

APPENDIX

APPENDIX

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~~NOT RECOMMENDED FOR PUBLICATION~~

File Name: 21a0263n.06

No. 20-3334

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

DEAN KOCH,

Plaintiff-Appellant,

v.

STATE OF OHIO, Department of Natural Resources, Division of Wildlife; JAMES ZEHRINGER, Director Department of Natural Resources; SCOTT ZODY, Chief Department of Natural Resources, Division of Wildlife; RANDALL MEYER, Inspector General; GINO BARNA, Ohio Wildlife Officer, Erie County, Ohio; BRIAN BURY, Ohio Wildlife Officer, Erie County, Ohio; GARY MANLEY, Ohio Wildlife Officer, Erie County, Ohio, individually and in their official capacities,

Defendants-Appellees.

FILED
Jun 02, 2021
DEBORAH S. HUNT, Clerk

ON APPEAL FROM THE
UNITED STATES DISTRICT
COURT FOR THE NORTHERN
DISTRICT OF OHIO

BEFORE: BATCHELDER, WHITE, and BUSH, Circuit Judges.

HELENE N. WHITE, Circuit Judge. Plaintiff-Appellant Dean Koch appeals the dismissal of his suit against the Ohio Department of Natural Resources (ODNR), Ohio's inspector general, and five ODNR officials, alleging malicious prosecution and six other claims, as either barred by sovereign immunity or for failing to state a claim. We **AFFIRM**.

I.

For purposes of deciding this appeal, we accept as true the factual allegations in Koch's Complaint. Those allegations are as follows.

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Koch is a commercial fisherman on Lake Erie and the owner of White's Landing Fisheries, Inc. in Sandusky, Ohio. From 1974 to 2008, Koch served as president of the Ohio Fish Producers Association, an organization representing commercial fisherman on Lake Erie.

Over the decades Koch served as president of the Ohio Fish Producers Association, Koch was at times critical of decisions made by the ODNR. For example, in 2000, Koch wrote to a member of the Ohio House of Representatives to criticize rules implemented by the ODNR that Koch believed would reduce the allowable catch of Ohio's commercial fisherman. In 2011, Koch wrote to then-Ohio Governor John Kasich criticizing ODNR for similar reasons, and circulated a letter opposing legislation that Koch believed would have ended commercial fishing in Ohio. Koch has also been quoted in at least one media publication criticizing the allocation of fishing resources away from Ohio's commercial fisherman.

Over the same time period, Koch had a difficult relationship with local fishing authorities. From 1974 to 1985, Koch was arrested fifteen times by Sandusky ODNR officers (Koch does not specify precisely what for). In 1988, Koch was arrested for illegally catching walleye. After the 1988 arrest, Koch filed an internal complaint against the Sandusky office. George Bauer, an ODNR officer from the Xenia office, investigated the complaint in June 1989. Koch alleges that Bauer found that Sandusky officials were "intentionally 'nickel and diming' Koch to keep him in court and cost him attorneys' fees and court costs," and that one of the defendants here, Gino Barna, destroyed his notes from the 1988 arrest.

In 1999, Koch's truck was seized by ODNR officers for another alleged illegal catch.

Koch alleges that in 2007, the State of Ohio and the ODNR proposed buying out commercial trap-net fisherman for approximately two cents on the dollar. Koch and the Ohio Fish Producers Association opposed the plan, which eventually failed. Koch alleges that the State and

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the ODNR then offered to increase the quota of yellow perch available to Ohio's commercial fisherman if they removed Koch from the presidency of the Ohio Fish Producers Association. The Complaint does not specify who from the ODNR communicated this offer or how it was conveyed. Koch was subsequently voted out of the Fish Producers Association presidency.

In 2008, the Ohio General Assembly passed Senate Bill 77, which limited commercial perch fishing in the western basin of Lake Erie. The legislation also contained a provision mandating the permanent revocation of the commercial fishing licenses of anyone committing three misdemeanor fishing violations ("strikes") over a period of ten years. In 2008, Koch was cited 42 times for fishing violations (the Complaint does not specify what each citation was for). Koch alleges that "due to plea agreements offered by the Defendants," no other commercial fisherman charged with fishing misdemeanors was charged with a strikable offense. Koch was not offered a plea deal and was subsequently convicted of one count of not having proper monitoring equipment, a strikable offense.

In 2013, Koch received a second strike after he was convicted of taking undersized perch. In 2014, Defendants ODNR officers Bury and Abele seized fish from Koch's boat. The Complaint does not explain why, but incident reports in the record indicate that a routine ODNR inspection found Koch in possession of undersized perch. Koch complained about the seizure to Defendant Barna, an ODNR supervisor, disputing how the fish were measured and complaining that the officers were rude. After taking statements from Bury and Abele, Barna issued an investigative report finding no just cause to discipline Bury, without mentioning Abele. Koch then wrote to Defendant Zody, the ODNR chief at the time, to request that the investigation of Bury be reopened. Zody declined, explaining that Koch's complaints had not been substantiated by Barna. Koch in turn filed a complaint with Defendant Randall Meyer, Ohio's inspector general, alleging selective

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arrest and prosecution. On July 15, 2016, Meyer wrote Koch “stating that the Intake Committee of the Inspector General’s Office determined that there was not just cause for an investigation.” R. 1, PID. 9 (Compl. ¶ 60); R. 10-2, PID. 136. Ten days later, Koch asked Meyer to reconsider his decision. Meyer replied on October 18, 2016, informing Koch that the Intake Committee again reviewed Koch’s complaint and “found no wrong doing [sic] on the part of the agency[.]” R. 1, PID. 10 (Compl. ¶ 62); R. 10-2, PID. 139.

In August 2015, between the time Zody declined to reopen the investigation of Bury and the time Koch complained to Meyer about the 2014 incident, Koch was arrested by Bury and Manley for illegally fishing in Lake Erie’s western basin. A conviction would cause Koch to lose his fishing license, since it would be his third misdemeanor fishing offense in ten years. Koch’s Complaint does not provide further detail on the charge, other than to note that the prosecution allegedly should have considered “a documented collision with a freighter moving his nets” when deciding whether to charge him. R. 1, PID. 8 (Compl. ¶ 46). The district court took notice of the state court’s filings in the matter, since the 2015 arrest serves as the basis for Koch’s malicious prosecution claim. As detailed in *State v. Whites Landing Fisheries, LLC*, Koch was informed in April 2015 that there would be no yellow perch allocated for commercial fishing in the western basin of Lake Erie. 91 N.E.3d 315, 317 (Ohio Ct. App. 2017). In November 2015, Koch was charged with harvesting more than two hundred pounds of yellow perch from the western basin of Lake Erie. *Id.* at 317. Koch initially won dismissal at the trial level on the ground that the regulations defining the western basin’s boundary lines were unconstitutionally vague. *Id.* at 318. The Ohio Court of Appeals reversed and reinstated the charges, *id.* at 322–23, and while this case was pending in the district court, Koch was tried and acquitted.

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~~In June 2016, Koch's commercial fishing license was suspended for 60 days. Koch does not say why.~~

In October 2018, Koch filed this action against the ODNR, Inspector General Meyer, and five ODNR officers in both their official and personal capacities, alleging § 1983 claims for First Amendment retaliation, deprivation of due process rights, conspiracy, and two *Monell* claims.¹ The Complaint also alleges state claims for malicious prosecution and civil conspiracy.

On March 3, 2020, the district court granted the Defendants' motion to dismiss the Complaint. The district court held that all of Koch's claims against the ODNR were barred by sovereign immunity, that all state-law claims for injunctive and monetary relief against the individual defendants in their official capacities were barred by sovereign immunity, and that federal claims for monetary relief against the individual defendants in their official capacities were also barred by sovereign immunity. After the district court's sovereign immunity rulings, Koch was left with his state and federal claims for monetary relief against the individual defendants in their personal capacities and federal claims for injunctive relief against the individual defendants in their official capacities. The district court then dismissed what was left of Koch's complaint under Federal Rule of Civil Procedure 12(b)(6) for failing to state a claim.

This appeal followed.

II.

All Koch's claims against the ODNR, all state-law claims against the individual defendants in their official capacities, and all federal claims for monetary relief against the

¹ The district court initially characterized Koch's failure to train and failure to supervise claims as state-law claims, but later analyzed them as *Monell* claims. On appeal, Koch describes the failure to train and supervise claims as federal claims, so that interpretation of the Complaint is adopted here. Appellant's Br. at 29.

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individual defendants in their official capacities were dismissed based on sovereign immunity. On appeal, Koch does not argue that the district court misapplied the doctrine of sovereign immunity, but rather that the doctrine of sovereign immunity itself is unconstitutional. Reply Br. at 7.

The Supreme Court established the doctrine of sovereign immunity more than a century ago, and neither this court nor the district court can ignore binding Supreme Court precedent. *See Hans v. Louisiana*, 134 U.S. 1, 13 (1890) (defining parameters of Eleventh Amendment sovereign immunity). The ODNR is a state agency, and suits against officials in their official capacities are suits against the state. The district court correctly found that sovereign immunity bars Koch's claims against the ODNR, his state-law claims against the individual defendants in their official capacities, and all federal claims for monetary relief against the individual defendants in their official capacities. *See Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1046 (6th Cir. 2015) (suits against officials in their official capacity are suits against the state, and sovereign immunity deprives federal courts of subject-matter jurisdiction over suits between a citizen and a state unless the state waives its immunity or Congress abrogates that sovereign immunity). The only exception to this rule is the *Ex parte Young* exception, which the district court correctly found is applicable to federal claims for injunctive relief against officers in their official capacities. *See id* at 1046–47.

Appellees argue that sovereign immunity also bars Koch's state-law claims for monetary relief against the individual officers in their personal capacities. Appellees' Br. at 17–21. There has been some disagreement in this Circuit as to whether sovereign immunity stretches so far. *Compare Williams v. Kentucky*, 24 F.3d 1526, 1543 (6th Cir. 1994) (sovereign immunity does not bar state-law claims for monetary relief against state officials sued in their personal capacities), with *In re Ohio Execution Protocol Litig.*, 709 F. App'x 779, 787 (6th Cir. 2017) (Sutton, J.,

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concurring) (raising question as to whether *Williams*'s sovereign immunity holding was *dicta* and arguing that state-law claims against state officials for monetary relief should be barred by sovereign immunity if the state is the real-party-in-interest, regardless whether the official was sued in the official's personal or official capacity). But even if Appellees are right that the relevant language in *Williams* is *dicta*, an en banc panel of this court squarely rejected Appellees' argument in *Wilson v. Beebe*, 770 F.2d 578, 587–88 (6th Cir. 1985) (en banc), and this court is bound by that decision. Accordingly, sovereign immunity does not bar Koch's state-law claims for monetary relief against the individual officers in their personal capacities. Nevertheless, we dismiss for the reasons that follow.

III.

We review the district court's dismissal of a complaint for failure to state a claim under Rule 12(b)(6) de novo. *Kottmyer v. Maas*, 436 F.3d 684, 688 (6th Cir. 2006). We construe the complaint in the light most favorable to the plaintiff, accept all well-pleaded factual allegations as true, and look to see whether the complaint contains "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, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556).

A. Malicious Prosecution Claim

Koch's first claim alleges he was maliciously prosecuted following his 2015 arrest for illegally fishing in the western basin of Lake Erie. The district court, after reviewing the facts of the underlying case, *State v. Whites Landing Fisheries, LLC*, 91 N.E.3d at 315, found that Koch could not state a claim for malicious prosecution because Koch did not allege any facts to show

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the prosecution lacked probable cause to bring charges against him. On appeal, Koch's briefing is less than clear, but we interpret Koch to argue that his subsequent acquittal on the state charges (while this case was pending before the district court) meant that the prosecution lacked probable cause. Appellant's Br. at 23, 26–28.

Under Ohio law, a malicious prosecution claim requires: "(1) malice in instituting or continuing the prosecution, (2) lack of probable cause, and (3) termination of the prosecution in favor of the accused." *Voyticky v. Vill. of Timberlake*, 412 F.3d 669, 675–76 (6th Cir. 2005) (quoting *Trussell v. Gen. Motors Corp.*, 559 N.E.2d 732, 736 (Ohio 1990)). As detailed in *Whites Landing Fisheries, LLC*, Koch was charged with harvesting hundreds of pounds of perch from the western basin of Lake Erie—where the allowable commercial perch catch was zero. 91 N.E.3d at 317. Koch does not allege in the Complaint that Defendants Bury and Manley lacked probable cause to arrest him, nor does he deny in the Complaint or his briefing that he was caught harvesting hundreds of pounds of perch from the western basin of Lake Erie, in apparent clear violation of Ohio law. Instead, the Complaint alleges that a post-arrest investigation should have considered "a documented collision with a freighter moving his nets." R. 1, PID. 8 (Compl. ¶ 46). This may be so, but the Complaint does not explain how either Bury or Manley would have had any personal knowledge of a freighter collision with Koch's nets when they arrested him in 2015, and the State of Ohio, which ultimately brought and maintained charges against him, is no longer a defendant in this case. Koch's subsequent acquittal does not negate Bury's and Manley's initial probable cause determination. Accordingly, the district court did not err in dismissing Koch's malicious prosecution claim.

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B. First Amendment Retaliation Claim

Koch's second claim alleges that Defendant Meyer, the Ohio inspector general, retaliated against Koch for his public criticisms of ODNR fishing policy by refusing to investigate Koch's 2014 complaint against Defendant Bury and officer Abele. The district court found that whether or not Meyer was correct to decline to investigate Koch's complaint, Meyer was entitled to qualified immunity since there is no clearly established right to an inspector general's investigation. The district court also found that Koch's First Amendment claims against the remaining defendants failed because they did not cause the harm Koch alleges—Meyer did. On appeal, Koch recounts decades-old grievances against the ODNR and argues that his complaint was specific enough to state a claim against each of the Defendants. Appellant's Br. at 19–22.

Under 42 U.S.C. § 1983, an individual may bring a private cause of action against anyone who, under color of state law, deprives the person of rights, privileges, or immunities secured by the Constitution or conferred by federal statute. *Blessing v. Freestone*, 520 U.S. 329, 340 (1997). To state a claim for First Amendment retaliation, a plaintiff must allege: "(1) the plaintiff engaged in constitutionally protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) the adverse action was motivated at least in part by the plaintiff's protected conduct." *Mezibov v. Allen*, 411 F.3d 712, 717 (6th Cir. 2005).

Qualified immunity shields government officials acting within the scope of their official duties from civil liability insofar as their conduct does not violate clearly established rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 817–18 (1982). To overcome Meyer's qualified immunity defense, Koch must be able to demonstrate that "the officer's conduct violated" the Constitution and that "clearly established" law at the time

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would have showed as much. *Saucier v. Katz*, 533 U.S. 194, 201–02 (2001). Koch is correct that the fact-intensive nature of a qualified immunity defense often makes 12(b)(6) dismissal on qualified immunity grounds inappropriate, *Wesley v. Campbell*, 779 F.3d 421, 433 (6th Cir. 2015), but we have upheld such dismissals when the “complaint establishes the defense.” *Siefert v. Hamilton County*, 951 F.3d 753, 762 (6th Cir. 2020). This is such a case. Even if Koch’s allegations are true and we assume they state a retaliation claim, Koch cites no case that would have put Meyer on notice that failing to open an inspector general investigation into Koch’s complaints would violate the Constitution, and we are aware of no such case.

Koch’s briefing contains additional facts and theories of liability for the First Amendment retaliation claim that were not clearly alleged in the Complaint, many of which appear to be far outside the applicable two-year statute of limitations. We find these additional theories to be without merit, and the district court did not err in dismissing them.

C. Due Process Claim

Koch alleges he was deprived of due process when Meyer declined to open an investigation in response to his complaint “with no statement of the procedures utilized, the standard of review used or an opportunity for [Koch] to be heard in any meaningful way.” R. 1, PID. 11 (Compl. ¶ 70). The Complaint does not specify whether Koch’s claim is a substantive due process claim or a procedural due process claim, but the district court found that either way, Koch failed to plead the deprivation of an interest protected by state law or the Constitution.

The district court did not err in dismissing Koch’s due process claim. With respect to Meyer’s investigation, all Koch’s allegations go to the process Meyer used in deciding not to open an investigation. Koch’s allegations are therefore best categorized as a procedural due process claim. As such, Koch must show he was deprived of an interest protected by law, and the district

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court correctly found that neither the Constitution nor Ohio law creates a protected interest in an inspector general investigation. *See Mitchell v. McNeil*, 487 F.3d 374, 378 (6th Cir. 2007) (“There is no . . . common law right, much less a constitutional right, to an investigation.”); Ohio Rev. Code § 121.42(B) (outlining duties of inspector general).

Koch also argues that his commercial fisherman’s license is a protected property interest and that “there is a liberty interest involved in this case due to [his] free speech claim.” Appellant’s Br. at 24. Koch’s Complaint alleged neither as the basis for his due process claim, and even if the Complaint were read to include a due process claim for deprivation of Koch’s fishing license and free speech, Koch was never prevented from speaking² and he never lost his fishing license. Without a deprivation, Koch cannot state a due process claim. *See Warren v. City of Athens*, 411 F.3d 697, 708 (6th Cir. 2005) (“Only after a plaintiff has met the burden of demonstrating that he possessed a protected property or liberty interest *and was deprived of that interest* will the court consider whether the process provided the plaintiff in conjunction with the deprivation, or lack thereof, violated his rights to due process.”) (emphasis added).

D. Conspiracy

Koch alleges Defendants Meyer, Zody, Barna, Bury, and Manley conspired to take away his fishing license and deprive him of an inspector general investigation because of statements he made in 2000 and 2011 that were critical of ODNR policies. The district court interpreted Koch

² Such a claim would also fail because it is duplicative of Koch’s First Amendment retaliation claim, and Koch cannot allege a claim based on substantive due process when a more explicit constitutional protection exists. *See Brandenburg v. Hous. Auth. of Irvine*, 253 F.3d 891, 900 (6th Cir. 2001) (dismissing claim for violation of substantive due process right to free speech as duplicative of First Amendment retaliation claim); *Handy-Clay v. City of Memphis*, 695 F.3d 531, 547 (6th Cir. 2012) (same).

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to be alleging state and federal conspiracy claims and dismissed both for failing to allege how the various defendants each participated in the alleged conspiracy.

“It is well-settled that conspiracy claims must be pled with some degree of specificity and that vague and conclusory allegations unsupported by material facts will not be sufficient to state such a claim under § 1983.” *Gutierrez v. Lynch*, 826 F.2d 1534, 1538 (6th Cir. 1987). Under Ohio law, “[a] plaintiff need not demonstrate an explicit agreement” but must at least plausibly allege “an understanding or common design between the parties to commit an improper act.” *Lee v. Countrywide Home Loans, Inc.*, 692 F.3d 442, 446 (6th Cir. 2012) (citing *Gosden v. Louis*, 687 N.E.2d 481, 496 (Ohio Ct. App. 1996)). Here, Koch alleges a wide-ranging conspiracy that includes the ODNR, the inspector general, and multiple officers of the ODNR, all acting in concert to retaliate against him for three statements he made over the course of two decades, of which Koch has not even alleged all of the defendants were aware. The district court did not err in concluding that the actions Koch describes in the Complaint fail to state a plausible conspiracy claim under either state or federal law.

E. Failure to Supervise and Train

The Complaint alleges separate “failure to supervise” and “failure to train” claims. The failure to supervise claim alleges that Defendants ODNR, Zehringer, Meyer, Barna, and Zody failed to adequately supervise Defendants Bury and Manley because they did not discipline Barna and Manley after Koch complained about them. The “failure to train” claim alleges that ODNR, Zehringer, Meyer, Zody, and Barna were “on notice” that “[ODNR] employees had acted in an unprofessional manner in matters involving [Koch]” and failed to provide remedial training. *Id.*

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at 14-15 (Compl. ¶ 91-92).³ The district court dismissed both claims because sovereign immunity bars any claim against ODNR, and *Monell* does not permit Koch to bring claims for failure to supervise or train against individual officers.

The district court did not err in dismissing Koch's final two claims. *Monell* does not provide a basis for bringing a "failure to supervise" or "failure to train" claim against individual officers based on a respondeat superior theory. *Hays v. Jefferson County*, 668 F.2d 869, 872 (6th Cir. 1982) ("The law is clear that liability of supervisory personnel must be based on more than merely the right to control employees. Without more, such a theory would allow liability on a respondeat superior basis-a basis expressly rejected by the Supreme Court in *Monell*"); *Heyerman v. County of Calhoun*, 680 F.3d 642, 647 (6th Cir. 2012) (attempt to sue individual officer for failure to adequately supervise without allegation of individual involvement "improperly conflates a § 1983 claim of individual supervisory liability with one of municipal liability") (quoting *Phillips v. Roane County*, 534 F.3d 531, 543 (6th Cir. 2008)).

To the extent Koch seeks to bring a § 1983 claim against the individual officers based on traditional principles of personal liability, he must allege that the Defendants "either encouraged the specific incident of misconduct or in some other way directly participated in it. At a minimum, a plaintiff must show that the official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers." *Hays*, 668 F.2d at 874. Koch's allegations again fall short. As a threshold matter, Koch has not alleged any unconstitutional conduct; his failure to supervise and failure to train claims are dependent on his

³ The Complaint does not specify whether these are state or federal claims, and the district court interpreted them to be asserting federal *Monell* claims. Koch does not challenge this interpretation on appeal. *See* Appellant's Br. at 29.

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malicious prosecution and due process claims, which are inadequate. Second, even if Koch had sufficiently alleged a malicious prosecution claim, his bare allegation that Zehringer, Meyer, Zody, and Barna “encouraged and supported” malicious prosecution by failing to train and discipline is not enough—he must allege sufficient factual detail to make that claim *plausible*, as opposed to *possible*. *See Iqbal*, 556 U.S at 679. Koch’s complaint fails to clear that hurdle.

IV.

For the reasons set forth above, we **AFFIRM**.

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~~JOHN K. BUSH, Circuit Judge, concurring.~~ I concur fully in the majority opinion because I believe that we are bound to assert jurisdiction over Koch's state-law damages claims against the defendant state officials in their personal capacities. *See Wilson v. Beebe*, 770 F.2d 578, 587–88 (6th Cir. 1985) (en banc). I write separately to urge this Court to reconsider its holding in *Wilson*.

"It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." *Hans v. Louisiana*, 134 U.S. 1, 13 (1890). The Supreme Court has applied that principle to bar actions for state-law claims for injunctive relief against state officials. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 97–98 (1984). In doing so, the *Pennhurst* Court emphasized that sovereign immunity applies when "'the state is the real, substantial party in interest' . . . regardless of whether [a suit] seeks damages or injunctive relief," with the exception of *Ex Parte Young*'s narrow rule. *Id.* at 101–02 (quotation omitted). I agree with Judge Sutton that the logic of *Pennhurst* applies to state-law claims for damages against state officials in their personal capacities when the claims arise from action taken within the scope of the defendants' official authority. *See In re Ohio Execution Protocol Litig.*, 709 F. App'x 779, 786–87 (6th Cir. 2017) (Sutton, J., concurring). Such claims seek to circumvent the Eleventh Amendment and interfere with state sovereignty in the same way that a claim seeking injunctive relief would.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Dean A. Koch,

Case No. 3:18-cv-2287

Plaintiff,

v.

MEMORANDUM OPINION
AND ORDER

State of Ohio, et al,

Defendants.

I. INTRODUCTION

Before me are the motions to dismiss filed by Defendant Randall J. Meyer, the Ohio Inspector General, (Doc. No. 10), and Defendants State of Ohio, Gino Barna, Brian Bury, Gary Manley, James Zehringer, and Scott Zody. (Doc. No. 16). Plaintiff Dean A. Koch filed a response to each of these motions, (Doc. No. 14 & 18), and Defendants replied. (Doc. No. 17 & 19).

II. BACKGROUND

Koch is a commercial fisherman who owns and operates White's Landing Fisheries, Inc., in Erie County, Ohio. (Doc. No. 1 at 4). From 1974 to 2008, Koch served as the President of the Ohio Fish Producers Association, an organization representing commercial fishermen. (*Id.*). Koch claims he and the organization lobbied continuously on behalf of commercial fishermen who use Lake Erie. (*Id.*). Koch further asserts that, in this role, he has long been an outspoken critic of many decisions made by the State of Ohio, through the Ohio Department of Natural Resources (“ODNR”) and its Division of Wildlife, concerning commercial fishing rights. (*Id.*). Koch alleges

that, in part because of his criticisms, he has been subjected, by the various defendants, to a coordinated effort to harass him in his business and cause him personal economic hardship, including litigation intended to harm him, as well as the deprivation of his commercial fishing license. (*Id.* at 5).

Koch's claims arise out of many different interactions with the ODNR, including an arrest in 2015 by ODNR officers that led to criminal charges which threatened to deprive him of his commercial fishing license, as well as a series of events that followed an arrest made by department officers in 2014.

While Koch's complaint details incidents dating as far back as the 1980s, the allegations relevant to his claims in the present suit begin with an incident in 2007. Koch claims that in 2007, the ODNR proposed a plan to buy out commercial trap net fishermen, but the plan failed after Koch and the Ohio Fish Producers Association opposed it. (Doc. No. 1 at 6-7). Sometime after this, the ODNR told another commercial fisherman that commercial fishermen would receive an increased quota of yellow perch if they would remove Koch from the presidency of the Ohio Fish Producers Association. (*Id.* at 7). Koch was later voted out of his presidency. (*Id.*).

Koch's complaint with the Inspector General stems from a series of events that followed his 2014 arrest by ODNR officers Brian Bury and Jared Abele. Koch alleges he complained about Bury and Abele to Gino Barna, a supervisor in the ODNR, on July 31, 2014. (Doc. No. 1 at 9). On September 18, 2014, the ODNR informed Koch it had completed its investigation of Bury and found no just cause to discipline him. (*Id.*). Koch requested the investigation be reopened. The ODNR, through its Chief at the time, Scott Zody, responded that Koch's complaints had not been substantiated and the investigation would not be reopened. (*Id.*).

Koch then turned to the Ohio Inspector General for relief, alleging he was the victim of "selective arrest and prosecution" by the ODNR. (*Id.*). On July 15, 2016, Inspector General Meyer

wrote Koch to inform him that the Intake Committee determined there was no just cause for an investigation. (*Id.*). On July 25, 2016, Koch wrote Meyer again, asking him to reconsider the decision, and Meyer responded on October 18, 2016, informing Koch the Intake Committee had once again reviewed Koch's complaint and found no wrongdoing on the part of the agency. (*Id.* at 9-10).

Also included in Koch's complaint are allegations related to an arrest by Bury and a different ODNR officer, Gary Manley, in 2015, for illegally fishing in the western basin of Lake Erie. (Doc. No. 1 at 8). This arrest led to Koch being charged with taking yellow perch from a restricted zone. (*Id.*). Under applicable state law, a conviction for this offense would have led to Koch having his commercial fishing license revoked. Since filing this complaint, Koch was acquitted of those charges following a bench trial. (Doc. No. 14 at 3).

III. DISCUSSION

A. The Eleventh Amendment

Because Koch brings claims against the State of Ohio and several of its officers, I begin the discussion with an analysis of the Eleventh Amendment.

“The Eleventh Amendment bars a suit against state officials when ‘the state is the real, substantial party in interest.’” *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984) (quoting *Ford Motor Co. v. Dep’t of Treasury of State of Indiana*, 323 U.S. 459, 464 (1945) (overruled on other grounds by *Lapides v. Bd. of Regents of Univ. Sys. of Georgia*, 535 U.S. 613 (2002))). “[T]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter.” *Pennhurst*, 465 U.S. at 101 (quoting *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963) (*per curiam*)). The Supreme Court has identified one “important exception” to this rule, which applies to suits challenging a state official’s action as unlawful under the federal constitution. *Pennhurst*, 465 U.S. at 102; *Ex Parte Young*, 209 U.S. 123 (1908). Even this exception has been

~~limited, however, and it applies only to claims for prospective relief. See *Edelman v. Jordan*, 415 U.S.~~

651 (1974).

Koch brings all seven of his causes of action against each of the defendants named in his complaint, I split the analysis here into two sections, first addressing Koch's claims against the State of Ohio, then proceeding to his claims against individual state officers.

1. State of Ohio

In his complaint, Koch names as a defendant the State of Ohio, Department of Natural Resources, Division of Wildlife. Relying on the Eleventh Amendment, the State moved to dismiss Koch's claims under Rule 12(b)(1) for lack of subject matter jurisdiction. (Doc. No. 16 at 14). "The Eleventh Amendment bars a suit against a state or its agencies in federal court unless the state consents to suit or Congress abrogated states' immunity with respect to certain claims." *Brent v. Wayne Cnty. Dep't of Human Servs.*, 901 F.3d 656, 681 (6th Cir. 2018). Absent any showing of abrogation or waiver, this court lacks subject matter jurisdiction over Koch's claims against the state of Ohio. While Koch names the state itself as the defendant, I note that the Eleventh Amendment's protection extends to the ODNR as well because it is a state agency. *See id.*; *see also Lupo v. Voinovich*, 235 F. Supp. 2d 782, 789 (S.D. Ohio 2002).

2. Individual State Officers

As for Koch's claims against the individual state officers, the analysis depends in part on whether the claims are brought under state or federal law.

I begin by addressing Koch's four state law claims: (1) malicious prosecution; (2) civil conspiracy; (3) failure to train; and (4) failure to supervise¹. As the Supreme Court explained in

¹ It is not clear from his complaint whether Koch is bringing his failure to train and failure to supervise claims under federal or state law. But in another filing addressing these claims, Koch states he is invoking the Court's supplemental jurisdiction. (Doc. No. 18 at 12). Koch characterizes these as state law claims in his response to Meyer's motion to dismiss, (Doc. No. 14 at 5), as well as

Pennhurst, any claims against state officials in their official capacity are barred by the Eleventh Amendment if the relief sought would operate against the sovereign. 465 U.S. at 106. Thus, Koch's claims for injunctive relief, as well as his claims for monetary damages against these individuals in their official capacity, are blocked by the Eleventh Amendment. Koch attempts to invoke the exception to the Eleventh Amendment that the Supreme Court announced in *Ex Parte Young*, (Doc. No. 14 at 5), but *Pennhurst* directly forecloses this argument. In *Pennhurst*, the Court reasoned that because the exception identified in *Ex Parte Young* was premised "on the need to promote the vindication of federal rights," it does not apply to claims under state law. *Pennhurst*, 465 U.S. at 105-06.

Koch can still bring state law claims for monetary damages against these individuals, provided those claims are against them in their individual capacity. Meyer's reliance on *Otte v. Kasich*, 709 F. App'x 779, 783 (6th Cir. 2017), to argue otherwise is misplaced because in *Otte*, the state claims which sought damages from officers were dismissed on state law immunity grounds.² *Otte*, 709 F. App'x at 784. In cases where the plaintiff seeks monetary relief from officials in their individual capacity, the claim can go forward as long as the plaintiff has "set forth clearly in their pleading that they are suing the state defendants in their individual capacity for damages, not simply their capacity as state officials." *Shepherd v. Wellman*, 313 F.3d 963, 967 (6th Cir. 2002) (quoting *Wells v. Brown*, 891 F.2d 591, 593 (6th Cir. 1989)). Koch has done so in his complaint, which clearly states that each of the individual defendants is being sued in both their official and individual capacities.

his response to the other defendants' motion to dismiss. (Doc. No. 18 at 16). Thus, I will treat Koch's failure to train and failure to supervise claims as claims for violations of Ohio law.

² Whether Ohio's immunity rules would still bar Koch from recovering damages from Meyer in his individual capacity is a question I need not decide given that I find Koch fails to state a claim against Meyer.

~~Koch also brings the following federal claims: (1) First Amendment retaliation; (2) Fourteenth Amendment Due Process; and (3) Conspiracy to violation constitutional rights to free speech and due process. (Doc. No. 14 at 5).~~

These claims against these defendants in their official capacities, to the extent Koch seeks prospective injunctive relief, are not barred by the Eleventh Amendment. *Edelman*, 415 U.S. at 665-67. Any claims for monetary relief from these defendants in their official capacity are blocked by the Eleventh Amendment just as the state law claims were. This is because when a suit seeks monetary relief from a state official in their official capacity, the state itself is the real party in interest. *See Turker v. Ohio Dep't of Rehab. & Corr.*, 157 F.3d 453, 456 (6th Cir. 1998) ("It is well-established that a plaintiff cannot sue a state agency or any of its employees in their official capacities for monetary damages.").

B. Failure to State a Claim

With the claims against the State of Ohio removed from consideration by virtue of the Eleventh Amendment, I proceed to Koch's remaining claims against individual officers. Defendants Barna, Bury, Manley, Zehringer, and Zody (hereinafter "ODNR defendants") and Defendant Meyer moved to dismiss the claims against them for failure to state a claim upon which relief can be granted.

In ruling on a motion to dismiss under Rule 12(b)(6), "[c]ourts must construe the complaint in the light most favorable to [the] plaintiff." *Albrecht v. Treon*, 617 F.3d 890, 893 (6th Cir. 2010) (citation omitted). To survive a motion to dismiss under Rule 12(b)(6), "even though a complaint need not contain 'detailed' factual allegations, its 'factual 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.'" *Ass'n of Cleveland Fire Fighters v. City of Cleveland, Ohio*, 502 F.3d 545, 548 (6th Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

Conclusory allegations or legal conclusions masquerading as factual allegations will not suffice. *Twombly*, 550 U.S. at 555 (stating that the complaint must contain something more than “a formulaic recitation of the elements of a cause of action”). A complaint must state sufficient facts which, when accepted as true, state a claim “that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (explaining that the plausibility standard “asks for more than a sheer possibility that a defendant has acted unlawfully” and requires the complaint to allow the court to draw the reasonable inference that the defendant is liable for the alleged misconduct).

1. Malicious Prosecution

Under Ohio law³, a malicious prosecution claim requires: “(1) malice in instituting or continuing the prosecution, (2) lack of probable cause, and (3) termination of the prosecution in favor of the accused.” *Voyticky v. Vill. of Timberlake, Ohio*, 412 F.3d 669, 675-76 (6th Cir. 2005) (quoting *Trussell v. Gen. Motors Corp.*, 559 N.E.2d 732, 736 (Ohio 1990)). Because Koch’s complaint fails to plead facts which support a plausible inference that the second element is satisfied, both Meyer and the ODNR defendants are entitled to dismissal of Koch’s claims for malicious prosecution.

First, it is important to identify precisely the basis for Koch’s malicious prosecution claims. This is because, under Ohio law, claims for malicious prosecution accrue on the date the prosecution is terminated and are subject to a one-year statute of limitations. Ohio Rev. Code § 2305.11. Koch’s complaint was filed in 2018 and the only prosecution that took place within the requisite time frame is addressed in detail below. The vast majority of the facts Koch pleads in

³ It is not entirely clear from the complaint whether Koch is bringing claims for malicious prosecution under state law or federal law. But, as was the case with his failure to train and failure to supervise claims, his pleadings as a whole demonstrate that his claim is being brought under state law. He invokes this court’s supplemental jurisdiction in the complaint, and cites state law in his response to Meyer’s motion to dismiss, (Doc. No. 14 at 5), as well his response to the ODNR defendants’ motion to dismiss. (Doc. No. 18 at 16). Therefore, I treat this as a claim under state law.

~~support of his malicious prosecution claim concern a 1989 investigation by George Bauer, which~~
Koch claims demonstrates that the Sandusky Office was intentionally “nickel and diming” him to keep him in court. (Doc. No. 1 at 5-6). Any malicious prosecution claim built on what this investigation found would have long since expired. Recognizing this, Koch argues that these facts are included for context, not to serve as the basis for any claim. (Doc. No. 18 at 15).

Instead, Koch’s malicious prosecution claim relies on an incident in 2015 where Bury and Manley arrested Koch for fishing in the western basin. (Doc. No. 1 at 8). On November 10, 2015, White’s Landing was charged with three violations of Ohio’s quota management system for Lake Erie fishery resources. Ohio Rev. Code § 1533.341. Under this system, the harvesting of Lake Erie yellow perch is regulated and allocated by statistical districts called “management units.” *State v. Whites Landing Fisheries, LLC*, 91 N.E.3d 315, 317 (Ohio Ct. App. 2017) (citing Ohio Rev. Code § 1533.341 and Ohio Adm. Code 1501:31-3-12(A)). In April 2015, the ODNR notified White’s Landing that there would be no yellow perch allocated for commercial fishing in management unit one. *Id.*

Koch initially won dismissal of the claims against him on the grounds that the regulations defining the boundary of management unit one and management unit two were void for vagueness due to their use of the word “northeast.” *Whites Landing Fisheries, LLC*, 91 N.E.3d at 318. But the Court of Appeals of Ohio reversed the trial court on this issue and reinstated the charges. *Id.* at 322-23. Koch was ultimately acquitted on the charges in November 2018.

Koch’s claim fails because he does not allege any facts to show his prosecution lacked probable cause, something that would require more than showing that he was ultimately acquitted of the charges. *See Beckett v. Ford*, 613 F. Supp. 2d 970, 979-80 (N.D. Ohio 2009). In this context, probable cause is “a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious individual in the belief that the person accused is guilty of the

offense with which he or she is charged.” *Id.* (citing *Harris v. Bornhorst*, 513 F.3d 503, 520 (6th Cir. 2008)) (further citations omitted). Koch’s only attack on the prosecution focuses on the investigation that led to it, claiming the investigation “was performed after the date he was purported to have been in the Western Basin and did not include consideration of a documented collision with a freighter moving his nets.” (Doc. No. 1 at 8). But even if these facts are true, they would not suggest that Bury and Manley lacked probable cause to believe he violated § 1533.341. For example, nothing in Koch’s complaint calls into question the fact that he was in the western basin while in possession of yellow perch⁴, a fact which by itself establishes probable cause to believe he harvested them from that area.

Koch further argues that statements by defendants⁵, in which defendants allegedly admitted their purpose was to take Koch’s license, support his malicious prosecution claim. (Doc. No. 18 at 15). But these statements do not impact whether there was probable cause to prosecute in the first place.

Koch’s reliance on all the previous charges brought against him and ultimately dismissed, which he argues provide context for understanding his current claim, is similarly unpersuasive. He still fails to show that probable cause was lacking in the prosecution that constitutes the basis of his claim.

⁴ While Koch only states that he was “purported to have been” in the western basin, he does not allege any facts to suggest he was not actually there. Neither the timing of the investigation, nor the fact that there were some mitigating circumstances contributing to his presence there, call into question the conclusion that seeing a commercial fishermen in possession of yellow perch in an area where commercial fishermen are not permitted to harvest yellow perch constitutes probable cause to believe that fishermen has committed a crime.

⁵ Koch does not identify which defendants in particular, though he alleges the statements themselves were made on behalf of defendants through the Attorney General’s Office during the course of the prosecution for the 2015 charges.

Finally, I note that with the exception of identifying Bury and Manley as the officers that arrested him in 2015, Koch's complaint fails to plead any facts which would tie the remaining defendants to his claim for malicious prosecution. For this alternative reason, defendants Meyer, Zehringer, Zody, and Barna are entitled to dismissal of the claims for malicious prosecution brought against them.

2. Deprivation of Constitutional Rights

Koch's second, third, and fourth causes of action allege the defendants deprived him of rights under the federal constitution. Although Koch is not clear on this point, I treat his federal law claims as claims under 42 U.S.C. § 1983.

Section 1983 creates a cause of action against “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.” 42 U.S.C. § 1983.

To state a claim against an individual under § 1983, “a plaintiff must set forth facts that, when construed favorably, establish (1) the deprivation of a right secured by the Constitution or laws of the United States (2) caused by a person acting under color of state law.” *Heyerman v. Cnty of Calhoun*, 680 F.3d 642, 647 (6th Cir. 2012) (quoting *Sigley v. City of Parma Heights*, 437 F.3d 527, 533 (6th Cir. 2006)). To meet the second element above, Koch must plead facts which tie the specific individuals he sues to the violations he alleges. *See Gilmore v. Corrections Corp. of America*, 92 F. App'x 188 (6th Cir. 2004) (affirming dismissal of complaint where plaintiff named twenty-two defendants in caption but failed to allege specifically how any of the individuals were involved in the conduct he alleged); *see also Heyerman*, 680 F.3d at 647 (6th Cir. 2012) (“Persons sued in their individual capacities under § 1983 can be held liable based only on their own unconstitutional behavior.”).

a. Right to Free Speech

In his second cause of action, “Deprivation of Constitutional Rights: Right to Free Speech,” Koch seems to be asserting a First Amendment retaliation claim.

To establish a First Amendment retaliation claim, Koch must demonstrate:

(1) [he] engaged in constitutionally protected conduct; (2) an adverse action was taken against [him] that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) the adverse action was motivated at least in part by [his] protected conduct.

Paterek v. Vill. Of Armada, Michigan, 801 F.3d 630, 645 (6th Cir. 2015) (quoting *Fritz v. Charter Twp. Of Comstock*, 592 F.3d 718, 723 (6th Cir. 2010)).

While it is not entirely clear which allegations Koch asserts constitute a First Amendment violation, I examine his complaint and subsequent pleadings to address each possible avenue of relief Koch could pursue.

I start with Koch’s complaint. In the section addressing his First Amendment cause of action⁶, Koch appears to base his claim on Meyer’s failure to investigate Koch’s complaint about his June 2014 arrest by Bury and Abele. If this is indeed the basis for his claim, Koch’s claims against Meyer would be dismissed on qualified immunity grounds⁷, and his claims against the ODNR

⁶ In paragraph 67, Koch alleges he has “publicly criticized the procedures or lack thereof concerning the investigation of his arrest and prosecution alleging to Defendant Meyer retribution and selective prosecution in Huron Case No. CRB 1500352ABC, for his previous activities as president of the Ohio Fish Producers Association and as an individual, *which Defendant Meyer terminated on behalf of all Defendants* to intimidate the Plaintiff from further exercise of his right to free speech and, to seek retribution for the exercise of his constitutional right to free speech on October 28, 2018.” (Doc. No. 1 at 10) (emphasis added).

⁷ Koch has no clearly established right to have the Inspector General investigate his complaint. See *Sizemore v. Hissom*, No. 2:12-cv-1166, 2013 WL 1867044 at *9 (S.D. Ohio May 2, 2013). Koch may have a right not to be retaliated against by Meyer in the form of a refusal to investigate Koch’s complaint, but Koch does not allege any facts to show this is the case, and Koch’s conclusory allegations on this front will not suffice.

~~defendants would fail because those individual actors did not cause the deprivation he alleges, Meyer did.~~

In subsequent pleadings, Koch provides additional theories to support his First Amendment retaliation claim but fails to demonstrate how these theories are supported by sufficient factual allegations in his complaint.

Koch argues defendants violated his First Amendment rights by offering certain benefits to commercial fishermen if they would vote him out of his post as President of the Ohio Fish Producers Association. (Doc. No. 18 at 7-8). While this conduct would likely qualify as the kind of adverse action that would deter a person of ordinary firmness, *see Fritz*, 592 F.3d at 725-26 (finding adverse action prong satisfied where public official indirectly threatened private individual's economic livelihood), Koch cannot rely on this theory because his complaint is devoid of factual allegations tying any particular defendant to this alleged proposal.⁸

Koch further asserts that the ODNR as a whole intentionally retaliated against him in the form of "targeted rules...that removed valuable fishing rights from him," (*Id.* at 7), and by not offering him plea deals to save his license when "[a]ll other fishermen found in[] this position were given plea deals..." (*Id.* at 8). Again, Koch's complaint fails to provide facts tying any individual defendants⁹ to these allegations.

Finally, I note that while Koch's response relies largely on case law involving claims for retaliatory prosecution in violation of the First Amendment, Koch's allegations fare no better when examined through that framework. This is because, to state a retaliatory prosecution claim, a

⁸ While Koch's response to the ODNR defendants' motion to dismiss claims the ODNR acted through Zody and Zehringer, (Doc. No. 18 at 7), this is not enough. Subject to limited exceptions, *see Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007), which do not apply here, information found outside the complaint cannot be considered in ruling on a motion to dismiss.

⁹ While Koch's allegations might be sufficient to state a claim against the State of Ohio, or against the ODNR, such a claim would be barred by Eleventh Amendment immunity.

plaintiff must, in addition to pleading an absence of probable cause, satisfy the same elements required for a more general First Amendment retaliation claim, which Koch fails to do. *See Hagedorn v. Cattani*, 715 F. App'x 499, 504-05 (6th Cir. 2017). Thus, while Koch alleges he was cited 42 times in 2008, but not convicted on any of these citations, (Doc. No. 1 at 7), those facts, absent allegations linking any of the current defendants to that conduct, are not enough to state a claim for retaliatory prosecution.

b. Due Process of Law

In his third cause of action, “Deprivation of Due Process of Law,” (Doc. No. 1 at 11), Koch asserts that he was deprived of due process because his complaint to Meyer was “terminated. . . with no statement of the procedures utilized, the standard of review used or an opportunity for Plaintiff to be heard in any meaningful way.” (Doc. No. 1 at 11). While it is unclear whether Koch means to rely on procedural or substantive due process for his claim, I find his claim fails to plead sufficient facts to support either.

To establish a procedural due process violation, Koch must demonstrate:

(1) that [he] had a life, liberty, or property interest protected by the Due Process Clause of the Fourteenth Amendment; (2) that [he] was deprived of that protected interest within the meaning of the due process clause; and (3) that the state did not afford [him] adequate procedural rights before depriving [him] of [his] protected interest.

Wedgewood Ltd. P'ship I v. Twp. of Liberty, Ohio, 610 F.3d 340, 349 (6th Cir. 2010). Because Koch fails to plead the deprivation of any interest protected by the Due Process Clause of the Fourteenth Amendment, his claim must fail.

“The list of liberty interests and fundamental rights ‘is short, and the Supreme Court has expressed very little interest in expanding it.’” *EJS Props., LLC v. City of Toledo*, 698 F.3d 845, 860 (6th Cir. 2012) (quoting *Seal v. Morgan*, 229 F.3d 567, 574–75 (6th Cir.2000)). In his complaint,

~~Koch seems to suggest that the interest he was deprived of was an appropriate investigation by the Inspector General's office, but there are two problems with this line of argument.~~

First, there is no such interest created by state law. Instead, Ohio Revised Code § 121.42, which establishes the powers and duties of the Inspector General under Ohio law, requires only that the Inspector General “[r]eceive complaints” and “determine whether the information contained in those complaints allege facts that give reasonable cause to investigate. . .” Ohio Rev. Code § 121.42(B). The statute does not require the Inspector General to investigate every complaint that the office receives. *See Sizemore v. Hissom*, No. 2:12-cv-1166, 2013 WL 1867044 at *9 (S.D. Ohio May 2, 2013).

Second, to the extent that Koch alleges he has some interest in that discretion being exercised in good faith, his argument fails because the Sixth Circuit has held there is no individual liberty interest in government officials making discretionary decisions free from corruption. *EJS Props., LLC*, 698 F.3d at 860.

Elsewhere in his motion, Koch argues a commercial fisherman's license is a protected property right. (Doc. No. 18 at 9). This may be so, but Koch was not deprived of his commercial fishing license, and therefore he still fails to state a claim for any procedural due process violation related to that license.

To the extent the complaint could be read to asserts substantive due process claims, those claims fail for the same reason. *See Am. Exp. Travel Related Servs. Co., Inc. v. Kentucky*, 641 F.3d 685, 688 (6th Cir. 2011) (requiring plaintiff to “demonstrate a deprivation of a constitutionally protected liberty or property interest in order to establish a due process violation based on discretionary conduct of government officials”); *see also Guertin v. Michigan*, 912 F.3d 907, 922 n. 5 (6th Cir. 2019) (reiterating that deprivation of constitutionally protected liberty or property interest is threshold requirement for a substantive due process claim).

c. Conspiracy

In his fourth cause of action, Koch seeks to bring a claim for “Conspiracy for Deprivation of Constitutional Rights.” (Doc. No. 1 at 11). Given that Koch characterizes this as a claim under federal law, I treat this as a § 1983 conspiracy claim. The following standard governs § 1983 conspiracy claims in the Sixth Circuit:

A civil conspiracy is an agreement between two or more persons to injure another by unlawful action. Express agreement among all the conspirators is not necessary to find the existence of a civil conspiracy. Each conspirator need not have known all of the details of the illegal plan or all of the participants involved. All that must be shown is that there was a single plan, that the alleged coconspirator shared in the general conspiratorial objective, and that an overt act was committed in furtherance of the conspiracy that caused injury to the complainant.

Spadafore v. Gardner, 330 F.3d 849, 854 (6th Cir. 2003) (quoting *Hooks v. Hooks*, 771 F.2d 935, 943-44 (6th Cir. 1985)). “It is well-settled that conspiracy claims must be pled with some degree of specificity and that vague and conclusory allegations unsupported by material facts will not be sufficient to state such a claim under § 1983.” *Gutierrez v. Lynch*, 826 F.2d 1534, 1538 (6th Cir. 1987).

Koch’s § 1983 conspiracy claim fails because he does not allege any facts to show how each of the defendants participated in the various plans that he alleges were concocted to deprive him of his constitutional rights.

In paragraph 75 of his complaint, Koch asserts all of the defendants “agreed and cooperated in the utilization of Plaintiff’s arrest and continuing prosecution to deprive him of his commercial fishing license, a recognized property right. . .” (Doc. No. 1 at 12). But this is a legal conclusion, and legal conclusions “masquerading as factual allegations” are not enough. *Heyne v. Metro. Nashville Pub. Sch.*, 655 F.3d 556, 564 (6th Cir. 2011) (quoting *Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 276 (6th Cir. 2010)). Koch does not allege how or when the defendants came to this alleged agreement. Paragraphs 76 and 77, which use the same “agreed and cooperated” language but refer to different constitutional rights, fail to state a claim for conspiracy in violation of § 1983 for the same reasons.

Koch argues his conspiracy claim is supported by the defendants' statements during court proceedings that their purpose was to deprive Koch of his commercial fisherman's license.¹⁰ (Doc. No. 18 at 11). But even aside from the problems with attributing this statement to each individual defendant, this argument fails because the prosecution's intent at that moment does not speak to whether each of these defendants agreed to a single plan to deprive Koch of his constitutional rights before the occurrence of the relevant overt acts he alleges. The argument also overlooks the fact that if Koch was convicted, he would have been subject to revocation of his commercial license under § 1533.641, regardless of whether the prosecution intended such a result or not. Thus, the fact that the prosecution said it intended to deprive Koch of his commercial fishing license—an intent amply demonstrated by the bringing of the charge itself—does not support an inference that the prosecution sought to do so on behalf of some number of state officials who allegedly shared the same conspiratorial objective.

3. Civil Conspiracy

To succeed on a civil conspiracy claim under Ohio law, a plaintiff must show: "(1) a malicious combination; (2) two or more persons; (3) injury to person or property; and (4) existence of an unlawful act independent from the actual conspiracy." *Lee v. Countrywide Home Loans, Inc.*, 692 F.3d 442, 446 (6th Cir. 2012) (quoting *Universal Coach, Inc. v. New York City Transit Auth., Inc.*, 629 N.E.2d 28, 33 (Ohio Ct. App. 1993)). While the "malicious combination" element of this test does not require an express agreement, it does require a common understanding or design between the parties. *Lee*, 692 F.3d at 446. Because Koch fails to allege facts which would support the inference

¹⁰ In paragraph 53 of his complaint, Koch alleges: "On the record in case number, CRB 1500352ABC, Huron Municipal Court, Defendants, through counsel of the Attorney General's Office, have stated, this present year, that it is their purpose to take Koch's license." (Doc. No. 1 at 9).

that the defendants, pursuant to a common understanding, worked in concert to achieve their goals, he fails to state a claim for civil conspiracy under Ohio law.

4. Failure to Supervise & Failure to Train

While Koch brings these as two separate causes of action in his complaint, his failure to train and failure to supervise claims appear to be very similar variations of what are known as *Monell* claims. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978); *Osberry v. Slusher*, 750 F. App'x 385, 397 (6th Cir. 2018). But, unlike the typical *Monell* claim, which seeks to hold a municipality liable for the acts of its officers, Koch brings these claims against individual officers.¹¹

At the outset, I note that Koch does not identify any authority to support the notion that case law developed in the context of *Monell* would apply to a § 1983 action seeking to hold an individual officer liable for their failure to train or supervise a subordinate. In fact, such an approach seems foreclosed by Sixth Circuit precedent:

Supervisory officials are not liable in their individual capacities unless they “either encouraged the specific incident of misconduct or in some other way directly participated in it. At a minimum, a plaintiff must show that the official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers.”

Heyerman, 680 F.3d at 647 (quoting *Hays v. Jefferson Cnty.*, 668 F.2d 869, 872 (6th Cir. 1982)). In *Heyerman*, the Sixth Circuit explained that the plaintiff’s attempt to hold a supervisory official liable for her alleged failure to adequately supervise subordinates “improperly conflates a § 1983 claim of individual supervisory liability with one of municipal liability.” *Heyerman*, 680 F.3d at 647 (quoting *Phillips v. Roane Cnty.*, 534 F.3d 531, 543 (6th Cir. 2008)). Koch makes the same mistake here by characterizing these as *Monell* claims. And Koch fails to state a claim for supervisory liability because

¹¹ Koch also names the State of Ohio, the ODNR, and the ODNR’s Division of Wildlife Resources as defendants in both his sixth and seventh causes of action, but these claims are not discussed in this section because they are barred by Eleventh Amendment immunity.

~~he does not allege facts which show how any individual supervisory defendant directly participated in the actions he alleges ODNR officers took against him.~~

IV. CONCLUSION

For the foregoing reasons, the motions to dismiss filed by Defendant Randall J. Meyer, (Doc. No. 10), and Defendants State of Ohio, Gino Barna, Brian Bury, Gary Manley, James Zehringer, and Scott Zody, (Doc. No. 16), are granted.

So Ordered.

s/ Jeffrey J. Helmick
United States District Judge

**IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
OHIO**

WESTERN DIVISION

DEAN A. KOCH

204 Norwood Avenue.
Sandusky, Ohio
44870

Plaintiff,

Case No.

v.

STATE OF OHIO

**Department of Natural Resources,
Division of Wildlife**
2045 Morse Road, Bldg. G
Columbus, Ohio 43229-6693

JAMES ZEHRINGER, Director

**Department of Natural Resources
Sued in both his individual and official capacities**
2045 Morse Road,
Columbus, Ohio 43229

SCOTT ZODY, Chief

**Department of Natural Resources,
Division of Wildlife
Sued in both his individual and official capacities**
2045 Morse Road, Bldg. G
Columbus, Ohio 43229-6693

RANDALL J. MEYER, Inspector General

Sued in both his individual and official capacities
Rhodes State Office Tower,
30 East Broad Street, Suite 2940,

~~Columbus, Ohio 43215-3414~~

GINO BARNA
OHIO WILDLIFE OFFICER, ERIE COUNTY, OHIO
Sued in his individual and official capacities
305 East Shoreline Drive
Sandusky, Ohio 44870

BRIAN BURY
OHIO WILDLIFE OFFICER, ERIE COUNTY, OHIO
Sued in his individual and official capacities
305 East Shoreline Drive
Sandusky, Ohio 44870

GARY MANLEY
OHIO WILDLIFE OFFICER, ERIE COUNTY, OHIO
Sued in his individual and official capacities
305 East Shoreline Drive
Sandusky, Ohio 44870

Defendants

COMPLAINT

Plaintiff, Dean Koch , through his attorney states as follows:

Jurisdiction

1. This action is brought pursuant to 42 U. S. C. §§1983, 1985 and 1988 and the First and Fourteenth Amendments to the United States Constitution, 11 U.S.C. §§362 and 1201 and, 15 U.S.C. §1692. Jurisdiction is founded on 28 U. S. C. §§1331 and 1341(3) and (4) and 1343 and the aforementioned constitutional and statutory provisions. The declaratory and injunctive relief sought is authorized by 28 U. S. C. §§ 2201 and 2202, 42 U.S.C. §1983 and Rule 57 Federal

Rules of Civil Procedure. Additionally, the Plaintiffs invoke this Court's supplemental jurisdiction, pursuant to 28 U. S. C. §1337(a), of state causes of action included herein since they are involved in the facts, law and issues of this matter.

Parties

2. Plaintiff Dean A. Koch is a Citizen of the United States and at all times alleged herein was a resident of Erie County, Ohio.
3. Defendant State of Ohio is a sovereign state within the United States of America and the Department of Natural Resources, Division of Wildlife Resources (ODNR) is a department of the State of Ohio, the Division of Wildlife Resources (ODWR) is a division of this department which regulates and enforces, among other matters, commercial and sport fishing on Lake Erie in the State of Ohio,
4. Defendant James Zehringer is and at all times alleged herein was the Director of the Ohio Department of Natural Resources, and is being sued in both his official and his individual capacities,
5. Defendant Scott Zody is and at all times alleged herein was the Chief of the Ohio Department of Natural Resources, Division of Wildlife Resources, and is being sued in both his official and his individual capacities,
6. Defendant Gino Barna is a citizen of the United States and at all times alleged herein maintained his place of business in Erie County, Ohio, and is being sued in both his official and his individual capacities,

7. Defendant Brian Bury is a Citizen of the United States and at all times alleged herein maintained his place of business in Erie County, Ohio and is being sued in both his official and his individual capacities,
8. Defendant Gary Manley is a Citizen of the United States and at all times alleged herein maintained his place of business in Erie County, Ohio and is being sued in both his official and his individual capacities,

First Cause of Action: Malicious Prosecution

9. Plaintiff repeats paragraphs 1 through 8 as if fully rewritten herein
10. Plaintiff Dean Koch (hereinafter "Koch") is a commercial fisherman and is the owner and operator of White's Landing Fisheries, Inc. (hereinafter "White's Landing") a corporation registered in the State of Ohio and located in Erie County, Ohio:
11. Koch was the president of the Ohio Fish Producers Association from 1974 to 2008, an organization representing commercial fisherman on Lake Erie,
12. Koch and the Ohio Fish Producers Association have lobbied continuously for commercial fisherman in Ohio on Lake Erie and have been critical of the decisions of Defendants State of Ohio, Ohio Department of Natural Resources ("ODNR"), Division of Wildlife Resources (ODWR), the Ohio Wildlife Council and Defendants Barna, Bury and Manley,
13. On March 25, 2000 Koch in his role as President of the Ohio Fish producer's Association, wrote to Chairperson Rose Vesper and the House Committee of Agriculture and Natural Resources criticizing the procedures of the Defendant ODWR that would reduce the availability of fish to Ohio's commercial fishermen,

14. Koch has written to Governor Kasich on September 6, 2011 criticizing Defendant ODWR's process in making policy decisions aimed at reducing commercial fishing in Ohio,
15. Koch was quoted in an article by Larry S. Moore , "Storm Clouds over Lake Erie" ,also criticizing the allocation of fishing resources away from commercial fishermen.
16. Koch circulated a letter opposing House Bill 609 that was intended to end commercial fishing in Ohio,
17. From his taking the position of president of the Ohio Fish Producers Association to the present, Koch has been subject to a coordinated effort to harass him in his business and to cause him personal economic hardship, including litigation intended to harm him economically and, the deprivation of his commercial fishing license number 214,
18. Defendant State of Ohio through Defendant ODNR and Ohio Wildlife Council have initiated policies since the 1970's that are intended to suppress commercial fishing in favor of sport fishing and the increased revenues generated by sport fishing licenses,
19. The natural resources of the State of Ohio belong to all of the people of the State of Ohio, Ohio Revised Code 1531.02,
20. From June 7, 1989 through June 21, 1989, the activities of officers of the Sandusky Office of the Ohio Division of Wildlife, Fisheries Division directed against Koch were investigated by Officer George Bauer (hereinafter "Bauer") upon a complaint by Koch,
21. Bauer found that between 1974 and 1985 Koch had been arrested 15 times by officers of the Sandusky Office and had three cases pending in 1988,

22. Bauer found that the Sandusky Office was intentionally "nickel and diming" Koch to keep him in court and cost him attorneys' fees and court costs,
23. Defendant Barna was involved in the arrests of Koch at this time, specifically for his arrest concerning the catching of walleye on May 26, 1988,
24. Bauer found that Barna had destroyed his notes on this incident and on testing the claims made by officers of the Sandusky Office, including Barna, Bauer found that their claims lacked credibility,
25. Barna acted as a guide for sport fishermen at this time, sometimes on State time,
26. Barna stated at the time that he was following orders of senior officers in conducting his guide activities,
27. In his Summary, Bauer found that the officers, including Barna, had acted unprofessionally, had knowingly engaged in an effort to keep Koch in court and spending money with "nickel and dime" cases, and that Koch's complaint was justified,
28. After Bauer's report, Barna transferred to another district office,
29. After Bauer's report, the Chief of the Sandusky Office retired and was replaced by Kevin Ramsey,
30. Officer Stanley Fisher continued the harassment of Koch, seizing his truck and defying a court order to return it for a claimed violation involving \$22.00 worth of fish until Koch filed another complaint against Ramsey in 1999 but Fisher retired before findings could be made,
31. In 2007, Defendant State of Ohio and ODNR, Division of Wildlife proposed buying-out commercial trap net fisherman for approximately 2 cents on the dollar, Ramsey is a sport

fisherman and was instrumental in a scheme to end trap net fishing on Lake Erie, attending all meetings concerning this proposal,

32. Koch and the Association opposed this plan, which failed,
33. Koch was informed by Frank Reynolds, another commercial fisherman, that commercial fisherman would receive an increased quota of yellow perch from the Defendants State of Ohio and ODNR if they would remove Koch from the presidency of the Ohio Fish Producers Association,
34. Koch was voted out of the presidency,
35. One year later, Senate Bill 77 passed after another president was elected and the Western Basin of Lake Erie was closed to Koch by Defendants State of Ohio and ODNR,
36. The totality of Koch's yellow perch catch was from the Western Basin under his license,
37. Also included in the legislation passed in 2008, ORC 1533.641, "Felony Revocation of Licenses", included a provision allowing the permanent revocation of commercial fishing licenses for persons who had three misdemeanor violations in 10 years,taking this jurisdiction from the courts,
38. No other commercial fisherman to Plaintiff's knowledge who were charged with misdemeanors were charged with strikable offenses due to plea agreements offered by the Defendants,
39. Koch was never offered such a plea deal,
40. In 2008, Koch was cited 42 times in four separate courts, but Koch was not convicted in any cases,

41. On appeal (decision in 2011) the State of Ohio appealed one case only and Koch was convicted

of one count of not having proper monitoring equipment, a strikable offense,

42. At this time, Defendant Barna returned as Chief of the Sandusky Office,

43. Under Barna, Koch was charged in Case Nos. CRB 14-02340 and CRB 14-02341, Sandusky

Municipal Court, with one count each of inaccurate daily catch reports for the dates July 30,

2013 and August 3, 2013, respectively, and Case No. CRB 14-02342 for taking over 10%, by

weight, undersized yellow perch,

44. Koch was convicted after trial of the count concerning undersized perch only, a second strikable

offense,

45. Defendants Bury and Manley arrested the Plaintiff in August, 2015 for fishing in the Western

Basin,

46. The investigation of Koch's location was performed after the date he was purported to have

been in the Western Basin and did not include consideration of a documented collision with a

freighter moving his nets,

47. Bury and Manley under Defendant Barna's supervision, and State of Ohio, filed charges

resulting in Huron Municipal Court Case No. CRB 1500352ABC, filed on November 10, 2015,

in which Koch was charged with taking yellow perch from a restricted zone,

48. The case was dismissed by the Court on September 26, 2016,

49. The Defendant, State of Ohio, appealed this decision and the decision was reversed on May 30,

2017,

50. Koch appealed to the Ohio Supreme Court which declined jurisdiction,

51. The case was reinstated, and Koch faces trial on this matter on October 24, 2018,
52. If convicted, this would be Koch's third strike and his license would be permanently revoked although others in his position have not faced such consequences,
53. On the record in case number, CRB 1500352ABC, Huron Municipal Court, Defendants, through counsel of the Attorney General's Office, have stated, this present year, that it is their purpose to take Koch's license,
54. After a June 13, 2014 seizure of fish from his boat, Koch complained to Defendant Barna concerning Defendants Bury and Abele on July 31, 2014,
55. Barna wrote Koch on September 18, 2014 finding no just cause to discipline Bury, Abele was not mentioned,
56. On June 26, 2015, Koch wrote to Defendant Zody requesting that the investigation of Bury be re-opened,
57. Defendant Zody replied on August 11, 2015 stating that Koch's complaints had not been substantiated by Defendant Barna and doing no other independent investigation of Koch' complaint,
58. On June 9, 2016, Koch's commercial fishing license was suspended for 60 days,
59. Koch filed a complaint concerning this matter with the Ohio Inspector General alleging selective arrest and prosecution among other matters,
60. On July 15, 2016, Defendant Meyer wrote Koch stating that the Intake Committee of the Inspector General's Office determined that there was not just cause for an investigation,
61. On July 25, 2016, Koch wrote again to Meyer requesting that he reconsider his decision,

62. On October 18, 2016, Meyer wrote Koch stating that the Intake Committee had again reviewed his complaint and found no wrong doing on the part of the agency,

63. This arrest and prosecution of Plaintiff that commenced prior to the limitation period has maliciously and intentionally been prolonged until the present time and is being used by all Defendants to intimidate the Plaintiff, to seek retribution for the exercise of his constitutional rights to free speech and due process of law in his activities as president of the Ohio Fish Producers Association and as an individual and his demands for an investigation which were terminated without a clear explanation of the process utilized, by Defendant Meyer on behalf of all Defendants on October 18, 2016,

64. WHEREFORE, Plaintiff demands that the Defendants be held joint and severally liable for actual damages in the amount of \$35,180.00 and punitive damages in excess of \$500,000.00 to be determined by the trier of fact, and appropriate injunctive and declaratory relief, plus costs and reasonable attorney's fees.

Second Cause of Action: Deprivation of Constitutional Rights: Right to Free Speech

65. Plaintiff repeats paragraphs 1 through 63 as if fully rewritten herein,

66. Plaintiff continues to speak publicly criticizing Defendants for their unfair allocation of Ohio's natural resources,

67. Plaintiff publicly criticized the procedures or lack thereof concerning the investigation of his arrest and prosecution alleging to Defendant Meyer retribution and selective prosecution in Huron Case No. CRB 15000352ABC , for his previous activities as president of the Ohio Fish Producers Association and as an individual, which Defendant Meyer terminated on behalf of all Defendants to intimidate the Plaintiff from further exercise of his right to free speech and, to seek retribution for the exercise of his constitutional right to free speech on October 18, 2016,

68. WHEREFORE, Plaintiff demands that the Defendants be held joint and severally liable for actual damages in the amount of \$35,180.00 and punitive damages in excess of \$500,000.00 to be determined by the trier of fact, and appropriate injunctive and declaratory relief, plus costs and reasonable attorney's fees.

Third Cause of Action: Deprivation of Constitutional Rights; Deprivation of Due Process of Law

69. The Plaintiff repeats paragraphs 1 through 68 as if fully rewritten herein,
70. Plaintiff's complaint to Defendant Meyer was terminated on October 18, 2016 with no statement of the procedures utilized, the standard of review used or an opportunity for Plaintiff to be heard in any meaningful way,
71. Plaintiff was not given an opportunity to be heard by Defendant Meyer concerning his complaint,
72. Defendant Meyer's actions were performed on behalf of all Defendants to deprive the Plaintiff of due process of law,
73. WHEREFORE, Plaintiff demands that Defendant Meyer and all Defendants be held joint and severally liable for actual damages in the amount of \$35,180.00 and punitive damages in excess of \$500,000.00 to be determined by the trier of fact, and appropriate injunctive and declaratory relief, plus costs and reasonable attorney's fees.

Fourth Cause of Action: Conspiracy for Deprivation of Constitutional Rights; Rights to Free Speech and Due Process of Law

74. Plaintiff repeats paragraphs 1 through 73 as if fully rewritten herein,

75. Defendants Meyer, Zody, Barna, Bury and Manley and the State of Ohio through its agent the Attorney General's Office, agreed and cooperated in the utilization of Plaintiff's arrest and continuing prosecution to deprive him of his commercial fishing license, a recognized property right, and his income therefrom,

76. Defendants Meyer, Zody, Barna, Bury and Manley agreed and cooperated in the foreclosure of Plaintiff's right to due process of law to deny him a meaningful process and opportunity to be heard in his complaints concerning his arrest and prosecution in Huron Municipal Court Case No. CRB 1500352ABC,

77. All Defendants have agreed and cooperated in the continuing selective prosecution of the Plaintiff in order to intimidate the Plaintiff, to seek retribution for the exercise of his constitutional right to free speech for his activities as president of the Ohio Fish Producers Association and as an individual and his demands for an investigation which were terminated without a clear explanation of the process utilized, by Defendant Meyer on behalf of all Defendants on October 18, 2016,

78. WHEREFORE, Plaintiff demands that Defendants Meyer, Zody, Barna, Bury and Manley be held joint and severally liable for actual damages in the amount of \$35,180.00 and punitive damages in excess of \$500,000.00 to be determined by the trier of fact, and appropriate injunctive and declaratory relief, plus costs and reasonable attorney's fees for conspiracy to deprive the Plaintiff of his due process rights in the investigation of Plaintiff's complaint to the Inspector General's Office.

79. WHEREFORE, Plaintiff demands that Defendants Meyer, Zody, Barna, Bury, Manley, State of Ohio and all Defendants, be held joint and severally liable for actual damages in the amount of \$35,180.00 and punitive damages in excess of \$500,000.00 to be determined by the trier of fact,

and appropriate injunctive and declaratory relief, plus costs and reasonable attorney's fees for conspiracy to deprive the Plaintiff of his Meyer retribution and selective prosecution in Huron Case No. CRB 15000352ABC , for his previous activities as president of the Ohio Fish Producers Association and as an individual, which Defendant Meyer terminated on October 18, 2016 on behalf of all Defendants to intimidate the Plaintiff from further exercise of his right to free speech and, to seek retribution for the exercise of his constitutional right to free speech,

Fifth Cause of Action: Civil Conspiracy

80. Plaintiff repeats paragraphs 1 through 79 as if fully rewritten herein,
81. The Defendants maliciously combined and conspired to deprive the Plaintiff of his personal property as described hereinbefore placing said property in jeopardy and causing the Plaintiff both monetary expense and emotional and medical distress by committing the overt acts of malicious and selective prosecution and deprivation of due process of law in furtherance of this conspiracy to obtain both real and personal property from the Plaintiffs..
82. WHEREFORE, Plaintiff demands that the Defendants be held joint and severally liable for actual damages in the amount of \$35,180.00 and punitive damages in excess of \$500,000.00 to be determined by the trier of fact, and appropriate injunctive and declaratory relief, plus costs and reasonable attorney's fees.

Sixth Cause of Action: Failure to Supervise

83. Plaintiff repeats paragraphs 1 through 82 as if fully rewritten herein,
84. Defendants State of Ohio, ODNR, ODWR, Zehringer Meyer, Zody and Supervisor Barna are responsible for the supervision and oversight of the employees of their respective departments and offices, specifically the Sandusky Office,

85. Defendants Barna, Zody, and Barna initiated investigations into the actions of Defendants

Bury and Manley as part of their supervisory roles,

86. The investigations stated in paragraph 85 were characterized by a lack of due process procedures and an opportunity to be heard by the Plaintiff,

87. No remedial or disciplinary actions were taken by Defendants State of Ohio, ODNR, ODWR, Meyer, Zody and Supervisor Barna and instead, the malicious and selective prosecution of Plaintiff was encouraged and supported and continues to this date,

88. WHEREFORE, Plaintiff demands that the Defendants be held joint and severally liable for actual damages in the amount of \$35,180.00 and punitive damages in excess of \$500,000.00 to be determined by the trier of fact, and appropriate injunctive and declaratory relief, plus costs and reasonable attorney's fees

Seventh Cause of Action: Failure to Train

89. Plaintiff repeats paragraphs 1 through 88 as if fully rewritten herein,

90. Defendants State of Ohio, ODNR, ODWR, Zehringer Meyer, Zody and Supervisor Barna are responsible for the training of the employees of their respective departments and offices, specifically the Sandusky Office,

91. Defendants State of Ohio, ODNR, ODWR, Zehringer Meyer, Zody and Supervisor Barna were on notice from the files and records and court documents and procedures applied to Plaintiff that its employees had acted in an unprofessional manner in matters involving the Plaintiff,

92. To this date no remedial training has been given to the employees of the Sandusky Office, instead, the malicious and selective prosecution of Plaintiff was encouraged and

supported by the Defendants State of Ohio, ODNR, ODWR, Zehringer Meyer, Zody and Supervisor Barna and continues to this date

93. WHEREFORE, Plaintiff demands that the Defendants be held joint and severally liable for actual damages in the amount of \$35,180.00 and punitive damages in excess of \$500,000.00 to be determined by the trier of fact, and appropriate injunctive and declaratory relief, plus costs and reasonable attorney's fees

Respectfully submitted,

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