UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BCO-061

No. 21-2945

MICHAEL GORRIO,
Appellant

v.

CORRECTIONAL OFFICER FRANCIS; CORRECTIONAL OFFICER CARASELLY; CORRECTIONAL OFFICER FETCHCO; SERGEANT WALSHAN; LIEUTENANT RHODES; LIEUTENANT PARKER; JOHN DOE, Other Unknown Officers; JANE DOE, Other Unknown Medical Personnel; CORRECTIONAL OFFICER EMMINGER; CORRECTIONAL OFFICER POLAND; CORRECTIONAL OFFICER SCOLES; SUPERINTENDENT MARK V. CAPOZZA; CORRECTIONAL OFFICER EVANS; CORRECTIONAL OFFICER TERRAVECHIA; CORRECTIONAL OFFICER DICKS; CORRECTIONAL OFFICER ROCKRIDGE; CORRECTIONAL OFFICER HAILEY; CORRECTIONAL OFFICER BURRIE; CORRECTIONAL OFFICER MINOR; SERGEANT MCKILEEN; JOHN DOE, Other Unknown Sergeants; LIEUTENANT ALBERT WOOD; LIEUTENANT DAILEY; LIEUTENANT RUSNAK; JOHN DOE, Other Unknown Lieutenants; RHONDA HOUSE, Superintendent Assistant; LUIS ALLEN; EDWARD BOHNA; BRITTANY KIMMEL; CORRECTIONAL OFFICER REGINA; CORRECTIONAL OFFICER COX; CORRECTIONAL OFFICER OHRMAN; CORRECTIONAL OFFICER TWARDZIK; CORRECTIONAL OFFICER SAXION; CORRECTIONAL OFFICER HENRY; SERGEANT HAINES; SERGEANT WILES; BETH RUDZINSKI; DEPARTMENT OF CORRECTIONS

(W.D. Pa. No. 2-19-cv-01297)

Present: MCKEE, SHWARTZ and BIBAS, Circuit Judges

1. Motion by Appellant for Leave to File Petition for Rehearing Out of Time

2. Second Motion by Appellant for Leave to File Petition for Rehearing Out of Time

3. Motion by Appellant to be Exempt from Rule L.A.R. Misc. 113.0 Electronic Filing

4. Motion by Appellant to File Exhibits to Petition for Rehearing

5. Motion by Appellant for Appointment of Counsel

6. Petition for Panel Rehearing by Appellant, which the Court may wish to construe as a Motion to Review Clerk's 10/26/21 Order, or Motion to Reopen the Appeal

Respectfully,
Clerk/CJG

ORDER

The foregoing motions by Appellant for leave to file petition for rehearing out of time, to be exempt from Rule L.A.R. Misc. 113.0 electronic filing, and to file exhibits to petition for rehearing are granted. The motions by Appellant for appointment of counsel and petition to reconsider the 10/26/21 order are denied.

By the Court,

s/Patty Shwartz
Circuit Judge

Dated: April 18, 2022
CJG/cc: Michael Gorrio
Scott A. Bradley, Esq.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

**No. 21-2945**

Gorrio v. Francis
(W.D. Pa. No. 2-19-cv-01297)

**ORDER**

On October 21, 2021, the district court entered an order notifying the Clerk of this Court that it would be treating the notice of appeal filed on October 20, 2021, in part, as an appeal from the decision of the Magistrate Judge to the district court, not a notice of appeal to this Court. The district court states that it will continue to retain jurisdiction over the case. The order provides additional direction to defendant about proceeding in the district court. In light of the district court's October 21, 2021 order, the appeal docketed at No. 21-2945 in this Court is administratively closed.

For the Court,

s/ Patricia S. Dodszuweit
Clerk

Dated: October 26, 2021
CJG/cc: Michael Gorrio
Scott A. Bradley, Esq.

A True Copy:

Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

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| MICHAEL GORRIO,<br><br>Plaintiff,<br><br>vs.<br><br>CORRECTIONAL OFFICER FRANCIS, *et al.*,<br><br>Defendants. | 2:19-cv-1297<br><br>Hon. J. Nicholas Ranjan<br><br>Magistrate Judge Patricia L. Dodge |

**MEMORANDUM ORDER**

This *pro se* prisoner civil rights case was referred to Magistrate Judge Patricia L. Dodge for proceedings in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1), and the Local Rules of Court applicable to Magistrate Judges.

Currently before the Court is a Report & Recommendation filed by Judge Dodge on May 7, 2021, ECF 92, recommending that the Court grant in part and deny in part Defendants' motion to dismiss and, further, that the Court dismiss three of the individual defendants named in Mr. Gorrio's amended complaint pursuant to the screening provisions of 28 U.S.C. § 1915(e)(2)(B)(ii). The parties were notified that, pursuant to 28 U.S.C. § 636(b)(1), objections to the Report & Recommendation were due by May 24, 2021. ECF 92. Neither party filed objections.

Upon a *de novo* review of the record of this matter and the Report & Recommendation, the Court finds no clear error on the face of the record, and therefore enters the following order:

**AND NOW**, this **16th day of July, 2021**, it is hereby **ORDERED** that Defendants' motion to dismiss is **GRANTED IN PART** and **DENIED IN PART** as follows:

(1) The motion is **GRANTED** with prejudice, and without leave to amend, as to all of Mr. Gorrio's official capacity claims, his claims for injunctive relief, and any claim for violation of the Pennsylvania Constitution.

(2) The motion is **GRANTED** with prejudice, and without leave to amend, as to as to **Counts A, F, O, P,** and **Q** of Mr. Gorrio's amended complaint;

(3) The motion is **GRANTED** without prejudice, and with leave to amend, as to **Counts E, G, H, L,** and **M**.

(4) The motion is **GRANTED IN PART** and **DENIED IN PART** as to **Count K**. Specifically, the motion to dismiss Count K is **DENIED** as to Defendants Henry, Saxion, Ohrman, Cox, Twardzik, Regina, and Haines, but **GRANTED** without prejudice, and with leave to amend, as to all other Defendants.

(5) Defendants did not move to dismiss **Counts B, C, D, I, J,** and **N** insofar as they are asserted against Defendants in their individual capacity, do not seek injunctive relief, and do not assert violations of the Pennsylvania Constitution.

It is **FURTHER ORDERED** that Defendants House, Allen, and Rudzinski are **DISMISSED** from this action pursuant to the screening provisions of 28 U.S.C. § 1915(e)(2)(B)(ii).

It is **FURTHER ORDERED** that Mr. Gorrio may, if he so chooses, file a second amended complaint to attempt to cure the pleading deficiencies with respect to those claims the Court has dismissed without prejudice (**Counts E, G, H, L, M,** and part of **Count K**). Alternatively, Mr. Gorrio may choose to proceed on his current complaint, but only as to **Counts B, C, D, I, J**, and **N.** Judge Dodge may, at her discretion, set an appropriate deadline for Mr. Gorrio to file any amended complaint.

It is **FURTHER ORDERED** that Judge Dodge's Report & Recommendation, ECF 92, is **ADOPTED** as the opinion of the Court.

BY THE COURT:

/s/ *J. Nicholas Ranjan*
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| MICHAEL GORRIO,<br><br>Plaintiff,<br><br>v.<br><br>CORRECTIONAL OFFICER FRANCIS, *et al.*,<br><br>Defendants. | ) | Civil Action No. 2:19-1297<br><br>Judge J. Nicholas Ranjan<br>Magistrate Judge Patricia L. Dodge |

**REPORT AND RECOMMENDATION**

## I. Recommendation

It is respectfully recommended that the Court grant in part and deny in part Defendants' Motion to Dismiss (ECF No.78) the Amended Complaint (ECF No. 43.) It is further recommended that the Court dismiss three of the defendants named in the Amended Complaint pursuant to the screening provisions set forth in 28 U.S.C. § 1915(e)(2)(B)(ii).

## II. Report

### A. Relevant Procedural History

Plaintiff Michael Gorrio is a state prisoner in the custody of the Pennsylvania Department of Corrections ("DOC") who is currently housed at SCI Phoenix. The events in question in this lawsuit occurred between December 2018 and February 2020 when Plaintiff was housed at SCI Fayette. Plaintiff alleges that the numerous defendants in this case, all of whom worked at SCI Fayette during the relevant time period, engaged in a wide-ranging conspiracy to commit violations under the Racketeer Influenced and Corrupt Organization ("RICO") Act, 18 U.S.C. §§ 1961-1968. Plaintiff also claims Defendants violated the Hobbs Act, 18 U.S.C. § 1951 and the

Clayton Act, 15 U.S.C. §§ 12-15, and brings numerous constitutional tort claims under 42 U.S.C. § 1983 as well as related state-law claims.

Plaintiff is proceeding *pro se*. He commenced this action in October 2019 when he was housed at SCI Fayette. In December 2019 the Court granted his motion for leave to proceed *in forma pauperis*, and his Complaint (ECF No. 6) was docketed. In May 2020 Plaintiff filed a motion for leave to file an amended complaint, which the Court granted. (*See* ECF Nos. 40, 41). Plaintiff then filed the Amended Complaint (ECF No. 43), which is the operative pleading, in June 2020. He also filed a RICO Case Statement. (ECF No. 44.)

Plaintiff names as defendants the following thirty-four officials and employees of SCI Fayette: (1) Superintendent Mark V. Capozza; (2) CO Scoles; (3) CO Evans; (4) CO Terravechia; (5) CO Dicks; (6) CO Emminger; (7) CO Rockridge; (8) CO Francis; (9) CO Caraselly; (10) CO Fetchco; (11) CO Hailey; (12) CO Burrie; (13) CO Minor; (14) CO Poland; (15) CO Regina; (16) CO Cox; (17) CO Ohrman; (18) CO Twardzik; (19) CO Saxion; (20) CO Henry; (21) Sgt. McKileen; (22) Sgt. Walshan; (23) Sgt. Haines; (24) Sgt. Wiles; (25) Lt. Wood; (26) Lt. Dailey; (27) Lt. Rusnak; (28) Lt. Parker; (29) Lt. Rhodes; (30) Superintendent Assistant Rhonda House and (31) Luis Allen, who were the Grievance Coordinators at SCI Fayette; (32) Edward Bohna, the Certified School Principal at SCI Fayette; (33) Brittany Kimmel, the School Guidance Counselor at SCI Fayette; and, (34) Beth Rudzinski, the Hearing Examiner at SCI Fayette. (Amend. Compl. ¶¶ 6-8.) Plaintiff sued each defendant in his or her official and individual capacities. (*Id.*)

Plaintiff also states in the Amended Complaint that he seeks to bring claims against numerous John/Jane Doe defendants who worked at SCI Fayette, including medical personnel and other correctional officers and lieutenants. (*Id.* ¶¶ 7-8.)

Defendants have filed a Motion to Dismiss (ECF No. 78) the Amended Complaint pursuant to Rule 12(b)(6) in which they seek to dismiss certain claims asserted by Plaintiff. (*See also* Brief in Support, ECF No. 79.) As explained below, Defendants are seeking dismissal of eleven of the seventeen causes of action Plaintiff brings in the Amended Complaint. They are not seeking dismissal of his constitutional tort claims related to incidents of excessive force, sexual assault, the interference with and/or deprivation of his education, or his state law claim of assault and battery. In his brief in opposition to Defendants' motion, Plaintiff contends that the Court should not dismiss any of his claims. (ECF No. 86.)

**B. Standard of Review**

At the pleading stage, Rule 8 requires a "short plain statement" of facts, not legal conclusions, "showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of a complaint, in whole or in part, for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). The Supreme Court held that, pertaining to Rule 12(b)(6)'s standard of review, a complaint must include factual allegations that "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "[W]ithout some factual allegation in the complaint, a claimant cannot satisfy the requirement that he or she provide not only 'fair notice' but also the 'grounds' on which the claim rests." *Phillips v. County of Allegheny*, 515 F.3d 224, 232 (3d Cir. 2008).

In determining whether a plaintiff has met this standard, a court must reject legal conclusions unsupported by factual allegations, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements;" "labels and conclusions;" and "'naked

assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (citations omitted). Mere "possibilities" of misconduct are insufficient. *Id.* at 679.

The Court of Appeals has summarized this inquiry as follows:

> To determine the sufficiency of a complaint, a court must take three steps. First, the court must "tak[e] note of the elements a plaintiff must plead to state a claim." *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 1947, 173 L.Ed.2d 868 (2009). Second, the court should identify allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* at 1950. Third, "whe[n] there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief." *Id.* This means that our inquiry is normally broken into three parts: (1) identifying the elements of the claim, (2) reviewing the complaint to strike conclusory allegations, and then (3) looking at the well-pleaded components of the complaint and evaluating whether all of the elements identified in part one of the inquiry are sufficiently alleged.

*Malleus v. George*, 641 F.3d 560, 563 (3d Cir. 2011).

"A document filed *pro se* is to be liberally construed and a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers[.]" *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (internal citation and quotation marks omitted); *see also Higgs v. Att'y Gen.*, 655 F.3d 333, 339 (3d Cir. 2011) ("The obligation to liberally construe a pro se litigant's pleadings is well-established.").

**C. Facts Alleged in the Amended Complaint**

1. The December 16, 2018 excessive force incident and Plaintiff's subsequent confinement in the RHU for 18 days

On December 16, 2018, Plaintiff was in the HC Unit attempting to negotiate the sale of chicken pieces to another inmate. CO Francis approached Plaintiff, accused him of being high on drugs, and handcuffed him. (Amend. Compl. ¶¶ 10-11.) Other officers arrived on the scene to escort Plaintiff to the medical unit and/or the "level 5" or Restrict Housing Unit ("RHU"). (*Id.* ¶ 14) Plaintiff alleges that Sgt. Walshan and other corrections officers subjected him to excessive

force when they restrained him during this incident. (*Id.* ¶¶ 15-18.) Afterwards, Plaintiff was examined by medical personnel and taken to the Psychiatric Observation Center ("POC") where he spent the night. (*Id.* ¶¶ 19-21.)

The following day, on December 17, 2018, Plaintiff was placed in the RHU in solitary confinement and he remained there for approximately 18 days. (*Id.* ¶ 21.) During this time Plaintiff submitted a Request to Staff. On December 29, 2018, Lt. Wood responded: "You become a problem you stay in the hole." (*Id.* ¶ 28.) Plaintiff was released from the RHU to the general population after his toxicology tests came back negative. (*Id.* ¶ 21.)

2. Plaintiff's allegations pertaining to his college correspondence courses

Plaintiff was taking correspondence college courses with Colorado State University and Adams State University while he was incarcerated at SCI Fayette. (*Id.* ¶ 51.) In January 2019, Plaintiff sent a Request to Staff Member to Kimmel, the Guidance Counselor at SCI Fayette, in which he inquired about education-related matters. In a response dated January 25, 2019, Kimmel informed Plaintiff: "Per institutional policy any inmate pursuing correspondence courses must be 6-month misconduct free. You can write me in July. You misbehave we revoke your education completely and place you in the RHU, per Supt. Capozza." (*Id.* ¶ 24.)

Plaintiff contacted Edward Bohna, SCI Fayette's Certified School Principal, in February 2019 inquiring about the completion of his ongoing college courses. Similar to Kimmel, Bohna advised Plaintiff that he would have to wait six months to take his exams. (*Id.* ¶ 25.) Plaintiff avers that the delay would have resulted in the automatic disqualification of the courses in which he was enrolled at the time. (*Id.*)

Plaintiff's father contacted the Chief Education Administrator of the Western Region. (*Id.* ¶ 26.) According to the Amended Complaint, the Administrator stated that Plaintiff was

"authorized and entitled to impending college correspondence courses, and that Bohna and Kimmel were directed to administer the examinations and rectify the issue at bar." (*Id.*)

Around this same time, Plaintiff submitted a Request to Staff Member to Lt. Wood, who responded: "You already went to the hole for using drugs. The answer is NO and we are not going to do more work after you make us do more work. Your education is a privilege not a right." (*Id.* ¶ 28.) On another occasion, Lt. Wood wrote to Plaintiff in a response to a Request to Staff Member: "Staff at this institution are becoming very irritated of your actions. You continue to harass education and wonder why we put you in the hole. Keep up the crap and you will NEVER leave the hole. Capozza gives us discretion to do what we want to whom we want." (*Id.*)

Superintendent Capozza, in another response to a Request to Staff Member, wrote to Plaintiff: "It is your responsibility to complete college course material—NO ONE ELSE. Also, you are starting to become a problem here. The next time I hear your name I will personally [E]NSURE that you go to the RHU to stay and NOT complete your education AT ALL." (*Id.* ¶ 29.)

Plaintiff alleges that Kimmel and Bohna's actions were in retaliation for his filing of unidentified grievances and "filing legal action." (*Id.* ¶ 26.)

3. The April 25, 2019 excessive force incident

According to the allegations of the Amended Complaint, on April 25, 2019 CO Hailey and CO Burrie escorted Plaintiff to a misconduct hearing and while doing so they slammed Plaintiff "into miscellaneous stationary objects along the way." (*Id.* ¶ 32.) Officer Hailey also slammed Plaintiff's head into the wall multiple times after they entered the hearing room. (*Id.* ¶ 33.)

Plaintiff required medical treatment for the head and face injuries he sustained. (*Id.* ¶¶ 36-37.) Following this incident, Plaintiff alleges, Officer Hailey filed a "fraudulent" misconduct report that falsely accused Plaintiff of refusing to obey an order during the hearing. (*Id.* ¶ 35.)

4. The May 4, 2019 excessive force incident and confiscation of Plaintiff's legal papers and eyeglasses

When Plaintiff was housed at SCI Forest in 2015, he filed a civil rights lawsuit against six staff members of that institution. That civil action was filed in this Court at *Gorrio v. C.O. Sheffer, et al.*, No. 1:15-cv-312. The Court may take judicial notice of the information on the docket of this case, which is a matter of public record. The docket reflects that by 2019, there were two remaining claims against two of the defendants Plaintiff had sued, and the trial in that case was scheduled to commence on May 20, 2019. While Plaintiff had litigated much of that lawsuit *pro se*, John F. Mizner entered his appearance as Plaintiff's counsel on May 8, 2019. *See* ECF Nos. 115, 129, 130 in *Gorrio v. C.O. Sheffer*, No. 1:15-cv-312.

Several days before, on May 4, 2019, unidentified officers arrived at Plaintiff's cell to conduct a "random search." (Amend. Compl ¶ 38.) Plaintiff avers that the officers stated to him: "give us all your paperwork, you think this is a fucking game filing lawsuits against us, now you fucked up, pass out all legal work!" (*Id.* ¶ 39.) According to the allegations in the Amended Complaint, the unidentified officers accused Plaintiff of being insubordinate and, as a result, Lt. Dailey arrived at his cell and deployed OC spray directly onto Plaintiff's face. (*Id.* ¶¶ 40-42.) Plaintiff alleges that Sgt. McKileen subsequently filed a false misconduct report against Plaintiff in order to cover up and justify Lt. Daily's use of excessive force. (*Id.* ¶ 41.)

After the May 4, 2019 incident, Plaintiff was removed from his cell, was administered decontamination solutions, and was moved to the L-Unit. (*Id.* ¶ 42.) He remained in that unit for two weeks. During much of that time, Plaintiff had access to some of his litigation materials for his case that was scheduled to begin trial on May 20, 2019. Plaintiff avers that approximately two days before his trial, and out of "sheer vindictiveness" and retaliation for him proceeding with that

lawsuit, "a large portion" of his litigation materials (such as trial exhibits and direct and cross examination questions) as well as "grievance documentation" were removed from his cell and destroyed. The Amended Complaint does not indicate who participated in this incident and/or allegedly destroyed his documents.

Plaintiff also noticed that his prescription eyeglasses were missing. (*Id.* ¶ 43.) The Amended Complaint indicates that Lt. Dailey was responsible for the confiscation of Plaintiff's eyeglasses. (*Id.* ¶ 44.)

Plaintiff alleges that he was not able to proceed forward with his trial without his legal documents and eyeglasses. (*Id.* ¶ 43.) Consequently, he entered into a settlement. Plaintiff claims that the actions to which he was subjected in May 2019 were taken to obstruct his ability to litigate this case. (*Id.* ¶¶ 41-43, 51.) The docket confirms, however, that Plaintiff was represented by counsel as of May 8, 2019. On August 29, 2019, his attorney filed a stipulation of voluntary dismissal pursuant to Rule 41(a) of the Federal Rules of Civil Procedure. On September 4, 2019, the Court dismissed the case because the parties reached a settlement. *See* ECF Nos. 143, 144 and 145 in *Gorrio v. C.O. Sheffer*, No. 1:15-cv-312.

5. Lt. Wood and Lt. Daily allegedly coerced Plaintiff to withdraw Grievance #804846, which Plaintiff filed following the May 4, 2019 incident

Plaintiff filed Grievance #804846 regarding the alleged excessive use of force administered against him by Lt. Dailey and "RHU staff" during the May 4, 2019 incident. (Amend. Compl. ¶ 44.) Lt. Wood interviewed Plaintiff about the incident on June 18, 2019. During this interview, Plaintiff alleges, Lt. Wood coerced him into withdrawing Grievance #804846 by threatening that Plaintiff would have to stay "in the hole" "for an indefinite amount of time" if he did not withdraw this grievance. (*Id.*) Plaintiff further alleges that Lt. Wood told him that if he withdrew the

grievance Lt Wood would "do away with the misconduct [he received regarding the May 4, 2019 incident] and the seventy-five (75) days" he was currently serving "in the hole" as a sanction. (*Id.*)

Plaintiff further alleges that Lt. Wood "instigated Lt. Dailey to further intimidate the Plaintiff and coerce him" into withdrawing Grievance #804846. (*Id.*) Specifically, Lt. Dailey informed Plaintiff that he had his eyeglasses and would return them if he withdrew the grievance. Thereafter, Plaintiff submitted a letter withdrawing Grievance #804846. (*Id.*)

Sgt. Reichart subsequently returned Plaintiff's eyeglasses to him. (*Id.* ¶ 49.) Plaintiff alleges that Sgt. Reichart stated to him that "next time" his eyeglasses would be "confiscated indefinitely" and that "Superintendent Capozza authorizes officers to do what they please to inmates who file grievances and lawsuits." (*Id.*)

6. Grievance #817811 challenging the alteration of two of Plaintiff's publications

Plaintiff alleges that on August 6, 2019 he filed Grievance #817811 because two of his publications—Atomic Habits and 10 Things Successful People Do—were altered from their original forms by cutting their cardboard bindings in accordance with DOC policy. (Amend. Compl. ¶ 45.) The Amended Complaint does not indicate against whom, if anyone, Plaintiff filed Grievance #817811.

7. The incident in which CO Terravechia and CO Evans allegedly planted drugs in the binding of one of Plaintiff's books

Plaintiff alleges that on October 15, 2019, CO Terravechia and CO Evans planted drugs in the binding of one of his books on the orders of Lt. Wood. (*Id.* ¶ 49.) Plaintiff received a misconduct because drug content was found among his possessions. He alleges that he was "falsely imprisonment" in the RHU as a result. (*Id.*)

8. The alleged confiscation and destruction of Plaintiff's "legal documentation or material" in December 2019 and February 2020

Plaintiff alleges that on December 12, 2019, after he filed the instant lawsuit, Sgt. Wiles and CO Saxon (who were not named defendants in the original complaint) searched his RHU cell at the direction of the security search team. (*Id.* ¶ 52.) During their search they allegedly confiscated and threw in the trash "legal documentation" such as requests to staff and other "critical courthouse documentation[.]" (*Id.*)

Plaintiff further alleges that between February 10, 2020 and February 19, 2020, CO Ohrman, CO Cox, CO Twardzik, CO Regina and Sgt. Haines (who were not named defendants in the original complaint) "targeted" him by "unjustifiably destroying his property and legal material." (*Id.* ¶ 59.) The Amended Complaint does not indicate what property or legal material they allegedly destroyed.

9. CO Henry and CO Saxion allegedly planted paperclips in Plaintiff's food

Plaintiff alleges that on December 17, 2019, CO Henry and CO Saxion (who were not named defendants in the original complaint) planted paper clips in the garden burger on his lunch tray. (*Id.* ¶¶ 54, 55.) Plaintiff was unaware that they had done so and he bit into the burger. One of the pieces lodged into Plaintiff's gums and he required "minor dental procedure for front tooth crack/chip." (*Id.* ¶ 55.)

10. The February 21, 2020 strip search and destruction of Plaintiff's legal and personal property

Plaintiff alleges that on February 21, 2020 CO Regina conducted a "sexually deviant" strip search of Plaintiff in the presence of CO Cox, CO Ohrman and Sgt. Haines. (*Id.* ¶ 60.) (None of these individuals were named defendants in the original complaint). During this incident the officers made sexually harassing and other inappropriate and insulting comments to Plaintiff. (*Id.*)

Plaintiff alleges that CO Ohrman and Sgt. Haines then entered his cell "and began destroying legal, business, educational and personal property." (*Id.* ¶ 61.) Sgt. Haines stated to Plaintiff: "these are the orders of Superintendent Capozza, to destroy property and legal material of jailhouse lawyers and who file grievances and lawsuits." (*Id.*) CO Ohrman said to Plaintiff: "I don't care if there is absolutely no contraband here, I am going to write you up and give you more [disciplinary conduct] time," and "I am talking about all the contraband that is in there, and if I cannot find it, I will make it appear." (*Id.*)

Plaintiff alleges that during this incident Sgt. Haines and CO Ohrman destroyed: (1) numerous photographs of Plaintiff's family members; (2) 325 pages of legal documents from his prior civil action at No. 1:15-cv-312 and 125 pages of evidence related to the instant civil action; (3) 215 songs composed and created by Plaintiff; (4) "1200 pages of business blueprints, articles of incorporate[ion], construct[ion] designs, and intellectual property, original, invaluable and irreplaceable in value"; and (5) "125 pages of study guide notes and handwritten notes on college course curriculums[.]" (*Id.*)

11. The Grievance Coordinators' alleged failure to respond to grievances within the allotted time frame set forth in DCO-ADM 804 Policy

Finally, Plaintiff alleges that he filed numerous grievances pertaining to the events discussed in the Amended Complaint. (*Id.* ¶ 50.) He avers that Superintendent Assistant Rhonda House and Luis Allen, who were the Grievance Coordinators at SCI Fayette, failed to respond to many of those grievances. (*Id.* ¶¶ 9, 50.)

11. Plaintiff's Claims

Plaintiff states in the Amended Complaint that he is bringing against all or some of the defendants the following causes of action:

- Civil RICO (Count A)
- Deliberate Indifference to Safety (Count B)
- Deliberate Indifference to Healthcare (Count C) (this claim is brought only against unknown "Jane Doe" medical personnel)
- Excessive Use of Force (Count D)
- Retaliation (Count E)
- Respondeat Superior (Count F)
- Wrongful Imprisonment (Count G)
- Conspiracy (Count H)
- Deprivation of the Right to an Education and Property Interest (Count I)
- Assault and Battery (Count J)
- Negligence (Count K)
- Intentional Infliction of Emotion Distress (Count L)
- Due Process (Count M)
- Sexual Harassment (Count N)
- Slavery/Involuntary Servitude (Count O)
- the Hobbs Act (Count P)
- the Clayton Act (Count Q).

(*Id.* at pp. 15-19.)

Plaintiff seeks compensatory and punitive damages against each defendant. He also seeks an injunction ordering that he be released from unlawful segregation and transferred to another correctional institution. (*Id.* at pp. 20-21.)

Defendants move for the dismissal of all claims asserted against them in their official capacities and for his claim of injunctive relief. They also contended that the Court should dismiss the following causes of action for failure to state a claim: Civil Rico (Count A); Retaliation (Count E); Respondeat Superior (Count F); Wrongful Imprisonment (Count G); Conspiracy (Count H); Negligence (Count K); Intentional Infliction of Emotional Distress (Count L); Due Process (Count M); Slavery/Involuntary Servitude (Count O); the Hobbs Act (Count P); and the Clayton Act (Count Q).

D. Discussion

1. Plaintiff's official capacity and injunctive relief claims

In the Amended Complaint, Plaintiff has asserted claims against all Defendants in both their official and individual capacities. Defendants contend that Plaintiff's official capacity claims are barred by their immunity from such claims under the Eleventh Amendment, and that Plaintiff's claim for injunctive relief is moot since he is no longer housed at SCI Fayette.

The Eleventh Amendment protects States and their agencies and departments from suit in federal court. *See, e.g., Lavia v. Pa., Dep't of Corr.*, 224 F.3d 190, 195 (3d Cir. 2000); *Kentucky v. Graham,* 473 U.S. 159, 167 n.14 (1985); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 100 (1984) ("[I]n the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment."). Individual state employees sued in their official capacity are also entitled to Eleventh Amendment immunity because "official capacity suits generally represent only another way of pleading an action against the state." *Betts v. New Castle Dev. Ctr.*, 621 F.3d 249, 254 (3d Cir. 2010) (citing *Lombardo v. PA. Dept. of Pub. Welfare*, 540 F.3d 190, 194 (3d Cir. 2008)).

As part of the executive department of the Commonwealth, the DOC is entitled to Eleventh Amendment immunity. *Lavia*, 224 F.3d at 195. Therefore, its employees share in the Commonwealth's Eleventh Amendment immunity to the extent that they are sued in their official capacities. *Jones v. Unknown D.O.C. Bus Driver & Transportation Crew*, 944 F.3d 478, 482 (3d Cir. 2019). Accordingly, the official capacity claims against Defendants are barred by the Eleventh Amendment.

Moreover, although suits seeking purely prospective relief against a state official in his or her official capacity for ongoing violations of federal law are not barred by the Eleventh

Amendment, *Ex Parte Young*, 209 U.S. 123, 159-60 (1908); *Graham*, 473 U.S. at 167 n.14, Plaintiff no longer has a viable claim for prospective relief against any of the defendants. *See, e.g., Christ the King Manor, Inc. v. Sec'y U.S. Dep't of Health & Human Servs.*, 730 F.3d 291, 318 (3d Cir. 2013) (while claims against state officers in their official capacity for prospective relief are not barred by the Eleventh Amendment, "remedies are limited to those that are 'designed to end a continuing violation of federal law.'") (quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985)). Here, Plaintiff's claim for injunctive relief is moot since he has been transferred from SCI Fayette and is now housed as SCI Phoenix. *See, e.g., Sutton v. Rasheed*, 323 F.3d 236, 248 (3d Cir. 2003) ("An inmate's transfer from the facility complained of generally moots the equitable and declaratory claims."); *Johnson v. Wenerowicz*, 440 F. App'x 60, 62 (3d Cir. 2011) ("As the District Court correctly determined, Johnson's requests for injunctive and declaratory relief against the named DOC defendants were rendered moot by his transfer to SCI-Fayette[.]"); *Santiago v. Sherman*, No. 1:05-cv-153, 2007 WL 217353, *3 (W.D. Pa. Jan. 25, 2007) ("In the prison context, the transfer of an inmate from the facility complained of moots claims for injunctive relief involving that facility.").

Accordingly, the Court should grant Defendants' motion to the extent that it seeks dismissal with prejudice of the official capacity claims against Defendants. Additionally, the Court also should dismiss with prejudice Plaintiff's claim for injunctive relief because it was rendered moot by his transfer to SCI Phoenix.

2. Civil RICO

Plaintiff's first claim, "Count A," is labeled as a Civil RICO claim against all Defendants. The basis of this claim is that Defendants "exert[ed] sadistic and malicious force, failing to intervene, imposing adverse action, disregarding the psychological and emotional state, and

unjustifiably seizing and apprehending [him] resulting in repeated placement in solitary confinement, amongst other 'predicate acts'" thereby committing civil RICO violations. (Amend. Compl. at p. 15, ¶ 64.). Throughout the Amended Complaint, and in his RICO Case Statement (ECF No. 44), Plaintiff also asserts that all of the alleged wrongful conduct committed by Defendants was part of their conspiracy to commit RICO violations. He further asserts that they committed fraud, obstructed justice, conspired to injure him in various ways, and repeatedly engaged in "patterns of racketeering." Such legal conclusions are not relevant when evaluating a motion to dismiss, however. *See, e.g., Fowler,* 578 F.3d at 210-11.

The federal civil RICO statute provides that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter[, which prohibits racketeering activity,] may sue therefor in any appropriate United States district court[.]" 18 U.S.C. § 1964(c). A civil RICO claimant must show a violation of the substantive RICO statute (18 U.S.C. § 1962) and also that he sustained (1) an injury to his *business or property* by reason of a violation of § 1962; and (2) that his injury was caused by the defendants' racketeering activities. *See, e.g., Maio v. Aetna, Inc.*, 221 F.3d 472, 482-84 (3d Cir. 2000).

Here, Plaintiff's RICO claim is premised upon all of the alleged wrongful acts that he contends Defendants committed in the Amended Complaint, and he asserts that they did so as part of a conspiracy to violate RICO. However, no allegation in the Amended Complaint or Plaintiff's RICO Case Statement[1] provides a plausible basis for concluding that Defendants engaged in "racketeering activity" as defined by 18 U.S.C. § 1961. *See, e.g., Brookhart v. Rohr*, 385 F. App'x

[1] "Courts may consider the RICO case statement in assessing whether plaintiffs' RICO claims should be dismissed." *Glessner v. Kenny*, 952 F.2d 702, 712 n. 9 (3d Cir.1991), overruled on other grounds by *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258, 260 (3d Cir.1995).

67, 70 (3d Cir. 2010) ("Conclusory allegations of a pattern of racketeering activity, in this case, a fraudulent scheme, are insufficient to survive a Rule 12(b)6) motion.")

Additionally, Defendants are correct that Plaintiff lacks standing to bring a civil RICO claim against them because he has failed to identify a specific loss to his "business or property" as those terms are defined under the statute. *See, e.g., Maio*, 221 F.3d at 481 n.7. Importantly, personal injuries do not qualify as an injury under RICO. *See, e.g., Williams v. BASF Catalysts LLC*, 765 F.3d 306, 323 (3d Cir. 2014) ("[I]n construing the federal RICO law, [the Third] Circuit has rejected the argument that personal injuries qualify as RICO injuries to 'business or property.'") (citing *Maio*, 221 F.3d at 492). Thus, the injuries Plaintiff alleges he sustained as a result of the excessive force incidents, the sexual assault incident, the paperclip incident, his housing in the RHU and/or solitary confinement and his resulting inability to complete is college coursework, are not injuries to his "business or property" under RICO. *See, e.g., Ettiben-Issaschar v. ELI Am. Friends of the Israel Ass'n for Child Prot., Inc.*, No. 15-cv-6441, 2016 WL 97682, *3 (E.D. Pa. Jan. 7, 2016) ("The type of harm suffered by [plaintiff] for which she seeks to recover in this action—*i.e.*, harm related to her detention and the alleged abuse she suffered while detained—is not an injury to 'business or property' that is cognizable under the RICO laws.").

Plaintiff also claims that he was injured when his legal materials and other personal items, such as photographs, songs he composed, business blueprints and designs, and documents related to his college coursework were destroyed. To establish the requisite injury for civil RICO purposes, however, Plaintiff must "demonstrate a 'concrete financial loss' in the form of an 'ascertainable out-of-pocket' deprivation." *Dipplito v. United States*, No. 13-cv-175, 2015 WL 9308238 (D. N.J. Dec. 21, 2015) (citing *Magnum v. Archdiocese of Philadelphia,* 253 F. App'x 224, 226 (3d Cir. 2007)). He has not done so. *See, e.g., Whitney v. Lt. Posika, et al.*, 2:19-cv-1237,

2021 WL 1566431, *4 (W.D. Pa. Jan. 12, 2021) (prisoner's allegation that defendants "stole his mail, which in turn resulted in a civil case being dismissed, which in turn cost [him] to be subject to high fines and court costs as well as high fines for postage and copies" did not amount to "they type of injury...compensable under the RICO Act.") (internal quotations omitted), report and recommendation adopted, 2021 WL 1099633 (W.D. Pa. Mar. 2021). Moreover, speculative damages that are "predicated exclusively on the *possibility* that future events might occur" cannot form the basis of a RICO injury. *See, e.g., Maio*, 221 F.3d at 495; *Clark v. Conahan*, 737 F. Supp.2d 239, 255 (M.D. Pa. 2010) (observing that "[m]ental distress, emotional distress, and harmed reputations do not constitute injury to business or property sufficient to confer standing on a RICO plaintiff" and explaining that "injury for RICO purposes requires proof of concrete financial loss, not mere injury to an intangible property interest"). For these reasons, the alleged destruction of the above-cited items does not qualify as an "injury" for RICO purposes.

Thus, based upon the foregoing, it is recommended that the Court should grant Defendants' motion to the extent that it seeks dismissal of "Count A" for civil RICO violations. The dismissal of this claim should be with prejudice because Petitioner lacks standing to bring a civil RICO claim since, even accepting his allegations as true, he did not suffer an injury to his business or property that would qualify as a compensable injury under that statute.

3. Retaliation

Plaintiff asserts in "Count E" that all Defendants retaliated against him. The Amended Complaint alleges that Plaintiff believes that all defendants were engaged in a conspiracy to retaliate against him.

To state a claim for retaliation under the First Amendment, a prisoner must allege that: (1) he was engaged in constitutionally protected conduct; (2) the defendant at issue took adverse

action against him; and (3) his constitutionally protected conduct was a substantial or motivating factor in the decision to take that adverse action. *See, e.g., Mitchell v. Horn*, 318 F.3d 523, 530 (3d Cir. 2003); *Rauser v. Horn*, 241 F.3d 330, 333 (3d Cir. 2001).

Since Plaintiff is bringing his retaliation claim under § 1983, he must also plead each defendant's personal involvement in the alleged retaliation. *See, e.g., Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (1988). That is because, as stated in the text of § 1983 itself, only a person who "subjects, or causes to be subjected" another person to a civil rights violation can be held liable under § 1983. Thus, each defendant can be held liable only for his or her own conduct. *See, e.g., id.; see also Parkell v. Danberg*, 833 F.3d 313, 330 (3d Cir. 2016); *Barkes v. First Correctional Medical*, 766 F.3d 307, 316 (3d Cir. 2014) (*rev'd sub. nom. on other grounds* 575 U.S. 822 (2015)); *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 173 (3d Cir. 2005) ("To impose liability on the individual defendants, Plaintiffs must show that each one individually participated in the alleged constitutional violation or approved of it.") (citing *C.H. v. Oliva*, 226 F.3d 198, 201-02 (3d Cir. 2000) (en banc)).

In the "Facts" section of the Amended Complaint, Plaintiff asserts that Kimmel and Bohna retaliated against him with respect to the matters related to his college correspondence courses because he "utilize[ed] the grievance system and file[d] legal action." (Amend. Compl. ¶ 26.) However, Plaintiff has not sufficiently alleged facts to show that he filed a grievance against Kimmel and Bohna, or that they were aware that he filed a grievance or lawsuit that plausibly could have a causal link to the adverse actions to which he claims they subjected him. For example, although at the time of Kimmel's and Bohna's alleged wrongful conduct Plaintiff had filed Grievance #780007, Plaintiff does not allege that he filed that grievance against them or that that specific grievance was the cause of their actions. Moreover, although Plaintiff was litigating his

civil action at No. 1:15-cv-312, that lawsuit was filed against officials and employees at SCI Forest and not anyone at SCI Fayette. Accordingly, Plaintiff has failed to state a claim of retaliation against Kimmel and Bohna.

Plaintiff also alleges in the "Facts" section of the Amended Complaint that the May 2019 destruction of his legal materials for his civil action at No. 1:15-cv-312 was retaliatory. (Amend. Compl. ¶ 43.) However, the Amended Complaint does not indicate which defendants, if any, were involved in the taking of legal materials. (*See id.* ¶¶ 33-39, 43.) Therefore, Plaintiff has failed to sufficiently plead that any of the defendants had the requisite personal involvement in that incident to proceed with a retaliation claim regarding it.

Finally, Plaintiff alleges throughout the Amended Complaint that the alleged wrongful conduct of the other defendants was retaliatory, but he must do more than assert threadbare allegations that defendants' conduct was due to him filing unspecified grievances or a lawsuit, or was part of "patterns of retaliation," since such allegations are mere legal conclusions that do not satisfy the pleading requirements of Rule 8 and do not support the requisite elements of a retaliation claim.

Based upon the foregoing, therefore, the Court should grant Defendants' motion to the extent that it seeks the dismissal of "Count E" Retaliation.

4. Respondeat Superior

Plaintiff asserts in "Count F" a claim identified as "Respondeat Superior" against all Defendants. (Amend. Compl. at p. 16, ¶ 57.) In support of this claim, Plaintiff alleges that each defendant "knowingly and intentionally participated in constitutional violations and failed to remedy the wrong successively after reporting the occurrences of such violations, resulting in eighth amendment violations." (*Id.*)

As Defendants correctly point out, *respondeat superior* is a theory of liability based on agency principles and is not a cause of action. *See, e.g.*, *Sherman v. John Brown Ins. Agency Inc.*, 38 F. Supp.3d 658, 669-70 (W.D. Pa. 2014) ("District Courts have found that under Pennsylvania law the doctrine of *respondeat superior* does not establish a separate tort, but merely a principle by which employers can be held liable for the tortious acts of their employee'") (internal citation and quotation omitted); *Care v. Reading Hosp. & Med. Ctr.*, No. 03-cv-04121, 2004 WL 728532 (E.D. Pa. Mar. 31, 2004) ("*respondeat superior* merely connotes a doctrine of imputation once an underlying theory of liability has been established. It is not a separate cause of action.") (internal citations and quotations omitted).

Additionally, *respondeat superior* is not a sufficient basis upon which any of the constitutional tort claims Plaintiff brings under 42 U.S.C. § 1983 can be asserted.[2] The doctrine of *respondeat superior*, which makes an employer automatically responsible for the wrongdoing of employees, does not apply to claims brought under that statute. *Iqbal*, 556 U.S. at 676 ("Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution."); *see, e.g., Rode*, 845 F.2d at 1207; *Maddox v. Gilmore*, No. 2:19-cv-1163, 2020 WL 1026799, *4 (W.D. Pa. Mar. 3, 2020) (granting superintendent's motion for judgment on the

[2] Plaintiff brings his constitutional tort claims under 42 U.S.C. § 1983, which "provides a cause of action against state actors who violate an individual's rights under federal law." *Filarsky v. Delia*, 566 U.S. 377, 380 (2012). Section 1983 does not create substantive rights but instead "provides only remedies for deprivations of rights established elsewhere in the Constitution or federal laws." *Kneipp v. Tedder*, 95 F.3d 1199, 1204 (3d Cir. 1996). "To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988).

pleadings because "liability for Eighth Amendment claims cannot be predicated upon *respondeat superior*[.]") (citing *Rode*, 845 F.2d at 1207-08).

Therefore, based upon the foregoing, the Court should grant Defendant's motion to the extent that it seeks dismissal of "Count F" asserting "Respondeat Superior" for failure to state a claim. The dismissal should be with prejudice because "Respondeat Superior" is not a viable cause of action.

5. Wrongful Imprisonment

Plaintiff claims in "Count G" that as a result of the alleged unlawful action of Defendants he was "wrongfully imprisoned" in solitary confinement for over 153 days in violation of the Eighth Amendment's prohibition against "cruel and unusual punishment." (Amend. Compl. at pp. 16 -17, ¶¶ 58.)

The Eighth Amendment's prohibition against cruel and unusual punishment guarantees that prison officials must provide humane conditions of confinement. Prison officials must ensure that inmates receive adequate food, clothing, shelter and medical care, and must "'take reasonable measures to guarantee the safety of the inmates[.]'" *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (quoting *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984)). To state a claim for an Eighth Amendment violation based on the conditions of confinement, a prisoner must plausibly allege that prison officials' acts or omissions denied him "the minimal civilized measure of life's necessities." *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981); *Betts v. New Castle Youth Dev. Ctr.*, 621 F.3d 249, 256 (3d Cir. 2010) (stating that the Eighth Amendment's prohibition of cruel and unusual punishment requires that prison officials provide "humane conditions of confinement."). As set forth above, such necessities include food, clothing, shelter, medical care and reasonable

safety. *See, e.g., Farmer*, 511 U.S. at 832; *Rhodes*, 452 U.S. at 347; *Tillman v. Lebanon Cnty. Corr. Facility*, 221 F.3d 410, 418 (3d Cir. 2000).

A prisoner must also allege that the defendants acted with deliberate indifference. *Id.* at 835. "Deliberate indifference" is a subjective standard. The official must have known of and disregarded "an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 838.

In the Amended Complaint, Plaintiff alleged only that he was placed in solitary confinement for a period of 153 days. He did not allege with any specificity the conditions under which he was confined. Therefore, even taking his allegations as true, no plausible reading of the Amended Complaint could support a conclusion that Plaintiff was denied "the minimal civilized measure of life's necessities." *Rhodes*, 452 U.S. at 347. *See, e.g., Kokinda v. Pennsylvania Dep't of Corr.*, 779 F. App'x 938 943 (3d Cir. 2019) ("Where conditions are not 'cruel and unusual' but merely 'restrictive and even harsh, they do not violate the Eight Amendment but rather 'are part of the penalty that criminal offenders pay for their offenses against society") (citing *Rhodes*, 452 U.S. at 347); *Powell v. McKeown*, No. 1:20-cv-348, 2020 WL 4530727, *8 (M.D. Pa. Aug. 6, 2020) ("It appears that Plaintiff bases his Eighth Amendment claim upon his placement in the RHU. Placement in the RHU, however, without allegations concerning the denial of any of life's necessities, is insufficient to state an Eighth Amendment violation.") Therefore, Plaintiff failed to state an Eighth Amendment claim related to his confinement in the RHU and/or solitary confinement.

Further, Plaintiff cannot establish a claim under the Fourteenth Amendment based on his alleged solitary confinement. To establish a due process violation in the prison context, a plaintiff

must show that he was deprived of a liberty interest protected by the Constitution or a statute. *Sandin v. Conner*, 515 U.S. 472, 479 n.4, 483-84 (1995). A prisoner's liberty interests are not violated, however, unless a condition "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 484. Therefore, in determining whether a prisoner's due process rights have been violated, courts first consider whether there has been a denial of a liberty or property interest. *See Ky. Dep't of Corrs. v. Thompson*, 490 U.S. 454, 460 (1989). In determining whether a condition of confinement creates a protected liberty interest, a court must consider (1) the duration of the challenged conditions and (2) whether the conditions overall imposed a significant hardship in relation to the ordinary incidents of prison life. *Williams v. Sec'y Pennsylvania Dep't of Corr.*, 848 F.3d 549, 560 (3d Cir. 2017) (citing *Shoats v. Horn*, 213 F.3d 140, 144 (3d Cir. 2000)). If a prisoner makes such a showing, the next step for the courts is to evaluate "whether the procedures attendant upon that deprivation were constitutionally sufficient." *Id.*

To the extent that the Amended Complaint alleges that certain defendants issued "fraudulent" misconduct reports against Plaintiff and that, as a result, he was "wrongfully imprisoned" in the RHU in solitary confinement, these allegations fail to state a claim. Plaintiff avers that he was housed a total of 153 days in solitary confinement. However, he does not allege he was in solitary confinement for 153 consecutive days. For example, Plaintiff alleges that he spent 18 days in the RHU after the December 16, 2018 incident and then was released to the general population. In any event, the allegation that Plaintiff spent 153 days in the RHU in solitary confinement, without more, is insufficient to establish the kind of atypical deprivation of prison life necessary to implicate a protected liberty interest. *See, e.g., Mutschler v. Tritt*, 765 F. App'x 653, 655 (3d Cir. 2019) (district court properly dismissed prisoner's due process claim because his

"amended complaint does not allege that any conditions of [his confinement in the RHU for 180 days] involved an atypical and significant hardship sufficient to create a protected liberty interest. We have held that even longer stays in restrictive confinement under otherwise similar circumstances did not implicate a prisoner's liberty interests.") (citing *Smith v. Mensinger*, 293 F.3d 641, 652 (3d Cir. 2002) (seven months in disciplinary custody insufficient to trigger a due process violation)).

Additionally, even if Plaintiff had plausibly alleged that his solitary confinement placement amounted to a denial of a protected liberty interest, the Amended Complaint contains no allegation that he was denied any of the process he may have been due through misconduct hearings and/or subsequent appeals. For example, he names Beth Rudzinski, the Hearing Examiner at SCI Fayette, as a defendant in this action, but he does not attribute any wrongdoing to her in the "Facts" section of the Amended Complaint. (Amend. Compl. ¶ 8; *see also id.* ¶¶ 10-62.)

In his response to Defendants' motion, Plaintiff indicates that he is also raising a state law claim of wrongful imprisonment. He does not cite to any Pennsylvania law that would support a conclusion that he has even arguably pleaded a state law claim for wrongful imprisonment, which typically is synonymous with a claim of false arrest and which does not apply to this case. *See, e.g., Manley v. Fitzgerald*, 997 A.2d 1235, 1241 (Pa. Commw. Ct. 2010) ("The elements of false arrest/false imprisonment are: (1) the detention of another person (2) that is unlawful. An arrest based upon probable cause would be justified, regardless of whether the individual arrested was guilty or not.") (internal citation and quotations omitted).

Accordingly, based upon the foregoing, the Court should grant Defendant's motion to the extent that it seeks dismissal of "Count G" asserting a "Wrongful Imprisonment" cause of action

under the Eighth and Fourteenth Amendments or under state law because it fails to state a claim upon which relief may be granted.

6. Conspiracy

In "Count H," Plaintiff claims that Defendants conspired to interfere with his "federal court prosecution proceedings" and his education, and to destroy his property in violation of his Eighth Amendment rights. (Amend. Compl. at p. 17 ¶ 59.)

"To prevail on a conspiracy claim under § 1983, a plaintiff must prove that persons acting under color of state law reached an understanding to deprive him of his constitutional rights. This requires that the state actors took concerted action based on an agreement to deprive the plaintiff of his constitutional rights, and that there was an actual underlying constitutional violation of the plaintiff's rights." *Harvard v. Cesnalis*, 973 F.3d 190, 207 (3d Cir. 2020) (internal quotations and citation omitted); *see, e.g., Jutrowski v. Township of Riverdale*, 904 F.3d 280, 293-94 (3d Cir. 2018) ("To prevail on a conspiracy claim under § 1983, a plaintiff must prove that persons acting under color of state law reached an understanding to deprive him of his constitutional rights.") (internal citations and quotations omitted). Although the agreement can be shown by direct or circumstantial evidence, a plaintiff cannot base his claim solely on suspicion and speculation. *See, e.g., Talley v. Varner*, 786 F. App'x 326, 329 (3d Cir. 2019) (citing *Young v. Kann*, 926 F.2d 1396, 1405 n.16 (3d Cir. 1991)) ("mere general allegation...[or] averment of conspiracy or collusion without alleging the facts which constituted such conspiracy or collusion is a conclusion of law and is insufficient [to state a claim]" (alterations in original) (quoting *Kalmanovitz v. G. Heileman Brewing Co.*, 595 F. Supp. 1385, 1400 (D. Del. 1984)); *Jackson v. Shouppe*, 17-cv-1135, 2018 WL 3361270, *2 (W.D. Pa. 2018) (same).

Here, Plaintiff has failed to allege any facts whatsoever beyond conclusory statements of conspiracy, let alone any facts that plausibly suggest a meeting of the minds, agreement or plan between any of the defendants. Therefore, there are no allegations in the Amended Complaint to support a plausible conspiracy claim. *See, e.g., Brandon v. Burkhart*, No. 1:16-cv-177, 2020 WL 5992281, *1 (W.D. Pa. Oct. 9, 2020) (plaintiff "pled only conclusory averments of a conspiracy, which is not enough to satisfy federal pleading standards.")

Thus, the Court should grant Defendants' motion to the extent that it seeks dismissal of "Count H" that asserts a "Conspiracy" cause of action against Defendants for allegedly conspiring to deprive him of any of his constitutional rights.

7. Negligence

Plaintiff claims in "Count K" that the Defendants were negligent for failing to "use reasonable care to avoid foreseeable risk" to him "in violation of the State Tort Claims Act of the state constitution." (Amend. Compl. at p. 18, ¶ 62.)

Defendants argue that Plaintiff's negligence claim is barred by Pennsylvania state sovereign immunity. In general, employees of the Commonwealth of Pennsylvania acting within the scope of their duties are immune from liability. 1 PA. CONS. STAT. § 2310; *see, e.g., Moss v. Pennsylvania*, 838 F. App'x 702, 707 (3d Cir. Dec. 9, 2020). To this end, Pennsylvania's sovereign immunity statute affords broad immunity to state officials from state-law tort claims. With respect to claims of negligence, there are certain specifically delineated exceptions to this general rule of sovereign immunity, including, in relevant part, when the claim pertains to the "care, custody or control of personal property in the possession or control of Commonwealth parties[.]" 42 PA. CONS. STAT. § 8522(b)(3). That exception may apply here with respect to certain

allegations made in the Amended Complaint. *See, e.g., Williams v. Stickman*, 917 A.2d 915, 918 (3d Cir. 2007). Defendants do not address this issue in their brief in support of their motion.

Specifically, the Amended Complaint alleges that some defendants destroyed Plaintiff's personal property. Specifically, according to the allegations in the Amended Complaint, CO Henry, CO Saxion, Co Ohrman, CO Cox, CO Twardzik, CO Regina and Sgt. Haines destroyed Plaintiff's legal paperwork and/or other personnel property.[3] (*Id.* ¶¶ 52, 59-61.) Therefore, at this stage of the litigation, the Court cannot conclude that these seven defendants are immune from suit with respect to any negligence claim Plaintiff may be asserting against them for the alleged destruction of his property.[4]

Defendants also contend that, to the extent Plaintiff attempts to assert any claim in "Count K" under the Pennsylvania Constitution, any such claim must fail. They are correct in this regard. In affirming the dismissal of an inmate's assertion of state constitutional claims, the Court of Appeals has observed that "Pennsylvania does not have a statutory equivalent to § 1983 and does not recognize a private right of action for damages stemming from alleged violation of the state constitution." *Miles v. Zech*, 788 F. App'x 164, 167 (3d Cir. 2019) (citing *Gary v. Braddock Cemetery*, 517 F.3d 195, 207 n. 4 (3d Cir. 2008)). *See also Whitenight v. Elbel*, No. 2:16-cv-

[3] Plaintiff avers that following the May 4, 2019 incident, during his subsequent stay in the L-Unit, his legal paperwork related to his civil action at No. 1:15-cv-312 was removed from his cell and destroyed. (Amend. Compl. ¶ 43.) As set forth above, however, the Amended Complaint does not identify who was involved in removing those documents.

[4] In his response to Defendants' motion, Plaintiff contends that the defendants involved in the alleged excessive force incidents, alleged sexual assault incident, and in the incident in which the paperclip was placed in Plaintiff's food are not entitled to immunity. The claims against the defendants involved in these incidents are not claims of negligence, however. Rather, if Plaintiff's allegations against these defendants are true, they violated Plaintiff's Eighth Amendment rights and/or committed state law intentional torts such as assault and battery but do not implicate a negligence cause of action.

00646, 2017 WL 6026379, *6 (W.D. Pa. Dec. 5, 2017) ("Any claim which Plaintiff purports to state under the Pennsylvania Constitution against the Defendants is dismissed with prejudice, as there is no Pennsylvania statute that establishes and no Pennsylvania court has recognized a private cause of action for damages under the Pennsylvania Constitution.") (internal quotations and citations omitted).

Based upon the forgoing, it is recommended that the Court grant Defendants' motion to the extent that it seeks dismissal of "Count K" negligence against all Defendants except for CO Henry, CO Saxion, Co Ohrman, CO Cox, CO Twardzik, CO Regina and Sgt. Haines. It is further recommended that the Court grant Defendants' motion to the extent it seeks dismissal with prejudice of a claim based upon a violation of the Pennsylvania Constitution.

8. Intentional Infliction of Emotional Distress

In "Count L," Plaintiff asserts a state law claim of intentional infliction of emotional distress against all Defendants. (Amend. Compl. at p. 18, ¶ 63.)

To state a claim for the state tort of intentional infliction of emotional distress ("IIED"), a plaintiff must allege: (1) extreme and outrageous conduct; (2) intentional or reckless conduct; (3) conduct caused the emotional distress; and (4) severe emotional distress. *See, e.g., Smith v. Washington Area Humane Soc'y*, No. 2:19-cv-1672, 2020 WL 6364762, *8 (W.D. Pa. Oct. 29, 2020) (citation omitted). Importantly, the "[p]laintiff must allege *physical manifestations of the emotional distress*." *Id.* (emphasis added) (citing *Reeves v. Middletown Athletic Ass'n*, 866 A.2d 1115, 1122 (Pa. Super. Ct. 2004)).

Thus, "a plaintiff 'must suffer some type of resulting physical harm due to the defendant's outrageous conduct.'" *Richardson v. Barbour*, No. 2:18-cv-1758, 2020 WL 4815829, *14 (E.D. Pa. Aug. 19, 2020) (quoting *Reedy v. Evanson*, 615 F.3d 197, 231 (3d Cir. 2010)). "It is not enough

for a plaintiff to generically plead the elements of a claim for IIED, but rather, sufficient detail must be asserted to make out a plausible claim." *Id.* (quoting *M.S. ex rel. Hall v. Susquehanna Twp. School Dist.*, 43 F. Supp.3d 412, 430-31 (M.D. Pa. 2014) ("Although Plaintiffs allege M.S. suffered 'physical harm' as a result of the emotional distress, such a general, non-specific averment has been found insufficient to survive motions to dismiss.") and citing *Dobson v. Milton Hershey School*, 356 F. Supp.3d 428, 439-40 (M.D. Pa. 2018) (holding plaintiff's bald allegations of "physical harm" and "physical manifestations of emotional distress" were not enough, without more, to set forth a plausible IIED claim)); *see also Hoy v. Angelone*, 720 A.2d 745, 755 (Pa. 1998) (identify IIED as a "most limited" tort); *Gomez v. Markley*, No. 2:07-cv-868, 2011 WL 112886, *1 (W.D. Pa. Jan. 13, 2011) ("in order to state a claim for [IIED] under Pennsylvania Law, a plaintiff must establish physical injury or harm...at the very least, existence of the alleged emotional distress must be supported by competent medical evidence.") (internal citations and quotation omitted).

Defendants are correct that Plaintiff did not make sufficient allegations in the Amended Complaint with respect to the nature and type of injury or injuries he suffered as a result of the conduct alleged on the part of Defendants to support his IIED claim. Therefore, as currently pled, the Amended Complaint fails to state a claim for IIED against any defendant.

Thus, it is recommended that the Court grant Defendants' motion to the extent that they seek dismissal of "Count L" for IIED.

9. Due Process

In the claim labeled "Count M," Plaintiff asserts that Defendants violated his due process rights under the Fifth and Fourteenth Amendments by "impeding his access to the grievance system and the courts[.]" (Amend. Compl. at p. 18, ¶ 64.)

Because Plaintiff's claims are brought only against state officials and employees, he cannot assert a claim against them under the Fifth Amendment. Therefore, his Fifth Amendment claim must be dismissed. *See, e.g., Fauntleroy v. Clark*, No. 1:19-cv-182, 2020 WL 5351063, *3 (W.D. Pa. July 30, 2020) ("it is axiomatic that '[t]he limitations of the [F]ifth [A]mendment restrict only federal government action.") (quoting *Nguyen v. U.S. Catholic Conference*, 719 F.2d 52, 54 (3d Cir. 1983)), report and recommendation adopted, 2020 WL 5350532 (W.D. Pa. Sept. 4, 2020).

To the extent that in "Count M" Plaintiff is generally attacking the DOC's grievance process at SCI Fayette under the Due Process Clause of the Fourteenth Amendment, inmates "do not have a constitutionally protected right to a grievance process." *Jackson v. Gordon*, 145 F. App'x 774, 777 (3d Cir. 2005). Because access to prison grievance procedures is not a constitutionally mandated right, "allegations of improprieties in the handling of grievances do not state a cognizable claim under § 1983." *Glenn v. DelBalso*, 599 F. App'x 457, 459 (3d Cir. 2015). *See, e.g., Walker v. Mathis*, No. 15-cv-5134, 2016 WL 2910082, *9 (E.D. Pa. May 19, 2016) ("an inmate does not have a constitutional right to an inmate grievance process and therefore cannot, as a matter of law, state a claim under the Fourteenth Amendment based upon a prison's failure to provide one.") Accordingly, Plaintiff's Fourteenth Amendment due process claim based generally on the prison's grievance procedures should be dismissed.

The same is true for Plaintiff's specific allegations that House and Allen failed to respond to many of his grievances (Amend. Compl. ¶ 50), and that Lt. Wood and Lt. Daily coerced him to withdraw Grievance #804846. (*Id.* ¶ 44). While those defendants' actions may be relevant to a potential affirmative defense of non-exhaustion, the fact that House and Allen allegedly failed to ensure that Plaintiff's grievances were processed in accordance with DOC policy, or that Lt. Wood

and Lt. Daily allegedly coerced Plaintiff to withdraw one of his grievances, does not in itself give rise to a Fourteenth Amendment due process claim for the reasons set forth above.

Finally, to the extent that Plaintiff is asserting in "Count M" that he was denied access to the court, such a claim implicates the First Amendment. *Lewis v. Casey*, 518 U.S. 343 (1996). In order to proceed with such a claim, a plaintiff must show that he (1) suffered an "actual injury," meaning he "lost a chance to pursue a 'nonfrivolous' or 'arguable'" legal claim; and (2) that he has "no other 'remedy that may be awarded as recompense' for the lost claim other than in the present denial of access suit." *Monroe v. Beard*, 536 F.3d 198, 205 (3d Cir. 2008) (quoting *Christopher v. Harbury*, 536 U.S. 403, 415 (2002)). "To that end, prisoners must satisfy certain pleading requirements: The complaint must describe the underlying arguable claim well enough to show that it is 'more than mere hope,' and it must describe the 'lost remedy.'" *Id.* at 205-06 (quoting *Christopher*, 536 U.S. at 416-17).

The Amended Complaint fails to identify any actual injury Plaintiff suffered in the form of "a nonfrivolous claim, or one of arguable merit" that has been lost as a result of any defendant's alleged interference with his access to courts.[5] Thus, Plaintiff failed to state a claim that he was denied access to the courts.

Accordingly, based upon the foregoing, it is recommended that the Court grant Defendants' motion to the extent that it seeks dismissal of "Count M." Specifically, "Count M" should be dismissed with prejudice to the extent that Plaintiff raised a due process claim under the Fifth Amendment, and dismissed to the extent that it seeks to raise claims under the Fourteenth and First Amendments.

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[5] The Court notes that although Plaintiff alleges that the legal documents for his case at No. 1:15-cv-312 were taken from him in May 2019, he had an attorney in that case as of May 8, 2019.

10. Slavery/Involuntary Servitude

In "Count O," Plaintiff claims that Defendants "subjected [him] to labor servitude or sexual servitude" in violation of his rights under the Eight Amendment. (Amend. Compl. at p. 19, ¶ 66.)

The Court should dismiss Count O. There are no allegations in the Amended Complaint that could even arguably constitute a cognizable cause of action for "slavery/involuntary servitude." For example, there are no averments regarding Plaintiff's labor at SCI Fayette. Moreover, it would be futile to grant Plaintiff leave to cure his deficient pleading with respect to this claim because it is "well settled that prisoners have no inherent constitutional right to wages for work performed while incarcerated." *Calipo v. Wolf*, No. 1:18-cv-320, 2019 WL 6879570, *10 (W.D. Pa. Nov. 15, 2019) (internal quotations and citations omitted), report and recommendation adopted, 2019 WL 6877181 (W.D. Pa. Dec. 17, 2019). Additionally, Plaintiff's allegation that he was sexually assaulted on February 21, 2020 provides no basis to support a claim of "sexual servitude" at SCI Fayette, and he is pursuing specific claims related to that alleged incident at other counts of the Amended Complaint.

Based upon the foregoing, the Court should grant Defendants' motion to the extent it seeks the dismissal with prejudice of "Count O" asserting a cause of action of slavery/involuntary servitude.

11. Hobbs Act

In "Count P," Plaintiff asserts a claim under the Hobbs Act, 18 U.S.C. § 1951, for allegedly "interfering with commerce by threats of violence[.]" (Amend Compl. at p. 19, ¶ 67.) Plaintiff's allegations fail to state a claim. "The Hobbs Act, 18 U.S.C. § 1951, a criminal statute, does not permit a private right of action." *Farrar v. McNesby*, No. 13-cv-5683, 2015 WL 1383096, *1 (E.D.

Pa. Mar. 24, 2015). *See also Brookhart*, 385 F. App'x at 70 ("The Hobbs Act provides only for criminal sanctions and not civil relief.").

Therefore, based upon the foregoing, the Court should grant Defendants' motion to the extent it seeks the dismissal with prejudice of "Count P," Plaintiff's claim alleging a Hobbs Act violation.

12. Clayton Act

In "Count Q," Plaintiff claims that the Defendant applied "barriers and obstructions in monopolies and combination in restraint of trade" in violation of the Clayton Act, 15 U.S.C. §§ 15-27.

The Amended Complaint does not state a claim under the Clayton Act, which is an antitrust law that concern the regulation of interstate commerce and protects competition in the marketplace. The Clayton Act provides a private right of action for violations of the Sherman Act. *See, e.g., Fields v. Doe*, No. 14-cv-4573, 2015 WL 3513367, *4 n.14 (E.D. Pa. June 4, 2015) (citing *In re Mushroom Direct Purchaser Antitrust Litigation*, 655 F.3d 158, 165 (3d Cir. 2011) and 15 U.S.C. §§ 15, 26). Plaintiff makes no plausible allegation in Amended Complaint against any defendant that implicates the Clayton Act.

Accordingly, it is recommended that the Court grant Defendants' motion to the extent that it seeks the dismissal with prejudice of Plaintiff's claim at "Count Q" under the Clayton Act as that statute does not apply to the events alleged in this case.

13. Dismissal of House, Allen and Rudzinski

Although Defendants do not move for the dismissal of any specific individual defendant, the Court should dismiss House, Allen and Rudzinski from this lawsuit pursuant to the screening provisions set forth in 28 U.S.C. § 1915(e)(2)(B)(ii).

Under the Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996) ("PLRA"), courts are required to screen complaints at any time where, as is the case here, the plaintiff has been granted leave to proceed *in forma pauperis*. 28 U.S.C. § 1915(e)(2)(B)(ii). It requires the Court to dismiss a complaint that, among other things, fails to state a claim on which relief may be granted. The legal standard for dismissing a complaint under the PLRA for failure to state a claim is identical to the legal standard used when ruling on a motion to dismiss under Rule 12(b)(6). *Tourscher v. McCullough*, 184 F.3d 236, 240 (3d Cir. 1999).

Here, Plaintiff seeks to hold House and Allen liable because they failed to ensure he received a response to his grievance in accordance with DOC policies. (Amend. Compl. ¶¶ 8, 9, 50.) As explained above, Plaintiff cannot state a claim against them for this alleged misconduct because "allegations of improprieties in the handling of grievances do not state a cognizable claim under § 1983." *Glenn*, 599 F. App'x at 459. Accordingly, the Court should dismiss House and Allen from this lawsuit.

As for Rudzinski, who is the Hearing Examiner at SCI Fayette, Plaintiff failed to allege any wrongdoing on her part. As set forth above, a plaintiff must plead a defendant's personal involvement in the alleged deprivation of his constitutional right. *See, e.g., Rode*, 845 F.2d at 1207. Thus, Plaintiff failed to state a claim against Rudzinski and the Court should dismiss her from this lawsuit for that reason.

**E. Leave to Amend**

When dismissing a civil rights case for failure to state a claim, a court must give a plaintiff the opportunity to amend a deficient complaint, irrespective of whether it is requested, unless doing so would be "inequitable or futile." *Fletcher-Harlee Corp. v. Pote Concrete Contractors, Inc.*, 482 F.3d 247, 251 (3d Cir. 2007). "An amendment is futile if the amended complaint would not survive

a motion to dismiss for failure to state a claim upon which relief could be granted." *Alston v. Suzuki*, 227 F.3d 107, 121 (3d Cir. 2000).

Under the circumstances presented here, Plaintiff may, if he so chooses, file another amended complaint to attempt to cure the pleading deficiencies with respect to those claims that the Court does not dismiss with prejudice. Alternatively, he may choose to proceed with the Amended Complaint as it stands but only with respect to his claims in "Count B" Deliberate Indifference to Safety; "Count C" Deliberate Indifference to Healthcare; "Count D" Excessive Use of Force; "Count I" Deprivation of the Right to an Education and Property Interest; "Count J" Assault and Battery; and "Count N" Sexual Harassment.

## III. Conclusion

Based upon the foregoing, it is respectfully recommended that the Court grant in part and deny in part Defendants' Motion to Dismiss (ECF No. 78), and dismiss House, Allen and Rudzinski from this action pursuant to the screening provisions set forth in § 1915(e)(2)(B)(ii). Specifically, it is recommended that the Court:

- dismiss with prejudice the official capacity claims against Defendants and Plaintiff's claim for injunctive relief;
- dismiss with prejudice "Count A" asserting a civil RICO claim;
- dismiss "Count E," which brings claims for Retaliation;
- dismiss with prejudice "Count F" asserting a claim for Respondeat Superior;
- dismiss "Count G" asserting a claim for Wrongful Imprisonment;
- dismiss "Count H" asserting a claim for Conspiracy;
- dismiss "Count K" asserting a claim of Negligence against all Defendants except for CO Henry, CO Saxion, Co Ohrman, CO Cox, CO Twardzik, CO Regina and Sgt. Haines;

- dismiss with prejudice any claim based upon a violation of the Pennsylvania Constitution;
- dismiss "Count L" asserting a claim for intentional infliction of emotional distress;
- dismiss "Count M" with prejudice to the extent that Plaintiff is asserting a due process claim under the Fifth Amendment;
- dismiss "Count M" to the extent that it seeks to raise claims under the Fourteenth and First Amendments;
- dismiss with prejudice "Count O" asserting a claim for Slavery/Involuntary Servitude;
- dismiss with prejudice of "Count P" asserting a violation of the Hobbs Act;
- dismiss with prejudice "Count Q" asserting a claim under Clayton Act; and,
- dismiss Hobbs, Allen and Rudzinski from this action for failing to state a claim against them.

Pursuant to the Magistrate Judges Act, 28 U.S.C. § 636(b)(1)(B) and (C), and Rule 72.D.2 of the Local Civil Rules, the parties are allowed fourteen (14) days from the date of this Order to file objections to this Report and Recommendation. Failure to do so will waive the right to appeal. *Brightwell v. Lehman*, 637 F.3d 187, 193 n.7 (3d Cir. 2011).

Dated: May 7, 2021

/s/ Patricia L. Dodge
PATRICIA L. DODGE
United States Magistrate Judge