn. Nov. 18, 2013) (Holding that plaintiff failed to state a RICO claim where complaint contained no allegations of an enterprise or two or more predicate offenses).

To the extent plaintiff raises a RICO conspiracy claim, she did not sufficiently state a claim for relief. Section 1962(d) prohibits conspiracy to violate the section's other substantive provisions. Specifically, the statute provides that "[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." 18 U.S.C. § 1962(d). To plausibly state a claim for a violation of 18 U.S.C. § 1962(d), plaintiffs must successfully allege all the elements of a RICO violation, as well as alleging "the existence of an illicit agreement to violate the substantive RICO provision." *United States v. Sinito,* 723

F.2d 1250, 1260 (6th Cir.1983). As demonstrated above, plaintiff has not successfully alleged all the elements of a RICO violation. Further, plaintiff did not allege the existence of an illicit agreement to violate the substantive RICO provisions. Therefore, this claim also fails.

b. ADA

Plaintiff states that a USPS employee would make comments that she smelled or her house smelled while delivering mail. According to plaintiff, these comments violated the ADA. (Dkt. 1, Pg ID 7). She does not state which title of the ADA she believes was violated. Nor does she allege a disability. Title I of the ADA "prohibits certain employers, including the States, from 'discriminat[ing] against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.'" *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 361 (2001) (citing §§ 12112(a), 12111(2), (5), (7)). Because plaintiff did not allege any facts regarding an employment relationship with the USPS, she does not have a Title I claim against the USPS. *White v. Stephens*, 2014 WL 4925867, at *6 (W.D. Tenn. Sept. 30, 2014) ("As Mrs. White has not raised ADA claims in the context of employment, Title I does not apply.).

Title II does not apply to the federal government. 42 U.S.C. § 12131(1)(B); *Collazo v. Corr. Corp. of Am.*, No. 4:11CV1424, 2011 WL 6012425, at *3 (N.D. Ohio Nov. 30, 2011) (citing *Cellular Phone Task Force v. F.C.C.*, 217 F.3d 72, 73 (2d Cir. 2000)) ("Title II of the ADA is applicable only to state and local governments, not the federal government."); *White*, 2014 WL 4925867, at *6. The same is true for Title III, as that title governs "place[s] of public accommodation," which are defined as facilities operated by "private entities," not the federal government. 42 U.S.C. § 12181(7); *see also Sandison v. Mich. High Sch. Athletic Ass'n, Inc.*, 64 F.3d 1026, 1036 (6th Cir. 1995) ("Public school grounds and public parks are of course operated by public entities, and thus cannot constitute public accommodations under [T]itle III."); *Agee v. United States*, 72 Fed. Cl. 284, 289 (Fed. Cl. 2006) ("[U]nder Title III, the Federal Government is not a private entity operating a public accommodation or service. Therefore, Congress has not waived the Federal Government's sovereign immunity with regard to ADA claims." (citation omitted)); *White*, 2014 WL 4925867, at *6. Accordingly, to the extent plaintiff raises a claim under either Title II or Title III, the claim fails.[2]

[2] Even if plaintiff could bring such claims against the USPS, she has failed to state a claim. Plaintiff is required to establish that she is a qualified person with a disability under the statute, among other things. *Mingus v. Butler*, 591 F.3d 474, 481-82 (6th Cir. 2010) (citing 42 U.S.C. § 12132). Plaintiff alleged no facts establishing that she is a qualified person with a disability. (Dkt. 1, Pg ID 7).

c. Civil Rights and Constitutional Claims

Plaintiff lists claims pursuant to unspecified provisions of the Civil Rights Acts of 1866 and 1964, the Thirteenth and Fourteenth Amendments, and Article II, Section 1 of the U.S. Constitution in order to establish federal question jurisdiction. (Dkt. 1, Pg ID 5). Plaintiff provided some factual background for her RICO and ADA claims. However, she provided very little or no factual development for the civil rights and constitutional claims. In the narrative portion of the complaint she does not mention the amendments to the Constitution at all and the only factual allegation attributable to her civil rights and constitutional claims is that the inspector threatened her and violated her civil rights to vote, to be a candidate "the same as any white person," and her constitutional right to run for president. The remaining factual allegations relate to her RICO and ADA claims, addressed above. This bare allegation is not sufficient to state a claim for relief. The statement that her rights were violated is a conclusion of law and is speculative at best; for instance, she provides no allegations regarding what action this inspector took that violated her rights; nor does she allege that she was in fact kept from voting or running for office. While the Court must accept factual allegations as true in evaluating a motion to dismiss, the Court need not accept conclusions of law as true. *Iqbal*, 556 U.S. at 678 ("A pleading that offers 'labels and

conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'"). To survive a motion to dismiss, the complaint must contain "factual content that allows the court to draw the reasonable inference that the Defendant is liable for the misconduct alleged." *Id.* In this case there is simply no factual content to allow a reasonable inference that defendants are liable for violations of the Civil Rights Acts of 1866 and 1964, or for violations of Article II, Section I of the U.S. Constitution, or the Thirteenth and Fourteenth Amendments thereto.[3] The undersigned is left to guess at which specific statutory or amendment provisions plaintiff seeks relief, and for what conduct. "As has been recognized by our circuit and others, despite liberal pleading requirements for *pro se* litigants, it is not the role of the court to guess the nature of the claim(s) asserted." *Agee v. Wells Fargo Bank*, 2010 WL 1981047, *2 (E.D. Mich. 2010) (citing *Wells v. Brown*, 891 F.2d 591, 594 (6th Cir. 1989; *Nuclear Transportation & Storage, Inc. v. United States*, 890 F.2d 1348 (6th Cir. 1989); *Chapman v. City of Detroit*, 808 F.2d 459 (6th Cir.

[3] This is to say nothing of whether plaintiff's claims are permissible. For example, the Court does not have jurisdiction over any constitutional claims against the USPS itself. In *FDIC v. Meyer,* 510 U.S. 471 (1994), the court declined to extend *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,* 403 U.S. 388 (1971), to authorize suit against federal agencies. Further, the Fourteenth Amendment claim against USPS employees is also improper. The Fourteenth Amendment restricts the activities of the states, and thus there can be no claim for violation against federal employees. A due process claim against federal employees is more properly brought under the Fifth Amendment. *Scott v. Clay County, Tenn.,* 205 F.3d 867, 873 n. 8 (6th Cir. 2000) ("The Fourteenth Amendment's Due Process Clause restricts the activities of the states and their instrumentalities; whereas the Fifth Amendment's Due Process Clause circumscribes only the actions of the federal government.").

1986)). For these reasons, these claims should be dismissed for failure to state a claim.

d. Claims against in-laws

It is not clear whether plaintiff attempted to bring criminal claims against her "former in-laws" when she lists a series of crimes they allegedly committed. It is also unclear whether her in-laws make up part of the 20 unnamed postal employee defendants. In any event, to the extent plaintiff is attempting to prosecute these claims, she lacks standing to enforce criminal laws or to seek a judicial order compelling initiation of a criminal prosecution. *Linda R.S. v. Richard D.,* 410 U.S. 614, 619 (1973); *Diamond v. Charles,* 476 U.S. 54, 64 (1986) (holding that a private citizen "lacks a judicially cognizable interest in the prosecution or nonprosecution of another"); *Saro v. Brown*, 11 Fed. Appx. 387 (6th Cir. 2001) ("A private citizen has no authority to initiate a federal criminal prosecution; that power is vested exclusively in the executive branch."); *Woods v. Miamisburg City Schools*, 254 F.Supp.2d 868, 873-74 (S.D. Ohio 2003) ("The law is clear that a private citizen has no constitutional, statutory, or common law right to require a public official to investigate or prosecute a crime."). Consequently, the claims should be dismissed.

e. State Law Claims

The Court further recommends that the District Court decline to exercise supplemental jurisdiction over plaintiff's Michigan Constitution claims. Under 28 U.S.C. § 1367, a district judge may decline to exercise supplemental jurisdiction over state-law claims if "the district court has dismissed all claims over which it has original jurisdiction. . . ." 28 U.S.C. § 1367(c)(3). "When all federal claims are dismissed before trial, the balance of considerations usually will point to dismissing the state law claims [.]" *Musson Theatrical, Inc. v. Express Corp.*, 89 F.3d 1244, 1254–55 (6th Cir.1996); *see also Wee Care Child Ctr., Inc. v. Lumpkin*, 680 F.3d 841, 849 (6th Cir.2010) ("As [plaintiff's] one federal claim was properly dismissed, it was likewise proper for the district court to decline to exercise supplemental jurisdiction over the remaining state law claims."); *Ketola v. Clearwater*, 2008 U.S. Dist. LEXIS 104205, at *13-14, 2008 WL 4820499 (W.D. Mich. Oct. 31, 2008) ("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 state-law claims should be dismissed without reaching their merits.").

3. Motion for Judgment on the Pleadings (Dkt. 12)

To the extent plaintiff's motion for judgment on the pleadings (Dkt. 12) raises argument beyond defendants' alleged untimely response to the complaint, in

light of the recommendation to dismiss the complaint the undersigned suggests that plaintiff's motion be denied as moot.

IV. RECOMMENDATION

For the reasons set forth above, the undersigned **RECOMMENDS** that defendants' motion to dismiss (Dkt. 11) be **GRANTED** and that the complaint be dismissed.

The undersigned further **RECOMMENDS** that plaintiff's motion for judgment on the pleadings (Dkt. 12), motion for summary judgment (Dkt. 13), and motion for default judgment (Dkt. 14) be **DENIED**.

The parties to this action may object to and seek review of this Report and Recommendation, but are required to file any objections within 14 days of service, as provided for in Federal Rule of Civil Procedure 72(b)(2) and Local Rule 72.1(d). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *Howard v. Sec'y of Health and Human Servs.*, 932 F.2d 505 (6th Cir. 1981). Filing objections that raise some issues but fail to raise others with specificity will not preserve all the objections a party might have to this Report and Recommendation. *Willis v. Sec'y of Health and Human Servs.*, 931 F.2d 390, 401 (6th Cir. 1991); *Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987). Pursuant to Local Rule 72.1(d)(2), any objections must be served on this Magistrate Judge.

Any objections must be labeled as "Objection No. 1," "Objection No. 2," etc. Any objection must recite precisely the provision of this Report and Recommendation to which it pertains. Not later than 14 days after service of an objection, the opposing party may file a concise response proportionate to the objections in length and complexity. Fed.R.Civ.P. 72(b)(2), Local Rule 72.1(d). The response must specifically address each issue raised in the objections, in the same order, and labeled as "Response to Objection No. 1," "Response to Objection No. 2," etc. If the Court determines that any objections are without merit, it may rule without awaiting the response.

Date: October 31, 2018

s/Stephanie Dawkins Davis
Stephanie Dawkins Davis
United States Magistrate Judge

CERTIFICATE OF SERVICE

I certify that on October 31, 2018, I electronically field the foregoing paper with the Clerk of the Court using the ECF system, which will send electronic notification to all counsel of record and that I have mailed by United States Postal Service to the following non-ECF participant: Cherunda Lynn Fox, P.O. Box 20274, Ferndale, MI 48220-0274.

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