APPENDIX A

NOT RECOMMENDED FOR PUBLICATION

No. 21-2824
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HERBERT W.G. Clanton, Plaintiff-Appellant,	)	ON APPEAL FROM THE UNITED
v.	)	STATES DISTRICT COURT FOR
SAM'S CLUB, et al., Defendants-Appelees.	)	THE WESTERN DISTRICT OF MICHIGAN

O R D E R

+Before: GILMAN, KETHLEDGE, and MURPHY, Circuit Judges.

Herbert W.G. Clanton, proceeding pro se, appeals a district judgment dismissing his employment- discrimination complaint alleging violations of various federal statutes, constitutional amendments, and Michigan law. This case has been referred to a panel of the court that, upon examination, unanimously agree that oral argument is not needed. *See* Fed.R.App.P. 34(a).

Clanton filed a complaint against Sam's Club and Wal-Mart.[1] Clanton asserted that his discharge for insubordination was unreasonable, unfounded, and disingenuous because he timely reported to work and adequately performed the requirement of his job. He asserted that he is "a member of a protected minority" and that he was not told why his employment was terminated, and not told how he was insubordinate, not allowed to respond to the insubordination allegations, and not treated the same as other employees.

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[1] Clanton also named the Michigan Department of Civil Rights("MDCR") as a "Party Of Interest" and seemed to assert that the MDCR did not correctly process his discrimination charge. To the extent that Clanton intended of assert a claim against the MDCR related to the processing of his discrimination charge, he lacked a cause of action. *See* Haddad v. Equal Emp. Opportunity Comm'n, 111 F. App'x 413, 415 (6th Cir. 2004); Mihous v. Equal Emp. Opportunity Comm'n, No. 97-5242, 1998 WL 152784, at *1 (6th Cir. 1998).

Clanton asserts claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2, -3,-5; Title VI of that Act, 42 U.S.C. § 2000d; the Age discrimination in Employment Act (ADEA), 29 U.S.C. § 623; 42 U.S.C. §§ 1981, 1983§ 1985§ 1986, AND 1988; and First, fifth, and Fourteenth Amendment to the United States Constitution. He also asserted state-law claims for libel, slander, wrongful discharge, and employment discrimination. He sought monetary relief.

Clanton field a motion for a default judgment. The defendants opposed Clanton's motion for a default judgment on the grounds that they were not properly served with pocess and, even if they were, they had a meritorious defense because the complaint failed to state a plausible claim for relief. A magistrate judge construed Clanton's motion as a non-dispositive motion for entry for default under Federal Rules Of Civil Procedure 55(a) and denied it because the defendants had not been properly served with process. The defendants then filed a motion t dismiss under Federal Rules of Civil Procedure 8, 12(b)(5), and 12(b)(6). The district court granted the motion and dismissed Clanton's complaint for failure to state a plausible claim or relief. Clanton now appeals and moves for summary judgment.

We review de novo a district court's dismissal of a complaint under Rule 12(b)(6) for failure to state a claim for relief. Lumbard v. city of Ann Arbor, 913 F.3d 585, 588-89 (6th Cir 2019). A complaint must contain "a short and plain statement of the claim showing that the pleader is entitle to relief." Fed.R.Civ.P. 8(a)(2). It must contain "enough facts to state a claim to relief that is plausible on its face." Bel Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). Although "detailed factual allegations" are not required, a

complaint must contain "more than a unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (quoting *Twombly,* 550 U.S. AT 555). The complaint must adequately inform the defendant of the plaintiff's claim "and the grounds upon which it rests." *Erickson v. Pardus,* 551 U.S. 89,93 (2007) (per curiam) (quoting Twombly, 550 U.S. at 555). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal,* 556 U.S. at 678.

Generally, courts liberally construe pro se pleadings and hold them "to less stringent standards that formal pleadings drafted by lawyers." *Erickson,* 551 U.S. at 94. But this liberal construction is not without limits, and does not "abrogate basic pleadings essentials." *Wells v. Brown,* 891 F.2d 591, 594 (6th Cir. 1989).

Clanton's complaint contains insufficient factual assertions to state plausible claim. The complaint simply asserted that the defendants unlawfully harmed Clanton, without alleging facts to support that bare assertion. *See Iqbal,* 556 U.S. at 678; *Twombly,* 550 U.S. at 570. Moreover Clanton's complaint did not prove the defendants with sufficient notice of the grounds on which his claims may rest. See Fed.R.Civ.P. 8(a)(2); *Erickson,* 551 U.S. at 93. Although Clanton attached to his complaint a "Dismissal and Notice of Right" issued by the Equal Employment Opportunity Commission, that document provided no details regarding his claim against the defendants. And Clanton's complaint failed to allege facts to establish the elements of any claim asserted. Clanton's complaint thus was properly dismissed for failure to state a claim on which relief may be granted.

In his appellate briefs, Clanton mentions the Michigan Elliott-Larsen Civil rights Act, Mich. Comp. Laws §§ 37.2101-.2804; the Michigan Employment Security Act, Mich. Comp. Laws §§ 421.1-.75; the Sixth, Eighth, Ninth, Tenth, and Thirteenth Amendments to the United

States Constitution; various provisions of the Michigan constitution; and 18 U.S.C. §§ 241, 242, and 1001. These new, insufficiently developed issues suffer from the same deficiencies as those presented in Clanton's complaint and, in any event, were not presented to the district court. We will not "entertain new claims raised for the first time on appeal." *Greco v. Livingston County,* 774 F.3d 1061, 1064 (6th Cir. 2014); *Kusens v. Pascal Co.,* 448 F.3d 349, 368 (6th Cir. 2006).

Accordingly, we **DENY** the motion for summary judgment and **AFFIRM** the district court's judgment

ENTERED BY ORDER OF THE COURT
ss.//Deborah S. Hunt, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HERBERT W.G. CLANTON
Plaintiff,
v. CASE No. 1:21-cv-00053
SAM'S CLUB, et al., HON. ROBEERT J. JONKER
Defendants.
_____/

JUDGMENT

In accordance with the Order Approving and Adopting Report and Recommendation entered this day, Judgment is entered in favor of Defendant's Sam's Club and Wal-Mart and against the Plaintiff Herbert Clanton

Dated: July 16, 2021

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HERBERT W.G. CLANTON
Plaintiff,
v. CASE No. 1:21-cv-00053
SAM'S CLUB, et al., HON. ROBEERT J. JONKER
Defendants.
_____/

ORDER APPROVING AND ADOPTING REPORT AND RECOMMENDATION

The Court has reviewed Magistrate Judge Beren's Report and Recommendation (ECF No. 27) and Plaintiff's Objection to the Report and Recommendation (ECT No. 28). Under the Federal Rules Of Civil Procedure, where, as here, a party has objected to portions of a Report and Recommendation, "[t] he district judge ... has a duty to reject the magistrate judge's recommendation unless, on de novo reconsideration, he or she finds it justified." 12 Wright, Miller, & Marcus, Federal Practice and Procedure § 3070.2, at 381 (2d ed. 1997), Specifically, the Rules provide that:

> **The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.**

FED.R.CIV.P. 72(b)(3). De novo review in these circumstances requires at least a review of the evidence before the Magistrate Judge. Hill v. Duriron Co., 656 F.2d 1208, 1215 (6th Cir. 1981). The Court has reviewed de novo the claims and evidence presented to the Magistrates Judge; the Report and Recommendations itself; and Plaintiff's objections. After its review, the Court finds the Magistrate Judge correctly concluded that Plaintiff's Complaint fails to state a Twombly plausible claim.

The Magistrate Judge recommends granting the defense motion to dismiss (ECF No. 17) AND DISMISSING THIS ACTION. In his objection, Plaintiff primarily reiterates and expands upon arguments presented in his original response briefs. His objections fail to deal in a meaningful way with the Magistrate Judge's analysis and the Rule 8 pleading standard. The Magistrate Judge carefully and thoroughly considered the record, the parties, arguments, and the governing law. The Magistrate Judge properly analyzed Plaintiff's claims. Nothing in the Plaintiff's Objections changes the fundamental analysis.

ACCORDINGLY, IT IS ORDERED that the Report and Recommendation of the Magistrate Judge (ECF No. 27) is **APPROVED AND ADOPTED** as the opinion of the Court.

IT IS FURTHERED ORDERED that:

1. Defendant's Motion to dismiss 9ECF No. 17) is **GRANTED**; and

2. This case is **DISMISSED.**

Dated: July 16, 2021 /s/ Robert J. Jonker

ROBERT J. JONKER CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HERBERT W.G. CLANTON,
Plaintiff,
v.

Hon. Robert J. Jonker
Case No. 1:21-cv-53

SAM'S CLUB, et al.,
Defendant.
_____/

REPORT AND RECOMMENDATIONS

On January 19, 2021, Plaintiff Herbert W.G. Clanton filed a complaint against Sam's Club and Wal-Mart, purporting to allege claims arising out his employment with one or both Defendants and seeking at east tens of millions of dollars in damages. (ECF No. 1.) In support of his claims, Clanton cites Title VII of the Civil Rights Act of 1964("Title VII"), 42 U.S.C. § 2000e et seq., the Age discrimination In Employment Act, 29 U.S.C. § 621 ET SEQ., 42 U.S.C. 1981, 1983, 1985,1986, and 1988. (*Id.* at PageID.1,2, and 6.) He alleges claims of libel, slander, wrongful discharge, and employment discriminarion.[1]

[1] **Clanton also included the Michigan Department of Civil Rights (MDCR) AS A "Party of Interest" in his complaint. It is unclear why he included the MDCR, other than possibly to establish that he exhausted his administrative remedies and obtain a right to sue letter for the purpose of his Title VII claim. In any event, Clanton has no cause of action against the MDCR for denying his administrative complaint. See Milhous v. EEOC, No. 97-5242, 1998 WL 152784, at *1 (6th Circuit Mar. 24, 1998) ("[P]laintiff simply does not have a cause of action under Title VII against the EEOC to challenge the processing of her discrimination complaint.") (citing, among others, Scheerer v. Rose States college, 950 F.2d 661, 663 (10th Cir 1991) (nothing that courts have uniformly rejected the notion that a plaintiff has a cause of action against the Equal Employment Opportunity Commission or challenges to the processing of an administrative claim)).**

On March 16, 2021, Clanton filed a motion for entry of default judgment against Defendants. (ECF No. 10.) Defendants responded on the motion, noting that the Court could not enter a default judgment because Clanton had failed to properly serve Defendant with the summons and complaint. (ECF No. 13.) On April 12, 2021, I entered an order denying Clanton's motion for entry o default judgment on the grounds that Clanton had not yet filed an application for entry of default. Thus, the motion for default judgment was premature. (ECF No. 16 at ageID.99.) I also concluded that Clanton had not properly served Defendants under both Federal Rule Of Civil Procedure 4(h)(1)(B) and under Michigan Court Rule 2.105(D). (*Id. at PageID.100-01.*) Finally, I found that Clanton's service was also improper because the summons and complaint to the Littler Mendelson Law firm's Kansas City Global Service Center, which was not acting as Defendants' agent for service, and not to Defendants. (Id at pageID.101-02.)

Presently before me is Defendants' Motion to dismiss pursuant to Federal Rule of Civil Procedure 8, 12(b)(5), and 12(b)(6). (ECF No. 17.) the Motion is fully briefed and ready or decision. Pursuant to 28 U.S.C. § 636(B)(1)(b), I recommend that the court GRANT the motion and dismiss the complaint with prejudice.[2]

I. The Complaint

In spite of its length- 24 pages-the complaint sets forth scant facts, consisting almost entirely of incomprehensible statements and legal conclusions. Nonetheless, for purposes of the instant motion, it is possible to glean some background from Clanton's statements and the right-to-sue letter he attaches to the complaint.

Clanton was employed by Wal-Mart or Sam's Club. His employment was terminated due to "allegation of insubordination," "[n]oncongeni[ality]," and "improper conduct(s)." (*Id.* at PageID.5.) Clanton alleges that the termination was unfounded, as he had always been "timely and prompt when reporting to work," and had "timely and effectively discharge[d] his assigned duties." (*Id.* at

[2] **Although defendants have requested oral arguments, I find that oral argument is unnecessary as Defendants' brief adequately develops the issues.**

PageID.4.) However, Clanton claims the he was never "informed of the reasons for his termination from employment," that he was never "given a chance to be heard, on charges directed against him, and charges of insubordination emerging thereof," that he was never "given a chance to...confront persons making accusations directed against him," and that he was not "afforded the same treatment as other employees." (*Id.* at PageID.5.)

II. The Complaint

A. Failure to State a Claim

A rule 12(b)(6) motion to dismiss for failure to state a claim on which relief may be granted tests the legal sufficiency of a complaint by evaluating its assertions in a light most favorable to Plaintiff to determine whether it states a valid claim for relief. *See In re N M Holdings Co., LLC,* 622 F.3d 613, 618 (6th Cir, 2010). Pursuant to Federal Rule Of Civil Procedure 12(b)(6), a claim must be dismissed for failure to state a claim on which relief may be granted unless the "[f]actual allegations [are] enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations ae true." *Bell Atlantic Corp. v Twombly,* 550 U.S. 544, 545 (2007). As the Supreme court held, to survive a motion o dismiss, a complaint must contain "sufficient factual matter, accept as true, to 'state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 677-78(2009). this plausibility started "is not akin to a 'probability requirement,' but it ask for more than a sheer possibility that a defendant has acted unlawfully." Id. If the complaint simply pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility of 'entitlement to relief.'" *Id.* As the court further observed, "[t]hreadbare recitals of elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. at 678-79

In addition, a complaint must be dismissed if it fails to meet Rule 8(a)(2)'s requirement that it set forth '"a short and plain statement of the claim showing that the pleader is entitled to relief,' in order o 'give the defendant fair notice of what the...claim is and the grounds upon which it rests.'" Twombly, 550 U.S. at 555 (quoting *Conley v. Gibson,* 355 U.S. 41, 47 (1957). A plaintiff properly pleads a claim for relief by "briefly describing the events" supporting the claim. *Peabody v. Griggs,* 2009 WL 3200686, *2 (D.R.I. 2009) (quoting *Sanjuan v. American*

Bl. Of Psychiatry & Neurology, Inc., 40 F.3d 247, 251 (7th CIR. 1994)). The rules require a short and plain statement of the claim because "unnecessary length places an unjustified burden on the court and on the party who must respond to it." *Id.* (quoting *Laurence v. Wall,* No. CA 07-081, 2007 WL 1875794, AT *1 (D.R.I. June 27, 2007)).

In this case, notwithstanding the labels he provides for his claims, Clanton fails to meet the bare minimum pleads requirements that he set forth facts showing more than a mere possibility that Defendant acted unlawfully and that Clanton is entitled to relief. Although Clanton has provided some basic facts, much of his complain t is what many courts have described as "legalistic gibberish." *Crain v. Commissioner,* 737 F.2d 1417, 1418 (5th Cir. 1984) (per curium).

Even if the complaint could be deem to meet Rule 8(a)'s requirement, it fails to allege a viable claim. Because Plaintiff is proceeding pro se, the Court must construe his pleadings more liberally than is usually the case for formal pleading drafted by lawyers. *Haines v. Kerner,* 404 U.S. 519, 520 (1972). But this liberal pleading standard "is not without its limits, and does not 'abrogate basic pleading essentials in pro se suits.'" *Clark v. Johnston,* 413 F.App'x 804, 817 (6th Cir. 2011) (quoting *Wells v. Brown,* 891 F.2d 591, 594 (6th Cir. 1989)). Stated differently '[l]iberal construction does not require a court to conjure allegations on a litigant's' behalf" *Erwin v. Edwards,* 22 F. App'x 579, 580 (6th Cir 2001). To require otherwise "would not only strain judicial resources...but would also transform the district court from its legitimate advisory role to the improper role of an advocate seeking out the strongest argument and the most successful strategies for a party." *Beaudett v. city of Hamptons,* 775 F.2D 1247, 1278 (4th Cir. 1985).

First, to the extent Clanton seeks to allege a claim under 42 U.S.C. § 1983 that Defendants violated his First, Fifth, and/or Fourteenth Amendment rights, his claim must be dismissed. "To state under § 1983, a plaintiff must allege the violation of rights secured by the constitution and laws of the United States, and must show that the alleged deprivation was committed by persons acting under color of law." *West v. Atkins,* 487 U.S. 42, 48 (1988).

Because neither Defendants is a "state actor," and Clanton fails to allege any fact indicating that they could be considered state actors under any theory recognized by the Supreme court, *see Wolotsky v. Huhn,* 960 F.2d 1331, 1335 (6th Cir. 1992) (describing: (1) the public function test; (2) the state compulsion test; and (3) the symbiotic relationship or nexus test), he cannot assert a claim under Section 1983. *See Hunt v. Walmart Store, Inc.,* No. 17-14095, 2020 WL 7294363, at *5 (E.D. Mich. Mar. 5, 2020) ("As a threshold matter, the claims brought under § 1983 against the Walmart Defendants fail because they are not 'state actors.'"); *Wilkins v. Sam's East, Inc.,* No. 08-2507, 2009 WL 10699876, at *3 (W.D. Tenn. July 13, 2009) (dismissing the plaintiff's Section 1983 claim against Sam's Club because it did not qualify as a state actor). Second, although a plaintiff may maintain claims under 42 U.S.C. §§ 1981, 1985, AND 1986 against private parties, *see Arendale v. city of Memphis,* 519 F.3d 587, 594 (6th Cir. 2008) (nothing that the Supreme Court held in *Runyon v. McCrary,* 427 U.S. 160 (1976), that private defendants may be held liable under Section 1981); *Taylor v. Brighton Corp.,* 616 F.2d 256, 264 (6th Cir. 1981) (nothing that Section 1985(3) 'reaches private conspiracies that are aimed at invidiously discriminatory deprivation of equal enjoyment of rights secured to all by law"); *Spencer v. Casavilla,* 903 F.2d 171, 174 (2d Cir. 1990) (nothing that state action is not a requirement in a claim under 42 U.S.C. § 1986), Clanton fails to allege any fact supporting under those Statues. Third, Clanton fails to allege a discrimination claim under Title VII as nothing in his complaint suggests that he was terminated based on his race, color, religion, sex, or national origin. 42

U.S.C. § 2000E-2(A)(1). Similarly, Clanton fails to allege any facts suggesting that he suffered age discrimination in violation of the ADEA.

Finally, I recommend that Clanton's state-law claims for libel, slander, and wrongful discharge be dismissed because they are nothing more than labels and conclusions without supporting facts. As such, they do not establish a claim for relief. Clanton does not allege the basis for jurisdiction over his state-law claims, i.e., diversity or supplemental jurisdiction. Although state-law claims brought pursuant to supplemental jurisdiction generally should be dismissed without prejudice pursuant to 28 U.S.C. § 1367(c)(3) when all of the federal claims are dismissed. *see Musson Theatrical, Inc. v. Fed. Exp. Corp.,* 89 F.3d 1244-55 (6th Cir. 1966) ("When all federal claims are dismissed before trial, the balance of considerations usually will point to dismissing the state law claims."), because these claims are so facially inadequate, if they are deemed to be asserted under supplemental jurisdiction, I recommend that the Court exercise its discretion to entertain them and dismiss them for failure to state a claim.

Accordingly, I recommend that the Court grant Defendants' Rule 12(b)(6) motion and dismiss the complaint.

B. Improper Service

Defendants also move for dismissal because Clanton has not properly served them. Clanton bears the burden of proof to show that the summons and complaint were properly served on Defendants. *See Metro. Alloys Corp. v. State Metals Indus., Inc.,* 416 f. Supp. 2d 561, 563 (E.D. Mich. 2006). As set forth in the April 12, 2021 Order (ECF No. 16). Defendant are correct that they have not been properly served with the summons and complaint.

A court may construe a motion to dismiss for ineffective service of process as a motion to quash service. *See Young's Trading Co. v. Fancy Import, Inc.,* 222 F.R.D. 341-43 (W.D. Tenn. 2004) (statin that "[w]here service is ineffective, a court has discretion to either dismiss the action or quash service and retain the case"). The sixth circuit has expressed a preference to treat the first motion for improper service as a motion to quash. "[I]f the first service of process is ineffective, a motion to dismiss should not be granted, but the case should be retained for proper service later." *Stern v. Beer,* 200 F.2d 794, 795 (6th Cir. 1952). Here, the appropriate remedy would be to treat the motion to dismiss as a motion to quash and afford Clanton another opportunity to attempt valid service. However, if the court adopts the above recommendation to dismiss the complaint pursuant to Rule 12(b)(6), the service of process issue will be moot.

III. Conclusion

For the foregoing reasons, I recommend that the Court **grant** Defendants' motion to dismiss pursuant to Rule 12(b)(6) (ECF No. 17) and dismiss the action.

Dated: July 6, 2021

/s/ Sally J. Berens
SALLY J. BERENS
U.S. Magistrate Judge

NOTICE

OBJECTIONS to this Report and Recommendations must be filed with the Clerk of the Court within 14 days of the date of service of this notice. 28 U.S.C. § 636(b)(1)(C). Failure to file objections within the specified time waives the right to appeal the District Court's order. *See Thomas v. Arn,* 474 U.S. 140 (1985); *United States v. Walters,* 638 f.2D 947 (6th Cir. 1981).

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HERBERT W.G. CLANTON,
Plaintiff,
v.
SAM'S CLUB, et al.,
Defendants,
_____/

Hon. Robert J. Jonker
Case No. 1:21-cv-53

ORDER

The Court has before it Plaintiff Herbert W.G. Clanton's Motion for Default Judgment. (ECF No. 10) Clanton has attached to his motion a "Testimony of Service" indicating that he served summonses and copies of his Request to Purse Redress Of Grievance and Redress of Grievance by certified mail on Defendant Wal-Mart's Human Resources Manager in Kansas City Missouri. (ECF No. 10 at Page ID.63.) Defendants Sam's Club and Wal-Mart have appeared and filed a response, contending that Clanton is not entitled to relief because he failed to properly serve them with the summons and complaint, and even if service was proper, they have a meritorious defense. Clanton has replied to Defendants' response. (ECF No. 15.)

For the reasons that follow, Clanton's motion, which the Court construes as a motion for entry of default pursuant to Federal Rule of Civil Procedure 55(a), is Denied.[1]

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[1] **Because Clanton's motion is construed as a motion for default, his motion is non-dispositive. See Oppenheimer v. City of Madeira, 336 F.R.D. 559, 562 (S.D. Ohio 2020). Accordingly, I may properly address the motion by an order pursuant to 28 U.S.C. §636(b)(1)(A).**

Federal Rule Of Civil Procedure 55 requires a party to follow a two-step process to obtain a default judgment. First, pursuant to Rule 55(a), the party seeking a default judgment must obtain entry of a default by the clerk of the court. Second, pursuant to Rule 55(b), the moving party may seek entry of a judgment on the default under either subdivision (b)(1) OR (B)(2). Here, Clanton has not moved for the entry of a default, and the Clerk has not entered a default, so a default judgment would be premature.

"In the absence of service, or a waiver of service, entry of default is improper. "*Baumer v. Bandyk,* No. 1:06-CV-573, 2006 WL 8455006, AT *2 (W.D. Mich. Oct. 10, 2006) (citing Murphy Bros. v. Michetti Pipe Stringing, 526 U.S. 344, 350 (1999)). It is well established that a default and a default judgment must be set aside where service on the defendant was not proper. *Soloway v. Huntington Nat'l Bank,* No. 1:12-cv-507, 2013 WL 12122009, AT *3(W.D. Mich. June 5, 2013) (citing *O.J. Distrib., Inc v. Hornell Brewing Co.,* 340 F.3d 345, 355 (6th Cir. 2003)), Defendants argue that a default may not enter because Plaintiff failed to perfect effect service.)

Defendants are both corporations, pursuant to Rule 4(h) of the Federal Rules of Civil Procedure, a domestic or foreign corporation may be served:

(A) in the manner prescribed in Rule 4(e)(1)...; or

> (B) by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and—if the agent is one authorized by statute and the statute so requires—by also mailing a copy of each to the defendant.

Fed. R. Civ. P. 4(h)(1). Rule 4€(1) allows for service pursuant to the law of the state in which the district court is located.

Courts have interpreted the term "delivering" in Rule 4(h)(1) as requiring personal service on the appropriate agent. *See Christian v. Federal Home Loan Mortg. Crop.,* No. 13-13795, 2016 WL 1640459, at *2 (E.D. Mich Apr. 26, 2016 ("notably, courts have interpreted 'deliver[y]' under [Rule 4 of the Federal Rules of Civil Procedure] as requiring personal service on the appropriate agent." (citing *Etherly v. Rehabitat* Sys., No. 13-11360, 2013 WL 3946079, at *5 (E.D. Mich. July 31, 2013; *Dyer v. Wal-Mart Stores,* Inc., 318 F.App'x 843, 844 (11 Cir 2009); *Larsen v. Mayo Med. Ctr.,* 218 F.3d 863, 868 (8th Cir. 2000)); see also Collett v. Kennedy, Koontz & Farinash, No. 3:14-CV-552, 2015 WL 7254301, AT *4(e.d. Tenn. Aug. 14, 2005).

Because Clanton did not personally an officer or authorized agent of either Defendant, he has failed to complete proper service under Rule (h)(1)(B). Although Clanton highlights in his reply the phrase "by mailing a copy of each to the defendants," and suggests that he properly effective service by certified mail, the clause are written in the conjunctive (requiring both), not disjunctive (either/or), form.

The question remains whether service was proper under Michigan law. Pursuant to Michigan Court Rule 2.105(D), service may be made on domestic or foreign corporation by

(1) serving summons and a copy of the complaint on an officer or the resident agent;

(2) serving a summons and a copy of the complaint on a director, trustee, or person in charge of an officer establishment of the corporation and sending a summons and a copy of the complaint by registered mail, addressed to the principal office of the corporation;

(3) serving a summons and a copy of the complaint on the last presiding officer, president, cashier, secretary, or treasurer of a corporation that has ceased to do business by failing to keep up its organization by the appointment of officer or otherwise, or whose term of existence has expired;

(4) Sending a summons and a copy of the complaint by registered mail to corporation or an appropriate corporation officer and to the Michigan Bureau of Commercial Services, Corporation division if

(a) the corporation has failed to appoint and maintain a resident agent or to file a certificate of that appointment as required by law;

(b) the corporation has failed to keep up its organization by the appointment of officers or otherwise; or

(c) the corporation's term of existence has expired.

Mich. Ct. Rule 2.105(D). There is no indication that subsections (3) or (4) apply. State and federal court have construed the term "serving" in Rule 2.105(D) to require personal service on an officer, resident agent, or other corporate representative authorized to receive service. *See Sutton v. Mountain High Investments, LLC,* No. 20-cv-11656, 2021 WL 859046, at *5 (E.D. Mich. Mar. *8, 2021) (observing that the plaintiff's "failure to allege that the service by certified mail was accompanied by personal service "on a director, trustee, or personal served"); *Williams v. Fannie Mae,* No. 332274, 2017 WL 2562608, at *2 (Mich. Ct. App. June 2.105(D)(1) "means

'personal' service"). Because personal service is required under both the Federal Rules of Civil Procedure and the Michigan Court Rules, Clanton's Sole method of service-by certified mail-was insufficient to accomplish proper service.

Clanton's attempted service suffers from another deficiency. As Defendants point out-and Clanton does not dispute-the service address, 2301 McGee Street, Suite 800, Kansas City, MO 64108-is the address for the Kansas City Global Services Center for the Littler Mendelson law firm.[2] Defendants state that Litter Mendelson is not their registered agent and is not authorized to accept service on their behalf. Moreover, even if Littler Mendelson represented either or both Defendants in the past (which the Court surmises in the cased based on Clanton's reply), service on a law firm that represented a defendant in another manner, even on related to the matter at hand, is insufficient to satisfy due process requirements. *See Lampe v. Kash* 735 F.3d 942, 943-44 (6th Cir. 2013) (notice to a former attorney does not count as notice to a former client).

In sum, because Clanton has not properly served Defendants, entry of a default is not appropriate. Defendants request that the Court dismiss Clanton's Complaint or, alternatively, afford them 21 days to answer or otherwise respond to the complaint. However, Defendants shall have 21 days from the date of this order to answer or otherwise respond to the complaint.

IT IS SO ORDERED.

Dated: April 12, 2021

/s/ Sally J. Berens
SALLY J. BERENS
U.S. Magistrate Judge

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

HERBERT W.G. CLANTON,
Plaintiff,

v.

Hon. Robert J. Jonker
Case No. 1:21-cv-00053

SAM'S CLUB, et al.,
Defendant.
_____/

ORDER

This matter is before the court on Plaintiff's Motion to Appoint Counsel. (ECF No. 2). For the reasons articulated herein, the court denies Plaintiff's motion.

Pursuant to 28 U.S.C. § 1915(e)(1), "the court may request an attorney to represent any person unable to employ counsel." In civil actions, however, the decision to grant such a request id discretionary and is generally allowed only in exceptional cases. *See Lavado v. Keohane,* 992 F.2d 601, 604-05 (6th Cir. 1993) (the decision to deny a civil litigant's request for counsel will be overturned only when the denial of counsel results in "fundamental unfairness impinging on due process rights").

When examining request such as this, courts have generally considered factors such as: (1) whether the action presents a colorable claim for relief, (2) the litigant's ability to investigate crucial facts, (3) whether the nature of the evidence indicates that the truth will more likely be revealed when both sides are represented by counsel, (4) the ability of the litigant to present his case, and (5) the complexity of the legal issues presented. See McKeever v. Israel, 689 F.2d 1315, 1320-21 (7th Cir. 1982); *Lavado,* 992 F.2d at 605-06. The Court presently finds absent the factors warranting the appointment of counsel.

Accordingly, the Court hereby DENIES Plaintiff's motion (ECF No. 2).

IT IS SO OREDERED.

DATE: March 23, 2021

/s/ Sally J. Berens
SALLY J. BERENS
U.S. Magistrate Judge

APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HERBERT W.G. CLANTON,
Plaintiff,
v.

Case No. 1:21-cv-53
hon. Robert J. Jonker

Sam's Club, et al,
Defendants.
_____/

ORDER

In light of the entry in the docket report in this case indicating that on February 19, 2021, the Clerk issued summonses for Defendants and returned them to Plaintiff at the counter, the February 8, 2021 Order to Show Cause (ECF No. 6) is DISCHARGED.

IT IS SO ORDERED.

Dated: February 22, 2021

/s/ Sally J. Berens
SALLY J. BERENS
U.S. Magistrate Judge

APPENDIX H

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

HERBERT W.G. CLANTON
Plaintiff,

v.
SAM'S CLUB, et al.,
Defendants.
_____/

Hon. Robert J. Jonker
Case No. 1:21-cv-00053

ORDER TO SHOW CAUSE

This is a job discrimination action brought by a pro se plaintiff on January 19, 2021 under 42 U.S.C. § 2000e. The Clerk's office mailed blank summons to Plaintiff due to his failure to provide summons at the time of filing. To date, Plaintiff has failed to submit summonses to the Clerk's office for issuance so that he can complete service of process.

Plaintiff shall show cause in writing by February 22, 2021 why this matter should not be dismissed pursuant to Fed.R.Civ.P 41(b) and W.D. Mich.L.Civ.R. 41.1 for want of prosecution and failure to comply with the rules and orders of this court. Failure to show good cause will result in a Report and Recommendation that case be dismissed.

IT IS SO ORDERED.

Dated: February 8, 2021

/s/ Sally Berens
SALLY J. BERENS
U.S. Magistrate Judge

APPENDIX I

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HERBERT W.G. CLANTON
Plaintiff,

v.
SAM'S CLUB, et al.,
Defendants.
_____/

Hon. Robert J. Jonker
Case No. 1:21-cv-00053

ORDER OF REFERENCE

The captioned case is referred to Magistrate Judge Sally J. Berens for all pretrial purposes. The magistrate judge shall decide all nondispositive motions and conduct all necessary conferences pursuant to 28 U.S.C. § 636(b)(1)(A). the magistrate judge shall file a report and recommendation on all dispositive matters under 28 U.S.C. § 636(b)(1)(B).

Dated: January 21, 2021

/s/Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES
DISTRICT JUDGE

APPENDIX J

U.S. Equal Employment Opportunity Commission

Dismissal And Notice Of Rights

To: Herbert Clanton	**From: Detroit Field Office**
P.O. Box 1431	**477 Michigan Avenue**
East Lansing, MI 48826	**Room 865**
	Detroit, MI 48226

THE EEOC IS CLOSING ITS FILE ON THIS CHARGE FOR THE FOLLOWING REASON:
'The EEOC has adopted the findings of the State or local fair employment practices agency that investigated this charge'

-NOTICE OF SUIT RIGHTS-

Title VII, the Americans with Disabilities Act, the Genetic Information Nondiscrimination Act, or the Age Discrimination In Employment Act: This will be the only notice of dismissal and of your right to sue that we will send you.

You may file a lawsuit against the respondents(s) under federal law based on this charge in federal of state court. Your lawsuit **must be filed WITHIN 90 DAYS of your receipt of this notice;** or your right to sue based on this charge will be lost. (The time limit for filing suit based on a claim under state law may be different.)

Equal Pay Act(EPA): EPA suits must be filed in federal of state courts within 2 years (3 years for willful violations of the alleged EPA underpayment. This means that back pay due for any violations that occurred more than 2 years (3 years) before you filed suit may not be collectible.

On behalf of the Commission

ss//: Michelle Eisele

Date: 10/23/20

District Director

cc: HUMAN RESOURCES MANAGER
WAL-MART STORES EAST, LP
2301 McGee Street
Suite 800
Kansas City, MO 64108

The above is an abridged representation of the United States Department Of Labor Equal Employment Opportunity Commission (EEOC), "**Dismissal And Notice Of Rights**" put forth to the person of Herbert W.G. Clanton, as of October 23, 2020

APPENDIX K

State Of Michigan
DEPARTMENT OF CIVIL RIGHTS
DETROIT

GRETCHEN WHITMER
GOVERNOR

JAMES E. WHITE
EXECUTIVE DIRECTOR

March 21, 2021
Herbert Clanton
P.O. Box 1431
East Lansing, MI 48826

RE: Reconsideration Request
MDCR Case#: 486103
Herbert Clanton v Wal-Mart Stores, Inc.

Dear Herbert Clanton

MDCR recently received service of your federal complaint against Respondents SAM's Club and Wal-mart Stores, Inc., naming MDCR a "party of interest." Given you have chosen to proceed in the court to address your claims of discrimination against Respondents, your reconsideration request challenging the adequacy of MDCR's complaint investigation and legal sufficiency supporting MDCR's complaint dismissal recommendation rest with the court. Your request that your complaint be reopened is therefore denied.

This letter constitutes the Department's final decision that it will not issue a charge on your behalf. Per Rule 37.18 of the Michigan Civil Rights Commission Rules, you may appeal this denial to the circuit court of the state of Michigan having jurisdiction provided by law, within 30 days of the date of service of this notice. Pursuant to state law, the parties to such an appeal would include yourself and the respondent named in your original complaint.

Sincerely,
ss//: David Stringer (SA) (signed with permission)
Reconsideration Attorney
Telephone: (313) 456-3794
Fax: (313) 456-3837
Email: StringerD@michigan.gov

PROOF OF SERVICE

This document and the above and foregoing statements are put forth Office Of the Clerk of the United States Supreme Court, at address Office Of The Clerk Supreme Court of the United States 1 First Street, NE Washington, DC 20543 via U.S. Postal Service, First Class Mail, Certified Mail Return Receipt Requested; 7021 2720 0001 6425 4298

Three copies are to be supplied to the Respondents; Human Resources Manager, Wal-Mart Stores East, LP 2301 McGee Street, Suite 800, Kansas City, MO 64108, via U.S. Certified Mail to: 7021 2720 0001 6425 4304

Three copies are to be supplied Michigan Department Of Civil Rights, Capitol Tower Building 110 W. Michigan Ave., Suite 800, Lansing, MI 48933, via U.S. Certified Mail to: 7021 2720 0001 6425 4311.

RESPECTFULLY SUBMITTED
HERBERT W.G. CLANTON

DATE: 12, 23, 2022

RESPECTFULLY SUBMITTED

DRAFTED BY: HERBERT W.G. CLANTON
IN PROPRIA PERSONA
P.O. Box 1431
East Lansing, MI 48826

"I, declare the foregoing and above is true to the best of my beliefs', information, and/or knowledge".