No: 22A1002

IN THE

Supreme Court of the United States

Gina Russomanno,

Petitioner

~against~

Sunovion Pharmaceuticals, Inc. and IQVIA, Inc.; and

Dan Dugan, Jenna Yackish, Trevor Voltz, Erik Weeden, and Sunovion Pharmaceuticals, Inc.

Respondent(s)

RULE 22 - On Application to Individual Justices to the United States Court of Appeals for the FEDERAL Circuit

APPLICATION TO CHIEF JUSTICE JOHN G. ROBERTS

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STATEMENT OF APPLICATION

Pro Se Petitioner, Gina Russomanno, makes this Application to Chief Justice, John Glover Roberts, of the United States Supreme Court, who has the *discretionary and supervisory power* to *grant relief* sought in this Case, from the **Federal Circuit Court of Appeals**, Case Nos. (2023): **[23-1020; 23-1022]**, and *pertaining in **Link**,* to **USSC** Certiorari Case, **[22-7365]**.

Petitioner files *this* application in appeal to Individual Justice, Chief Justice, John G. Roberts. Justice Roberts is Justice allotted to the **Federal Circuit Court of Appeals** from which this Appeal Case *arises, by appeal upon decision from the* **New Jersey District Court** for the **Third Circuit**, with *no other alternative form for remedy or relief.*

Petitioner has filed a Writ of Certiorari, *herein this Court, Case No.* **[22-7365]**, also *linked to this Application* to *Individual Justice, Chief Roberts,* and *currently pending.*

Imperative for Chief Justice Robert's full capture, is there have been a total of 14 Cases filed among 4 different

United States Courts in **relation** to a **same**, "**Overall Matter.**"

Whereby, each case or appeal has *thus*, been "*incorrectly dismissed*" due to a "*wrongly, tainted premise*" that the original, initial case, NJ District (**DCNJ**), Case No. **[3:19- cv-05945], [Dkt. 61]**, was thereby, dismissed with prejudice.

However, the **DCNJ** Case (*noted- above*), was in fact, ***incorrectly*** *dismissed, as all individual appeals have testified*.

Notwithstanding, every Appeal Case had clearly and *efficiently,* entered *material testimony, facts, and* ***Memorandums of Law***, *demonstrating,* reason, *why and how*, the original case was "*improperly dismissed*."

Whereby, Pro Se Plaintiff Petitioner was "*never provided 'Any Provisional Form' of the Mandate Law Standard* in '*Curative Remedy for Amendment*' upon a *Rule 12(b)(6) Dismissal Action*, per [***Phillips v. Allegheny***]; and *multiple* other standard case law, to support. ***See***: [*Shane v.*

Fauver]; [*Grayson v. Mayview*]; [*Borelli v. City of Reading*]; [*Alston v. Parker*]; [*Batoff v. State Farm Ins.*].

{**All the above-noted Cases are 3rd Circuit Cases**; to which *Ironically*, The Federal District of New Jersey, is the **Third Circuit**. Thus, the NJ District Court and its 3Rd Cir. Court of Appeals (each having repetitively dismissed plaintiff's various actions) should be ***wildly familiar*** with these standard case law memorandums}.

Furthermore, the Mandate for "Curative Remedy Action," upon a "Rule 12(b)(6) Dismissal Action" is a "***Binding Authority***" for these Courts to ***must provide***.

Hence, the *consequential results* of that *initial*, improper, and *incorrect dismissal action* by the NJ District Court, upon Case [3:19-cv-05945], [Dkt. 61], has not only caused the *incorrect dismissals* of *its subsequent related* cases, and *its numerous related appeals* to *the same matter*, (whereby, wasting judicial resources); it has also brought about ***Serious Question*** *for this U.S. Supreme Court.*

Whereby, "the determination of when *deference"* to an (*improper, incorrect*) "judgement, *goes too far*," (wherein, 4 Federal Courts and numerous Federal Appeals Judges *have refused* to grant (*proper*) **Judgement Correction** to vacate and remand these cases); has become a serious, "*abdication of judicial responsibility;"* and this (*unjust*) judicial "scrutiny" (on the part of the judges) has also "*gone too far;*" it has become *judicial activism* which lacks the *proper judicial restraint*.

As Result, the *righteous* ***monitoring*** *and* ***execution of key decisions*** *and* ***standard case law*** is not being met, and the *public interest is thus, thereby, seriously* ***compromised***.

These actions by the lower Federal Courts have wrongly refused Plaintiff her Constitutional Rights and Civil Trial Rights of the **Seventh Amendment**.

Whereto, in *Suits of Common Law*, wherein the amount in Controversy shall exceed twenty dollars, *the right of trial by jury shall be preserved*, and no-fact tried by a jury,

shall be otherwise re-examined in any Court of the United States, ***than according to the rules of the common law.***

The *Merriam-Webster dictionary* defines **common law** as: 1). "a group of *legal practices and traditions originating in judges' decisions* in *earlier cases* and in *social customs* and *having the same force in most of the U.S.* as if *passed into law by a legislative body*." 2). "a body of law on custom and general *principles* and *embodied into case law* and that *serves as precedent* or is *applied to situations not covered by statute*."

Thereby, Plaintiff enters this Application to Individual Chief Justice John G. Roberts in that:

1. There is a "reasonable probability" that four Justices will grant certiorari, or agree to review the merits of the case; **2.** that there is a "fair prospect" that a majority of the Court will conclude upon review that the decision below on the merits was erroneous; **3.** that irreparable harm will result from the denial of the stay; **4.** finally, the Circuit Justice may find it appropriate to balance the equities,

exploring the relative harms to the applicant and respondent, as well as the interests of the public at large.

It is likely more than Four Justices will find that the **Dismissal Action in the DCNJ [3:19-cv-05945], [Dkt. 61] cannot "officially stand;" wherein,** the Dismissal-Opinion *does not demonstrate "any statement* ***provisions*** *whatsoever* in providing plaintiff curative remedy on a Rule 12(b)(6) Dismissal; (wherein specifically, to the Rule 12(b)(6) Dismissal **portion,** of the Uniform-Opinion with a Remand-Reconsideration).

The Federal Circuit Appeals Court was issued a Stay by Plaintiff on the Court's "Show Cause, ORDER," [**23-1020**], [Dkt. 18], 1/3/2023; requesting parties to support *either* a case dismissal OR transfer to the Third Circuit Court of Appeals.

The Federal Circuit *did not transfer* the Case as **required by 28 U.S.C. § 1631**, stating reason that the Third Circuit had dismissed *similar* appeal to the Third Circuit, on 12/29/23.

Notwithstanding, the Third Circuit appeal was *not* of exact *same* (testimony) thus presented to the Federal Circuit in its *separate, individualized* Appeal. Therefore, Federal Case **[23-1020, 23-1022]** should rightfully be *fully briefed for continuance* OR *transferred to the Third Circuit* for process continuance. Rather, the appeal was *wrongly dismissed* without providing plaintiff rightful case process on its (separate), *independent appeal* to the Federal Circuit.

Furthermore, the Federal Circuit's Show Cause Order *inappropriately interrupted* Briefing Schedule to which plaintiff was *not afforded rightful Reply* to Defendants.

Additionally, Plaintiff *simultaneously moved* for **summary judgement** *concurrent with the Stay motion* since Primary Defendant, Sunovion Pharmaceuticals failed to appear or answer in opposition.

These Courts have *repetitively denied* and dismissed every action in a **very intentional**, "*Layering upon Layering*" of "*improper dismissals.*" Plaintiff is Pro Se, and she "*can demonstrate"* that she "*was never provided curative*

remedy amendment for the initial case, DCNJ [3:19-cv-05945], [Dkt. 61]."

Thus, all past dismissals, *are by no other reason*, then that the Courts find it *extremely unsettling* to Admit to their Judgement Error, (or the *Court Prejudice,* behind that error); thereto, properly serve to "Relieve the Pro Se Party of that Judgement, Wrongdoing."

Plaintiff's numerous '*denied requests*' by these Courts to "*correct this manifest injustice*," (of not providing plaintiff *any form* of *provisional curative remedy* upon a *Rule 12(b)(6) Dismissal)*, and vacate the requested Dismissal Orders, *thereto*, Remand and Relieve this Pro Se Plaintiff of the "Improper, Incorrect Judgment," is a *deliberate* and *unjust 'dismissal layering'* by these Courts that is ***unconscionable***, *egregious, and further Prejudice* toward this Pro Se Plaintiff.

The "Relief Requested" per all these "Appeals;" ***Wherein***, the "Case(s) **Judgement Orders, [3:19-cv-05945] and [3:20-cv-12336]**" (were *incorrectly premised*

upon the *incorrect dismissal of the initial case* DCNJ [3:19-cv-05945], [Dkt. 61]), **is *Extraordinary, Exceptional Circumstance,*** which supports this Application to Chief Justice Roberts, and which *has also supported every other prior Appeal* that Pro Se Plaintiff has *past-entered* these Courts, *to date*.

These Appeal dismissal actions have been an *amazingly grotesque, "**Waste of Judicial Resources**."* ***Whereby,*** the very "*specific reason*" for the Appeals, (that to which, "*none* of the *provisional forms* for *curative remedy* amendment, *was ever provided plaintiff* for DCNJ Case [3:19-cv-05945], [Dkt 61])," is ***a truth*** "**So Obvious**" upon *actual* **OPINION**-Review, of [Dkt. 61]), and was *always* of '*testimony fact*' stated in each one of those Appeals.

Further, each appeal provided *in-depth descriptions* and *support testimony*, with *actual statements* from every pertinent Plaintiff Brief and the Decision-Opinion, [Dkt.61], *itself*, from DCNJ Case [3:19-cv-05945]); (all appeals were *inclusive* in "*back-relation*" to that initial case)!

There is no feasible or reasonable explanation that these *Courts could not capture* or grasp this "*Extraordinary, Exceptional Circumstance,*" in Plaintiff's Requests for Judgement Relief per DCNJ Case(s): [3:19-cv-05945], and subsequent Case [3:20-cv-12336].

In fact, Pro Se Plaintiff entered "***Formal***" not "*informal*" Briefs and **Memorandum of Law**, in every case matter. ***Thereby***, Plaintiff has had to comply with all the Rules of the Court, such like, every Licensed Attorney must.

That said, Plaintiffs testimony was succinct, and law supported, *allowing* any legal professional of the Court a clear *ability to understand* what was *presented,* "multiple times, stated and supported," over and over. Yet, the Courts have continually *failed to capture* such. *Thus,* these Courts *have failed* to Uphold Justice and Judicial Integrity, (misusing judicial resources, taxpayer money, and court integrity).

These *are the distinct facts,* and I feel certain Individual Chief Justice Roberts *will want to honor the U.S.*

Supreme Court integrity, and *slice away this erroneous nonsense*.

Accordingly, Chief Justice Roberts, your jurisprudential philosophy has compared judges to baseball umpires, having stated: "it's my job to call the balls and strikes, and not to pitch or bat."

As such, Plaintiff should rightfully advance in these case actions since the lower Federal Courts have *failed* to *provide* plaintiff her *provisional rights for curative remedy* upon a Rule 12(b)(6) dismissal... actions of which have thereby, "*served the balls that righteously walk the plaintiff to base for due continuance.*"

Wherefore, extraordinary wrong actions by the lower courts upon *incorrect, erroneous judgment dismissal, are* given *their "due relief"* by this Highest, U.S. Supreme Court, thereto granting to vacate and remand these cases for their proper continuance.

All past Appeal Requests were denied. Some requests were dismissed because Plaintiff had not "*exhausted all*

other avenues for relief" such as "**Request to "Reopen"** and "**Request to Permission to Appeal**" the initial DCNJ Case [3:19-cv-05945], [Dkt 61].

Those *exact above-actions* have *now since been taken*, and are on Appeal per this Case from the **Federal Circuit** Court of Appeals, in this Application to Chief Justice Roberts, and pertaining in **Link to USSC Case [22-7365]**, Writ of Certiorari.

Plaintiff's actions to Reopen that Case, and Action for Permission to Appeal (per the ***Extraordinary, Exceptional Circumstances***; ***wherein,*** plaintiff was never provided "any form" of *curative amendment* upon the Rule 12(b)(6) Dismissal Action, per Judgement-Opinion, [Dkt. 61], for DCNJ Case [3:19-cv-05945]), have also been, *egregiously denied.*

Dear Chief Justice Roberts, as United States Supreme Court Chief Justice, and Justice for the Federal Circuit (to which *this Case arises*), you are most familiar with common law, and the Mandate Standard Laws, such as, *in*

particular, the Case Law from the **Third Circuits (2008)**, "[***Phillips v. County of Alleghany: 515 F3d 224 (3rd Cir. 2008)***]. *Wherein,* that Case Law is *also further supported* by numerous other Case Law in Standard of the same, "***Binding Authority***" for these Federal Courts.

Chief Justice Roberts, naturally, you do not know me personally, nor do I you, but please understand, I am a very direct-spoken personality, as I am sure you have already surmised, (by this testimonial Application). I am personality of which will not *tend* to speak in a *light, tip-toe,* just to simply *please*, others in the *opposite* quadrants of our *various* human personalities. *Responsibility for Relatability is Unanimous*, and *not a One-Way Uniform*.

Therefore, my directness is a *necessary style*, and ever more *warranted* in *these circumstances*. I set *truth*, as is *relative*, and *truth, of course*, is often the *venom* of others *despise*.

As you had once past-noted in commencement address, June 2017, that to "*endure* **unfairness**, **betrayal**,

loneliness, bad luck, **loss**, **being ignored**, and pain; teaches one to "learn the **value** of, *in turn*, **justice**, loyalty, friends, the role of **chance**, sportsmanship, listening to others, and compassion.

The very way these Courts *have ruled* upon my cases is true to those of your **bolded** words above. *In turn*, I most certainly know the value of **Justice**, and Justice *righteously belongs* to *those* who not only speak truth, but demonstrate truth by justifiable means, in the very **Chance** that **Justice shall be Righteously Delivered and Upheld**. However, so far, (5 years along), I have also learned that these Federal Courts have *unfortunately demonstrated* very poor **sportsmanship** per my case matters. Yet, I must continue to take the expected **chance** that the Court's **sportsmanship, *will duly improve***.

All said, I believe you became Honorable Chief Justice because you ***Believe** in Truth*, and too, ***Aim to Set** that Truth*. I believe if you Please take the necessary, *appropriate time,* to *Simply Dissect* the **Opinion**-Dismissal, **DCNJ** Case

[3:19-cv-05945] at **[Dkt. 61]**, you will be able to *clearly see* these Courts have *wrongly acted* in *Despise of Me*, and *Prejudice of Me, thereto render* ***Incorrect Judgements upon my Cases.***

Thus, as I surely appreciate, respect, and admire your Justice authority, I *must demonstrate* in this written Application to you, my *direct* illustrations of '***What IS Obvious***:'

This has been an *absolutely unnecessary journey of extreme, unreasonable, length*. Why? Because *any public lay person* can "*Grasp*" what is being *Appealed here (and before). Nevertheless*, these Courts have *ridiculously* (or more rather, *purposely*), *not been able to understand,* the following:

Any "**Opinion-Evidence**" (to which would thereby, *demonstrate* **otherwise**, that Plaintiff (was *somewhere* provided) Mandate curative remedy by ***"any of the provisional forms,***" upon a Rule 12(b)(6) Dismissal Action, is **Very Clearly "Absent" and "Not There," in any 'Statements Via the Dismissal Opinion.'**

This "Lack of Evidence," pertaining to *mandate curative remedy provisions* for DCNJ [3:19-cv-05945],[Dkt 61] is an *absolute*, easy, Clear-Cut *observation* for All! Plaintiff cannot offer more Concise Testimony! *Furthermore*, the evidence of plaintiff's testimony by this Application and Appeal is easily visible per the Dismissal-Opinion itself, DCNJ 3:19-cv-05945], [Dkt. 61].

The 23-page Opinion-Decision from DCNJ [3:19-cv-05945], [Dkt. 61], (in **material** fact), *never provided* the Pro Se Plaintiff "*any form of curative remedy upon a Rule 12(b)(6) Dismissal Action*, which *is thereby*, ***Extraordinary, Exceptional Circumstance*** that Requires these Courts, by **Mandate and Binding Authority**, to **must provide**.

****Included in this Application*, is the "Actual Case Text" from [*Phillips v. County of Alleghany: 515 F3d 224 (3rd Cir. 2008)*] for your review. ****See:* [ATTACHMENT].**

Included in this Application, is the actual [Opinion-Dismissal] from DCNJ Case [3:19-cv-05945], [Dkt. 61], also for your review. ****See:* [ATTACHMENT].

Plaintiff has also set forth the specifics of the [*Phillips v. Cty Allegheny*] Mandate Law in her Writ of Certiorari, USSC No. **[22-7365]: **Argument I.** "[*Phillips v. - Allegheny*]," (pages 8-16); **Argument III.** "*Exceptional Circumstances for Appeal,*" (page 18); and **Argument IV.** "*DCNJ refused Mandate Law Provision,*" (page 18-20). ***Thereby***, Plaintiff *does not "re-supply"* that same information again, *herein,* this Application to Chief Justice Roberts, since it *can be readily retrieved* from the **USSC Case** Docket, No. **[22-7365]**.

In **CONCLUSION**, Plaintiff ***has demonstrated***, that the DCNJ Dismissal-Opinion [3:19-cv-05945], [Dkt, 61], was rendered in clear and obvious, "**Court Erroneous Error**" to the case merits, which caused *irreparable harm* to plaintiff party, and *does not serve to balance judicial equities* for the plaintiff or public at large.

Whereby, "no curative remedy, ***in any of the provisional forms,*** was ever provided Plaintiff upon the *Rule 12(b)(6) Dismissal," portion, (per the uniform-dismissal,*

with a remand reconsideration, and the Rule 12(b)(6), action).

Whereby, No Court, nor Either Defendant, ***"Can Testify to Demonstrate"*** *as to* ***"where within"*** *that Dismissal-Opinion,* at [Dkt. 61], *the Court provided Plaintiff provisional, mandate, curative remedy amendment, upon the Rule 12(b)(6) Dismissal, portion of the decision.*

The DCNJ *Court completely refused Plaintiff this Mandate* Law, Provision Action!

Therefore, Dismissal-Opinion DCNJ [3:19-cv-05945], [Dkt. 61], *cannot be "Justly Upheld," and, per Standard,* ***"cannot be officially dismissed"****.*

Additionally, DCNJ, Subsequent Case, **[3:20-cv-12336], *can neither be Upheld***; *whereby,* upon an *incorrect res judicata dismissal,* that *extended* from the *incorrect dismissal* per the initial Case, [3:19-cv-05945], [Dkt. 61].

THEREIN, Plaintiff respectfully requests, this Application to Chief Justice Roberts, be Granted; and *whereby,* this Application is Linked to Certiorari Case [**22-**

7362], **Writ of Certiorari;** thereby also, Grant Certiorari, thereto, Vacate these Judgements and Remand these cases back to the NJ District Court for amendment and proper continuance.

****See:* ATTACHMENT:**
1. [*Phillips v. County of Alleghany: 515 F3d 224 (3rd Cir. 2008)*]. {Actual, Case Text Provided}.

2. Dismissal-Opinion, DCNJ [3:19-cv-005945], [Dkt. 61].

CERTIFICATION

I certify under penalty of perjury that the foregoing is true and correct.

Respectfully Submitted,
/s/ Gina Russomanno
Date: May 16, 2023

U.S. Notary Public, State of New Jersey;
Commission: **#50148307**; *expires* 1/14/2026
Gina Russomanno

ATTACHMENT: (Case Text)

No. 06-2869
United States Court of Appeals. Third Circuit
[Phillips v. County of Allegheny]
515 F.3d 224 (3d Cir. 2008)
Decided Feb 5, 2008

No. 06-2869
United States Court of Appeals, Third Circuit

Phillips v. County of Allegheny

515 F.3d 224 (3d Cir. 2008)
Decided Feb 5, 2008

No. 06-2869.

Argued June 26, 2007.

Filed February 5, 2008.

Appeal from the United States District Court for the Western District of Pennsylvania, Arthur J. 225 Schwab, J. *225

Philip A. Ignelzi, Esq. (Argued), Michael A. Murphy, Esq., Ogg, Cordes, Murphy Ignelzi, Pittsburgh, PA, for Appellant.

Scott G. Dunlop, Esq., Stephen J. Poljak, Esq. (Argued), Alan E. Johnson, Esq., Marshall, Dennehey, Warner, Coleman Goggin, Pittsburgh, PA, for Appellees Northwest Regional Communications, Nussbaum, Tush, Craig, Deutsch, Ging, Zurcher, and Cestra.

Wendy Kobee, Esq., Michael H. Wojcik, Esq., Office of Allegheny County Law Department, Pittsburgh, PA, for Appellees County of Allegheny and Allegheny County 911.

Before: FISHER, NYGAARD, and ROTH, Circuit Judges.

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OPINION OF THE COURT

NYGAARD, Circuit Judge.

Jeanne Phillips ("Phillips"), individually and in her capacity as administrator of the estate of her son, decedent Mark Phillips, appeals the District Court's dismissal of her claims against various defendants for violations of 42 U.S.C. § 1983. The District Court, in deciding a motion under FED.R.CIV.P. 12(b)(6), was required to accept as true all factual allegations in the complaint and draw all inferences from the facts alleged in the light most favorable to Phillips. *Worldcom, Inc. v. Graphnet, Inc.*, 343 F.3d 651, 653 (3d Cir. 2003). Moreover, in the event a complaint fails to state a claim, unless amendment would be futile, the District Court must give a plaintiff the opportunity to amend her complaint. *Shane v. Fauver*, 213 F.3d 113, 116 (3d Cir. 2000). Because the District Court did not follow these dictates, we will reverse in part and remand.

I.

As is typical with state-created danger cases, the facts here are inescapably tragic. Beginning in October of 2003, Michael Michalski, who was employed by the Allegheny County 911 Call Center as a dispatcher, used his position to surreptitiously gain access to unauthorized information. Specifically, Michalski ran multiple searches of the 911 Call Center's computer network and databases in an attempt to locate the whereabouts of his former girl-friend, Gretchen Ferderbar, and her then-boyfriend, Mark Phillips. By October 19, 2003, Daniel Nussbaum, who was Michalski's supervisor, became aware of Michalski's actions and placed Michalski on a one-week suspension, but allowed Michalski to remain on the job for a week. The day before the suspension took effect, Michalski again used the 911 Call Center's computer network and databases 229 without *229 authorization to access personal

information regarding Mark Phillips. Michalski specifically accessed Mark Phillips' motor vehicle and license plate registrations in an effort to track and locate Mark Phillips' whereabouts.

During the evening hours of October 28, 2003, and the early morning hours of October 29, 2003, while on suspension, Michalski made numerous telephone calls to the 911 Call Center and spoke with Danielle Tush and Brian Craig. During those telephone calls, Michalski requested information that would assist him in locating Mark Phillips. Tush and Craig assisted Michalski, aware that they were accessing unauthorized personal information that had no relationship to their jobs as dispatchers for the 911 Call Center.

Gretchen Ferderbar contacted Nussbaum to inform him that Michalski had accessed the 911 Call Center's computer system in his position as a dispatcher to obtain information which enabled him to track and locate her and Mark Phillips at Mark Phillips' residence. After confirming that Michalski had improperly accessed information regarding Mark Phillips, Nussbaum met with Michalski at the 911 Call Center and confronted him about his repeated and unauthorized use of the 911 Call Center's computer system. Michalski admitted to Nussbaum that he had used the 911 Call Center's computer system to gain access to unauthorized information regarding Mark Phillips, and Nussbaum terminated Michalski's employment with the 911 Call Center.

Recognizing Michalski's "volatile appearance" and apparently concerned that Michalski might commit a violent act, Nussbaum placed two telephone calls. Nussbaum left either a voicemail message on Ferderbar's cellular telephone warning her to be careful and to be on guard for Michalski or Nussbaum warned her in person — the record is unclear. What is clear, however, is that Nussbaum also contacted the McCandless Township Police Department to notify them of Michalski's volatile state. Nussbaum made no effort, however, to contact the police departments of Shaler Township or the Borough of Carnegie where Ferderbar and Phillips, respectively, lived. Despite recognizing that Michalski had used the 911 Call Center's computer system to track Mark Phillips, Nussbaum made no effort to detain Michalski, to deter him from reaching Mark Phillips or to warn Mark Phillips of Michalski's potentially violent behavior.

Later that same day, Michalski contacted dispatchers at the 911 Call Center, including Tush, Craig, Leonard Deutsch, Ryan Ging, Susan Zurcher and Phillip Cestra, to explain the circumstances of his termination. Michalski indicated that he "had nothing left to live for" and that Ferderbar and Mark Phillips were going to "pay for putting him in his present situation." Despite this contact by Michalski, none of the dispatchers contacted either Ferderbar or Mark Phillips or the police departments of the Township of Shaler or the Borough of Carnegie. Later that afternoon, Michalski shot and killed Mark Phillips with a handgun. Michalski also shot and killed Ferderbar and her sister.

Jeanne Phillips, as Administratrix of her son's estate, sued numerous defendants, including Allegheny County, Allegheny County 911, 911 Supervisor Nussbaum and 911 Dispatchers Tush, Craig, Deutsch, Ging, Zurcher and Cestra, alleging violations of Mark Phillips' civil rights under 42 U.S.C. § 1983 and alleging, through pendant jurisdiction, a wrongful death action, and a survivorship action. In response, Appellees moved
230 to dismiss Phillips' claims *230 pursuant to Federal Rule 12(b)(6) and the district judge granted the motion.[1]

[1] Rather than filing its own motion to dismiss, Allegheny County filed a motion for stay of time to file a responsive pleading pending resolution of the motion to dismiss. Phillips did not oppose the motion to stay and the District Court granted it. After consideration of the papers, the District Court granted the motion to dismiss the complaint and in its

final order lifted the stay, granted the motion to dismiss in its entirety, and entered judgment for all defendants. The District Court declined to exercise supplemental jurisdiction over Plaintiff's remaining state law claims and transferred the case to the Court of Common Pleas of Allegheny County. Appellee Allegheny County 911 did not join in the motion to stay, and the District Court apparently never required it to file a responsive pleading, most likely because the District Court considered Allegheny County 911 to be part of or coextensive with either Northwest (which filed a motion to dismiss) or Allegheny County (which filed a motion to stay). Although the District Court closed the case by entering judgment for all defendants on all counts, the Court did not have before it a motion to dismiss from the County or Allegheny County 911. The parties on appeal do not mention this issue, presumably because it makes no difference in light of the fact that the Supreme Court's decision in *Monell v. Dep't of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) bars § 1983 suits against municipalities based on respondeat superior and Phillips failed to allege facts supporting an official pattern or practice claim giving rise to constitutional injury.

II.

We have jurisdiction pursuant to 28 U.S.C. § 1291. The standard of review for a dismissal under FED.R.CIV.P. 12(b)(6) is *de novo*. *Omnipoint Communications Enters., L.P. v. Newtown Township*, 219 F.3d 240, 242 (3d Cir. 2000). Because this standard requires us to review the District Court's order anew and without any deference, we pause here to re-evaluate our *de novo* standard of review in light of the Supreme Court's recent decision in *Bell Atlantic Corp. v. Twombly*, ___ U.S. ___, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).[2]

2 *See In re Paoli R.R. Yard PCB Litigation*, 221 F.3d 449, 461 (3d Cir. 2000) (" *de novo* means [that] . . . the court's inquiry is not limited to or constricted by the record . . . nor is any deference due the . . . conclusions [under review]").

After oral argument, we asked the parties to brief the *Twombly* decision's impact on pleading standards generally and on this appeal specifically. Few issues in civil procedure jurisprudence are more significant than pleading standards, which are the key that opens access to courts. In *Twombly*, the Supreme Court held that the plaintiffs failed to state a claim under § 1 of the Sherman Antitrust Act. The plaintiffs had alleged that defendants had engaged in parallel conduct, but had pleaded no set of facts making it plausible that such conduct was the product of a conspiracy. In reaching this decision, the Supreme Court rejected language that long had formed part of the Rule 12(b)(6) standard, namely the statement in *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), that a complaint may not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 45-46, 78 S.Ct. 99.

What makes *Twombly's* impact on the Rule 12(b)(6) standard initially so confusing is that it introduces a new "plausibility" paradigm for evaluating the sufficiency of complaints. At the same time, however, the Supreme Court never said that it intended a drastic change in the law, and indeed strove to convey the opposite impression; even in rejecting *Conley's* "no set of facts" language, the Court does not appear to have believed that it was really changing the Rule 8 or Rule 12(b)(6) framework. Therefore, our review
231 of how *231 *Twombly* altered review of Rule 12(b)(6) cases must begin by recognizing the § 1 antitrust context in which it was decided. *See e.g., Twombly*, 127 S.Ct. at 1963 ("We granted certiorari to address the proper standard for pleading an antitrust conspiracy through

allegations of parallel conduct."). Outside the § 1 antitrust context, however, the critical question is whether and to what extent the Supreme Court altered the general Rule 12(b)(6) standard.

Before *Twombly*, that standard had been well-established for decades. Our typical statement of the standard has instructed that:

> The applicable inquiry under Rule 12(b)(6) is well-settled. Courts are required to accept all well-pleaded allegations in the complaint as true and to draw all reasonable inferences in favor of the non-moving party. The inquiry is not whether plaintiffs will ultimately prevail in a trial on the merits, but whether they should be afforded an opportunity to offer evidence in support of their claims. Dismissal under Rule 12(b)(6) is not appropriate unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

In re Rockefeller Ctr. Props., Inc. Sec. Litig., 311 F.3d 198, 215-16 (3d Cir. 2002) (internal citations omitted). Another common formulation of the standard, which does not include the "no set of facts" language, reads:

> In evaluating the propriety of the dismissal, we accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief.

Pinker v. Roche Holdings Ltd., 292 F.3d 361, 374 n. 7 (3d Cir. 2002).

In determining how *Twombly* has changed this standard, we start with what *Twombly* expressly leaves intact. The Supreme Court reaffirmed that FED.R.CIV.P. 8 "`requires only a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to `give the defendant fair notice of what the . . . claim is and the grounds upon which it rests,'" and that this standard does not require "detailed factual allegations." *Twombly*, 127 S.Ct. at 1964 (quoting *Conley*, 355 U.S. at 47, 78 S.Ct. 99). The Supreme Court also reaffirmed that, on a Rule 12(b)(6) motion, the facts alleged must be taken as true and a complaint may not be dismissed merely because it appears unlikely that the plaintiff can prove those facts or will ultimately prevail on the merits. *See id.* at 1964-65, 1969 n. 8. The Supreme Court did not address the point about drawing reasonable inferences in favor of the plaintiff, but we do not read its decision to undermine that principle.

We find two new concepts in *Twombly*. First, in its general discussion of Rules 8 and 12(b)(6), the Supreme Court used certain language that it does not appear to have used before. The Court explained that "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's [Rule 8] obligation to provide the `grounds' of his `entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 127 S.Ct. at 1964-65 (alteration in original) (internal citations omitted). The Court explained that Rule 8 "requires a `showing,' rather than a blanket assertion, of entitlement to relief." *Id.* at 1965 n. 3. Later, the Court referred to "the threshold requirement of Rule 8(a)(2) that the `plain statement' possess enough heft to `sho[w] 232 that the pleader is entitled to relief.'" *Id.* *232 at 1966. The Court further explained that a complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 1965 n. 3.

Second, the Supreme Court disavowed certain language that it had used many times before — the "no set of facts" language from *Conley*. *See id.* at 1968. It is clear that the "no set of facts" language may no longer be used as part of the Rule 12(b)(6) standard. As the Court instructed, "[t]his phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has

been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Twombly*, 127 S.Ct. at 1969. We find that these two aspects of the decision are intended to apply to the Rule 12(b)(6) standard in general. *See Iqbal v. Hasty*, 490 F.3d 143, 157 n. 7 (2d Cir. 2007) ("[I]t would be cavalier to believe that the Court's rejection of the `no set of facts' language from *Conley* . . . applies only to section 1 antitrust claims.").

A.

While the Supreme Court's emphasis on Rule 8's requirement of a "showing" is new, the Court also expressly reaffirmed that Rule 8 requires only a short and plain statement of the claim and its grounds. *Twombly*, 127 S.Ct. at 1964, 1965 n. 3 (citing *Conley*, 355 U.S. at 47, 78 S.Ct. 99). Even the dissent in *Twombly* did not believe that the requirement of a Rule 8 "showing," by itself, had any other meaning. *See Twombly*, 127 S.Ct. at 1979 n. 6 (Stevens, J., dissenting) ("The majority is correct to say that what the Federal Rules require is a `showing' of entitlement to relief. Whether and to what extent that `showing' requires allegations of fact will depend on the particulars of the claim."). However, the *Twombly* decision focuses our attention on the "context" of the required short, plain statement. Context matters in notice pleading. Fair notice under Rule 8(a)(2) depends on the type of case — some complaints will require at least some factual allegations to make out a "showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Twombly*, 127 S.Ct. at 1964. Indeed, taking *Twombly* and the Court's contemporaneous opinion in *Erickson v. Pardus*, ___ U.S. ___, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007), together, we understand the Court to instruct that a situation may arise where, at some point, the factual detail in a complaint is so undeveloped that it does not provide a defendant the type of notice of claim which is contemplated by Rule 8. *See Airborne Beepers Video, Inc., v. AT T Mobility L.L. C.*, 499 F.3d 663, 667 (7th Cir. 2007). Put another way, in light of *Twombly*, Rule 8(a)(2) requires a "showing" rather than a blanket assertion of an entitlement to relief. We caution that without 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. *See Twombly*, 127 S.Ct. at 1965 n. 3.

B.

The second important concept we take from the *Twombly* opinion is the rejection of *Conley's* "no set of facts" language. The *Conley* language was problematic because, for example, it could be viewed as requiring judges to speculate about undisclosed facts. "This famous observation," the Court held, "has earned its retirement. The [`no set of facts'] phrase [in *Conley*] is best forgotten as an incomplete, negative gloss on an accepted pleading standard: Once a claim has been stated 233 adequately, it may be supported by *233 showing any set of facts consistent with the allegations in the complaint." *Twombly*, 127 S. Ct at 1969 n. 8. After *Twombly*, it is no longer sufficient to allege mere elements of a cause of action; instead "a complaint must allege facts suggestive of [the proscribed] conduct." *Id.* The Supreme Court appears to have rejected a "hyper-literal" understanding of *Conley's* "no set of facts" language. As the Supreme Court explained,

> [t]his "no set of facts" language can be read in isolation as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings. . . . On such a focused and literal reading of *Conley's* no set of facts, a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleading left open the possibility that a plaintiff might later establish some set of [undisclosed] facts to support recovery.

Twombly, 127 S.Ct. at 1968 (alteration in original). *See also* Geoffrey C. Hazard, *From Whom No Secrets Are Hid*, 76 Tex. L.Rev. 1665, 1685 (1998) (explaining that "literal compliance" with *Conley* "could consist simply of giving the names of the plaintiff and the defendant, and asking for judgment") (cited for related proposition in *Twombly*, 127 S.Ct. at 1969). **We have already recognized principles that preclude the hyper-literal reading of *Conley's* language rejected in *Twombly*.** [3]

> [3] **Recent cases in which we recited** the *Conley* language but did not apply it in the hyper-literal sense which *Twombly* rejects include **(in addition to those cited above), *Leuthner v. Blue Cross and Blue Shield of Ne. Pa.*, 454 F.3d 120, 129-131 (3d Cir. 2006)** (compare majority opinion and dissent), ***Pryor v. National Collegiate Athletic Ass'n*, 288 F.3d 548, 564-65 (3d Cir. 2002), and *Levy v. Sterling Holding Co.*, 314 F.3d 106, 119 (3d Cir. 2002).**

In rejecting the *Conley* language, the Supreme Court was careful to base its analysis in pre-existing principles. *See id.* at 1968-69 n. 8. The Court emphasized throughout its opinion that it was neither demanding a heightened pleading of specifics nor imposing a probability requirement. *See id.* at 1964, 1965, 1973 n. 14, 1974. Indeed, the Court cited *Twombly* just days later as authority for traditional Rule 8 and 12(b)(6) principles. *See Erickson*, 127 S.Ct. at 2200.

Thus, under our reading, the notice pleading standard of Rule 8(a)(2) remains intact, and courts may generally state and apply the Rule 12(b)(6) standard, attentive to context and an showing that "the pleader is entitled to relief, in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Twombly*, 127 S.Ct. at 1964. It remains an acceptable statement of the standard, for example, that courts "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." ***Pinker*, 292 F.3d at 374 n. 7. *See also Twombly*, 127 S.Ct. at 1969 n. 8 (citing as consistent with its rejection of the "no set of facts" language the statement that "if, in view of what is alleged, it can reasonably be conceived that the plaintiffs . . . could, upon a trial, establish a case which would entitle them to . . . relief, the motion to dismiss should not have been granted") (citation omitted).**

C.

The more difficult question raised by *Twombly* is whether the Supreme Court imposed a new "plausibility" requirement at the pleading stage that materially alters the notice pleading regime. *See id.* at 1988 (Stevens, J., dissenting) ("Whether
234 *234 the Court's actions will benefit only defendants in antitrust treble-damages cases, or whether its test for the sufficiency of a complaint will inure to the benefit of all civil defendants, is a question that the future will answer."). The answer to this question is difficult to divine. Numerous references to "plausibility" in *Twombly* seem to counsel reliance on the concept as a standard for notice pleading. The Court explained that a plaintiff must "nudge [his or her] claims across the line from conceivable to plausible" in order to survive a motion to dismiss. 127 S.Ct. at 1974. Relying on this, the Court of Appeals for the Tenth Circuit has held that

> the mere metaphysical possibility that some plaintiff could prove some set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that this plaintiff has a reasonable likelihood of mustering factual support for these claims.

Ridge at Red Hawk, L.L.C. v. Schneider, 493 F.3d 1174, 1177 (10th Cir. 2007). Yet, the *Twombly* decision repeatedly indicated that the Court was not adopting or applying a "heightened pleading standard." 127 S.Ct. at 1974 ("[W]e do not require heightened fact pleading of specifics, but only

enough facts to state a claim to relief that is plausible on its face."). We are not alone in finding the opinion confusing. *See e.g. Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007) ("These conflicting signals create some uncertainty as to the intended scope of the Court's decision.").

The issues raised by *Twombly* are not easily resolved, and likely will be a source of controversy for years to come. Therefore, we decline at this point to read *Twombly* so narrowly as to limit its holding on plausibility to the antitrust context. Reading *Twombly* to impose a "plausibility" requirement outside the § 1 context, however, leaves us with the question of what it might mean. "Plausibility" is related to the requirement of a Rule 8 "showing." In its general discussion, the Supreme Court explained that the concept of a "showing" requires only notice of a claim and its grounds, and distinguished such a showing from "a pleader's `bare averment that he wants relief and is entitled to it.'" *Twombly*, 127 S.Ct. at 1965 n. 3. While Rule 12(b)(6) does not permit dismissal of a well-pleaded complaint simply because "it strikes a savvy judge that actual proof of those facts is improbable," the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 1965.

The Supreme Court's *Twombly* formulation of the pleading standard can be summed up thus: "stating . . . a claim requires a complaint with enough factual matter (taken as true) to suggest" the required element. *Id.* This "does not impose a probability requirement at the pleading stage," but instead "simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of" the necessary element. *Id.*

D.

As Professor Edward H. Cooper has pointed out, all of the foregoing discussion can be reduced to this proposition: Rule 8(a)(2) has it right. *See* Edward H. Cooper, *Notice Pleading: The Agenda After Twombly*, 5 (January 2008) (unpublished manuscript, on file with the Administrative Office of the United States Courts, Rules Committee Support Office), *available at* www.uscourts.gov/rules/Agendabooks/st2008-01.pdf. This rule requires not merely a short and plain statement, but instead mandates a statement "showing that the pleader is entitled to relief." That is to say, there must be some showing sufficient to justify moving the case beyond the
235 pleadings to the next *235 stage of litigation. The complaint at issue in this case clearly satisfies this pleading standard, making a sufficient showing of enough factual matter (taken as true) to suggest the required elements of Phillips' claims.

III.

Under Section 1983, a plaintiff must plead a deprivation of a constitutional right and that the constitutional deprivation was caused by a person acting under the color of state law. *Kneipp v. Tedder*, 95 F.3d 1199, 1204 (3d Cir. 1996). Phillips alleges a deprivation of her son's right to life, liberty and bodily integrity under the Fourteenth Amendment to the Constitution. Individuals have a constitutional liberty interest in personal bodily integrity that is protected by the Due Process Clause of the Fourteenth Amendment. *D.R. v. Middle Bucks Area Vocational Technical School*, 972 F.2d 1364, 1368 (3d Cir. 1992) (citing *Ingraham v. Wright*, 430 U.S. 651, 672-74, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977)).

However, the Due Process Clause does not impose an affirmative obligation on the state to protect its citizens. *See DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189, 195-96, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989). The state-created danger theory operates as an exception to that general rule and requires plaintiffs to meet a four-part test: (1) the harm ultimately caused to the plaintiff was foreseeable and fairly direct; (2) the state-actor acted in willful disregard for the plaintiffs safety; (3) there was some relationship between the state and the plaintiff; and (4) the state-actor used his authority to create an opportunity for danger that otherwise would not

have existed.[4] *Bright v. Westmoreland County*, 443 F.3d 276, 281 (3d Cir. 2006) (quotations and footnotes omitted); *see also Rivas v. City of Passaic*, 365 F.3d 181, 194 (3d Cir. 2004). Here, the District Court dismissed Phillips' complaint under a Rule 12(b)(6) motion, based upon her failure to adequately plead the first, second and fourth elements of the test — that the harm was foreseeable, that the state actor's behavior "shocked the conscience," and that the defendant's conduct rendered Mark Phillips more vulnerable to danger. *See Bright*, 443 F.3d at 281; *Rivas v. City of Passaic*, 365 F.3d 181, 194 (3d Cir. 2004). Because the District Court erred in its analysis of several elements, we will discuss each in turn.

[4] Neither party addresses whether Nussbaum, Tush and Craig are indeed state-actors. The complaint alleges that these defendants were both employees of the Northwest Corporation and Allegheny County, and accepting this allegation as true, we will treat them as state-actors for purposes of this appeal.

A.

We begin with the fourth element, the requirement of an affirmative act, because our conclusion obviates the need to analyze the other three elements with respect to the claim against Nussbaum. State actors must use their authority to create an opportunity that otherwise would not have existed for the third-party's crime to occur. *Kneipp*, 95 F.3d at 1208. In *Bright*, we stressed that under the fourth element of a state-created danger claim,

> [l]iability . . . is predicated upon the states' *affirmative acts* which work to the plaintiffs detriment in terms of exposure to danger. It is the *misuse of state authority, rather than a failure to use it*, that can violate the Due Process Clause.

443 F.3d at 282 (emphasis added) (quoting *D.R. by L.R.*, 972 F.2d at 1374). The line between action and inaction may not always 236 *236 be clear. However, we have never found a state-created danger claim to be meritorious without an allegation and subsequent showing that state authority was affirmatively exercised in some fashion.

The allegations in the complaint against defendant Nussbaum do not sufficiently allege that he acted "affirmatively." Specifically, Phillips alleges that Nussbaum misused his authority by notifying the wrong authorities of the dangers Michalski posed to Mark Phillips. Also, Phillips alleges that Nussbaum misused his authority by deferring Michalski's employment suspension, with full knowledge that Michalski was using the 911 Call Center's computers to improperly access confidential information about Mark Phillips — information which he used to determine Mark Phillips' whereabouts, and to track his movements. This misuse of Nussbaum's authority, Phillips alleges, worked to Mark Phillips' detriment by exposing him to a continuing danger, and by allowing Michalski to harm Mark Phillips. Phillips' difficulty, however, is that these allegations, at their core, are omissions, not commissions — inactions rather than actions. To be sure, it has been sufficiently alleged that Nussbaum's performance worked to Mark Phillips' detriment in terms of exposure to danger. But, that is only a portion of our test.

Our jurisprudence requires that Phillips allege an affirmative action, rather than inaction or omission. *Bright*, 443 F.3d at 282 (citing *D.R. v. Middle Bucks Area Vocational Tech. Sch.*, 972 F.2d 1364, 1374 (3d Cir. 1992) (en banc)). Phillips' complaint does not make such an allegation against Nussbaum and, hence, no state created danger claim has been sufficiently pleaded.

Nonetheless, the District Judge erred when he dismissed the complaint without offering Phillips the opportunity to amend her complaint. It does not matter whether or not a plaintiff seeks leave to amend. We have instructed that if a complaint is

vulnerable to 12(b)(6) dismissal, a district court must permit a curative amendment, unless an amendment would be inequitable or futile. *Grayson v. Mayview State Hosp.*, 293 F.3d 103, 108 (3d Cir. 2002) (citing *Shane v. Fauver*, 213 F.3d 113, 116 (3d Cir. 2000)). In *Shane*, we held that when dismissing for a failure to state a claim:

> [W]e suggest that district judges expressly state, where appropriate, that the plaintiff has leave to amend within a specified period of time, and that application for dismissal of the action may be made if a timely amendment is not forthcoming within that time. If the plaintiff does not desire to amend, he may file an appropriate notice with the district court asserting his intent to stand on the complaint, at which time an order to dismiss the action would be appropriate.

Id. at 116 (quoting *Borelli v. City of Reading*, 532 F.2d 950, 951 n. 1 (3d Cir. 1976)). Because Phillips was not given such an opportunity, we will remand to allow her to decide whether to stand on her complaint or attempt an amendment so as to properly allege an affirmative act by defendant Nussbaum.

Turning to defendants Tush and Craig, we find that the complaint adequately alleges they acted affirmatively by providing Michalski with confidential 911 computer information about Mark Phillips that permitted Michalski to harm him. This allegation satisfies this element of our state-created danger analysis.

However, pleading an affirmative act by a state actor is not enough: the complaint must also plead a direct causal relationship between the
237 affirmative act and plaintiff's *237 harm. *Kaucher v. County of Bucks*, 455 F.3d 418, 432 (3d Cir. 2006). The direct causal connection between the affirmative actions of Tush and Craig (actively providing Michalski with requested confidential information about Phillips) and the ultimate harm to Mark Phillips is well pleaded. The complaint alleges that after Tush and Craig provided Michalski with confidential information, Michalski used that information to hunt down and kill Mark Phillips.

In sum, under this element, Phillips has sufficiently alleged that Tush and Craig undertook affirmative actions which worked to Mark Phillips' detriment by exposing him to danger and that there is a direct causal relationship between their harm and the defendants' actions.

We divert our discussion here to rectify an incorrect holding by the District Court on this point. As to this fourth element of our state-created danger analysis, the District Court determined that Phillips had failed to allege that defendants Tush and Craig "rendered Mark Phillips more vulnerable to danger." Specifically, the District Court noted that the complaint fails to allege where the shooting took place, and reasoned that if the shootings did not occur at Mark Phillips' residence, the unauthorized information provided by Tush and Craig did not render him vulnerable to danger. This was simply wrong. Where Mark Phillips was killed is not dispositive. At this preliminary pleading stage, it is reasonable to infer that Michalski could have gained relevant information at Mark Phillips' house as to his whereabouts, which could have directly assisted Michalski in stalking and killing him.

Such an unduly crabbed reading of the complaint denies Phillips the inferences to which her complaint is entitled. Based on the allegations in Phillips' complaint and reasonable inferences drawn from those allegations, Phillips may well be able to prove facts that would satisfy the four elements of the state-created danger analysis with respect to Tush and Craig. Therefore, Phillips has alleged the deprivation of an actual constitutional right, the substantive due process right to life and liberty under the Fourteenth Amendment and we will reverse the District Court's contrary determination.

B.

To properly allege a state-created danger claim, a plaintiff must additionally plead that the harm ultimately caused was a foreseeable and a fairly direct result of the state's actions. *Morse v. Lower Merion School Dist.*, 132 F.3d 902, 908 (3d Cir. 1997). As to foreseeability, the District Court initially determined that since there were "no allegations in the complaint that Michalski had a history of violence or, if he did, that any of the defendants were aware of this history of violence," the harm caused by Michalski was not foreseeable. We have never held that to establish foreseeability, a plaintiff must allege that the person who caused the harm had a "history of violence." Indeed, these types of cases often come from unexpected or impulsive actions which ultimately cause serious harm. For example, in *Kneipp v. Tedder*, 95 F.3d 1199 (3d Cir. 1996), it was alleged that when a police officer left an intoxicated woman outside alone late at night, ordinary common sense and experience (in this instance attributed to the officer) sufficiently informed the officer of the forseeability of harm to the woman. This information was sufficient to put him on notice that leaving the woman significantly enhanced the risk of harm to her. We concluded that the harm incurred by the woman in *Kneipp* was foreseeable. *Id.* at 1208. *238

Also, in *Rivas, supra.*, it was alleged that because the state actors were emergency medical technicians, their expertise equipped them with concrete information that a seizure victim should not be restrained. The information that they had was sufficient to put them on notice of the harm that would result if they failed to tell the police officers who arrived on the scene to assist the emergency medical technicians with the seizure victim. We concluded that, in the context of a state-created danger claim, the harm to the seizure victim was foreseeable. 365 F.3d at 194.

Conversely, in *Morse*, there was no allegation that the school district had sufficiently concrete information about the risk of violence presented by the perpetrator or other trespassers on school property to put the school district on notice of the harm that might result from a propped-open door. Therefore, when the school district employees, contrary to their own regulations, unlocked the door for the contractors to work, and the perpetrator of the violent incident entered through that open door, we held that the school district lacked sufficiently concrete information to consider its action a foreseeable cause of the harm to the teacher who was shot. As we explained, the harm was "too attenuated" because the only notice to the school district that the harm might occur was that the person who ultimately shot the teacher had been loitering in the hallways the week before the killing. *Morse*, 132 F.3d at 908-09. Knowledge of someone loitering, in and of itself, did not provide defendants with notice of a risk of violence. To adequately plead foreseeability then, we require a plaintiff to allege an awareness on the part of the state actors that rises to level of actual knowledge or an awareness of risk that is sufficiently concrete to put the actors on notice of the harm. Turning to the complaint here, such an awareness was clearly alleged as to Tush and Craig.

Tush and Craig were dispatchers at the Allegheny County 911 Call Center. Starting at paragraph 23, Phillips' complaint adequately establishes that Tush and Craig were actually aware based on concrete information of the risk of harm. First, paragraph 23 establishes that after being suspended from his job, Michalski called the 911 Call Center and spoke with Tush and Craig. Paragraph 24 alleges that Michalski requested information that would assist Michalski in locating Phillips. In paragraph 26, Phillips alleges that Tush and Craig assisted Michalski. The complaint additionally alleges (paragraph 27) that Tush and Craig were aware that the relationship between Ferderbar and Michalski had recently ended and that Michalski was in a distraught mental state as a result.[5]

5 At paragraph 27, the complaint alleges that "[d]efendants were aware that the relationship between Ferderbar and Michalski had recently ended and that Michalski was distraught over this." While this paragraph does not specifically aver that Tush and Craig were aware of this, they certainly are "defendants" in this case and the generic use of that term includes them.

At paragraph 40, the complaint alleges that Michalski again contacted the 911 Call Center and spoke with Tush and Craig, among others. During this conversation, Michalski allegedly indicated that he "had nothing left to live for" and that Ferderbar and Mark Phillips "were going to pay for putting him in his present situation." We view this allegation as putting Tush and Craig on notice that their actions in giving Michalski the unauthorized information about Mark Phillips significantly enhanced the risk of harm to him. 239 The alleged *239 statement by Michalski also made Tush and Craig actually aware of the risk to Mark Phillips. Therefore, the complaint adequately alleges foreseeability as to these two defendants and the District Court's determination to the contrary will be reversed.

The District Court noted that the only individuals who were alleged to have accessed Mark Phillips' personal information on the 911 computers were Tush and Craig. Therefore, the Court also dismissed the state-created danger counts against all other remaining defendants.

The gist of the allegations against the remaining individual defendants (Deutsch, Ging, Zurcher and Cestra) are found in paragraphs 40 and 41 of the complaint. Paragraph 40 alleges that Michalski contacted individual defendants Deutsch, Ging, Zurcher and Cestra and that Michalski explained the circumstances of his dismissal and also related that he "had nothing left to live for and that Ferderbar and Mark Phillips were going to pay for putting him in his present situation." Paragraph 41 alleges that the aforementioned defendants "made no effort to contact either Ferderbar, Mark Phillips or the police departments. . . ." These two paragraphs contain the only allegations that pertain to the remaining individual defendants specifically. Not only do these allegations fail to allege any affirmative actions, we further conclude that foreseeability was also not alleged against these remaining defendants.

The complaint also fails against these defendants because it has not been alleged that any actions on their part enhanced the risk of that harm. As the District Court indicated, these defendants were not accused of the actions attributed to defendants Tush and Craig or to defendant Nussbaum. No alleged actions of these remaining defendants could be viewed as enhancing the risk of harm to Mark Phillips and for that reason, "foreseeability" was not properly alleged here.

Once the foreseeability element of the state-created danger test has been determined, the complaint must also allege that the attack or harm is a "fairly direct" result of the defendant's acts. Such "directness" has been adequately pleaded against defendants Tush and Craig. Although this inquiry is unavoidably fact specific for each individual case, a distinction exists between harm that occurs to an identifiable or discrete individual under the circumstances and harm that occurs to a "random" individual with no connection to the harm-causing party. *See Morse*, 132 F.3d at 909 (to satisfy the first element "the harm visited on the plaintiffs [must be] more foreseeable than the random attack."). In *Estate of Smith v. Marasco*, 318 F.3d 497 (3d Cir. 2003), for example, we reversed the District Court's finding that the harm caused to the plaintiff was not foreseeable because it was not fairly direct. In so doing, we concluded that the fact that some of the police officers were aware of Smith's mental and medical conditions combined with the obviously stressful position they placed him in created the foreseeable possibility that Smith could be injured or killed,

especially with the knowledge that he was without his medication. *See Estate of Smith*, 318 F.3d at 507.

In *Morse*, however, we held as a matter of law, that defendants could not have foreseen that allowing construction workers to use an unlocked back door could also permit a mentally disturbed individual to enter and cause harm to an individual in the school. *See Morse*, 132 F.3d at 908. Put another way, the harm was not "fairly direct."

Here, the harm caused to Phillips was a fairly
240 direct result of Tush and *240 Craig's actions. First, unlike in *Morse*, Mark Phillips was not a random individual who "happened" to be in the path of danger. Rather, Mark Phillips was the new boyfriend of Michalski's former girlfriend. The complaint alleges that Michalski knew that Mark Phillips was Ferderbar's new boyfriend. The complaint also alleges that Tush and Craig knew that Michalski was distraught and that he had threatened to make Mark Phillips "pay." We conclude that this sufficiently pleads that the attack and murder of Mark Phillips was a "fairly direct" result of Tush and Craig's activities. Far from being unrelated to an intervening third party, for example, Mark Phillips was an individual directly affected by these defendants' decisions. It is reasonable to infer from the complaint that Michalski used the time, access and information given to him by the defendants to plan an assault on Mark Phillips and Ferderbar.

C.

Next, we turn to the question of whether Phillips has properly alleged that Tush and Craig acted with a degree of culpability that "shocks the conscience." *Bright*, 443 F.3d at 281. This determination depends largely on the circumstances of the case.

Our most recent discussion of the culpability element of the state-created danger test can be found in *Sanford v. Stiles*, 456 F.3d 298 (3d Cir. 2006), an opinion issued four months after our decision in *Bright*. In *Sanford*, the plaintiff was the mother of a 16-year-old boy who committed suicide a short time after he had spoken with a high school guidance counselor who had inquired as to the boy's welfare and whether he had any plans to harm himself. *Sanford*, 456 F.3d at 301. The boy, Michael Sanford, had sent a note to a former girlfriend in which he said "I've heard 3 different stories about you Ryan. The one I heard almost made me want to kill myself." *Id.* at 299. The former girlfriend went to a guidance counselor with the note, expressing concern for Michael, as well as indicating that she wanted him to stop "bugging" her. *Id.* After reviewing the note, a guidance counselor, Pamela Stiles, called Michael into her office and had a discussion with him to explore whether he was upset. *Id.* Stiles expressly asked Michael if he had any plans to harm himself, to which he responded "definitely not." *Id.* Despite giving this answer, about one week after this meeting, Michael killed himself.

Sanford then filed a claim against Stiles and the school district in which she alleged that the defendants were liable for Michael's death under a state-created danger theory. *Id.* 301. In affirming the district court's summary judgment in favor of the defendants, the *Sanford* court concluded that Sanford had not established that Stiles acted with the requisite degree of culpability to sustain a claim grounded on a state-created danger theory. In so concluding, we held that there is a continuum upon which the degree of culpability required to establish such a claim must be measured, relating to the circumstances of each case.

The time in which the government actors had to respond to an incident is of particular significance. For example, in *Sanford*, we stated that "[t]he level of culpability required to shock the conscience increases as the time state actors have to deliberate decreases." *Id.* at 306. We then concluded that although *intent* to cause harm must be found in a "hyper-pressurized environment," where officials are afforded the luxury of a greater degree of deliberation and have time to make

"unhurried judgments," *deliberate indifference* is sufficient to support an allegation of culpability. 241 *Id.* We further noted *241 "the possibility that deliberate indifference might exist without actual knowledge of a risk of harm when the risk is so obvious that it should be known." *Id.* Finally, where the circumstances require a state actor to make something less exigent than a "split-second" decision but more urgent than an "unhurried judgment," i.e., a state actor is required to act "in a matter of hours or minutes," a court must consider whether a defendant disregarded a "great risk of serious harm rather than a substantial risk." *Id.*

Therefore, under *Sanford*, three possible standards can be used to determine whether state action shocked the conscience: (1) deliberate indifference; (2) gross negligence or arbitrariness that indeed shocks the conscience; or (3) intent to cause harm. 456 F.3d at 306. Taking the allegations as true, the complaint leads us to conclude that defendants Tush and Craig were not acting in a "hyperpressurized environment." Instead, they had sufficient time to proceed deliberately. The complaint alleged that Michalski asked Tush and Craig for their help in obtaining confidential computer information on Ferderbar and Mark Phillips, assistance which they ultimately provided. Complaint paragraph 26. Also, at paragraph 40, Michalski telephones Craig and Tush (among others) and tells them that he has "nothing to live for" and that Ferderbar and Mark Phillips "would pay for putting him [Michalski] in this situation." There is no sense of urgency or emergency here either. The complaint does not allege any facts which would lead to an inference that Michalski was on his way to attack Phillips or that he told the dispatchers that he was at Phillips' house. The dispatchers here had no information which would have placed them in a "hyperpressurized environment." Hence, to "shock the conscience," they have to have behaved with deliberate indifference to the results of their actions.[6]

6 *Sanford* is specific: "We again clarify that in *any* state-created danger case, the state actor's behavior must always shock the conscience. But what is required to meet the conscience-shocking level will depend upon the circumstances of each case, particularly the extent to which deliberation is possible. In some circumstances, deliberate indifference will be sufficient. In others, it will not." 456 F.3d at 309.

Phillips has alleged sufficient facts, which, if proven, would demonstrate that these defendants were deliberately indifferent, establishing a level of culpability that was conscience-shocking. Accepting the allegations of the complaint as true, the complaint alleges that Tush and Craig were aware that Michalski was distraught over his break up with Ferderbar and yet they assisted him in getting confidential information on Ferderbar and Phillips. Tush and Craig did not have to make any hurried judgments in responding to Michalski's requests for assistance. Unlike most state-created danger cases, Tush and Craig did not have to make a decision at all; they could have refused Michalski's inappropriate requests and terminated his telephone call immediately.

Taking these allegations as true and drawing reasonable inferences therefrom, the complaint does sufficiently allege facts that these defendants not only foresaw the danger of harm their actions presented, but were deliberately indifferent in providing Michalski more confidential information.

The District Court determined that Phillips failed to allege that the defendants' behavior "shocked the conscience" and concluded as a matter of law that the alleged conduct of Tush and Craig in providing Michalski with unauthorized personal 242 information concerning Mark Phillips *242 from the 911 Call Center's network and databases does not rise to the required level of conscience shocking action. The District Court opined that no reasonable dispatcher in the position of these

dispatchers would have understood his or her conduct to be conscience-shocking. *Cf. Estate of Smith v. Marasco*, 430 F.3d 140, 154 (3d Cir. 2005). The District Court, again here, was wrong.

First, the District Court's conclusory reliance on *Estate of Smith* (*Smith II*), was inappropriate. The discussion in *Smith II* focused on the application of qualified immunity — not whether the plaintiff had appropriately alleged a state-created danger claim.[7] Although such a determination may be germane when deciding qualified immunity, it is not relevant to a determination at the 12(b)(6) dismissal stage. Second, our test for whether a plaintiff has alleged that an action "shocks the conscience" does not contain a requirement that the actor know his or her actions are "conscience-shocking." The District Court inappropriately imported an element of qualified immunity analysis into its state-created danger analysis.

[7] To decide if an individual government official is entitled to qualified immunity, a court must first "determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all." *Wilson v. Russo*, 212 F.3d 781, 786 (3d Cir. 2000) (citation omitted). If plaintiff has alleged such a deprivation, a court should thereafter "proceed to determine whether that right was clearly established at the time of the alleged violation." *Id.* Although it is important to resolve qualified immunity questions at the earliest possible stages of litigation, the importance of resolving qualified immunity questions early "is in tension with the reality that factual disputes often need to be resolved before determining whether defendant's conduct violated a clearly established constitutional right." *Curley v. Klem*, 298 F.3d 271, 277-78 (3d Cir. 2002). A decision as to qualified immunity is "premature when there are unresolved disputes of historical facts relevant to the immunity analysis." *Id.* at 278. Following *Wilson*, the District Court should have first decided whether Phillips has alleged the deprivation of a constitutional right. If he has, then, the Court should have determined whether that right was clearly established at the time the individual defendants allegedly violated that right.

D.

Finally, the state-created danger analysis requires that some relationship exist between the state and the plaintiff. The District Court did not analyze this element. To adequately allege such a relationship, a plaintiff need not plead facts that show the same "special relationship" basis for constitutional liability. *Morse*, 132 F.3d at 912. Instead, the relationship requirement of the third element "contemplates some contact such that the plaintiff was a foreseeable victim of the defendant's acts in a tort sense." *Morse*, 132 F.3d at 912. The relationship that must be established between the state and the plaintiff can be "merely" that the plaintiff was a foreseeable victim, individually or as a member of a distinct class. *See Rivas*, 365 F.3d at 202. Such a relationship may exist where the plaintiff was a member of a discrete class of persons subjected to the potential harm brought about by the state's actions. *Morse*, 132 F.3d at 913; *Rivas*, 365 F.3d at 197.

Here, Mark Phillips was a member of a discrete group (namely, Ferderbar and himself) that was subjected to harm by the defendant's actions. He was specifically targeted for retribution by Michalski. Complaint at paragraph 40. Lending more support to Phillips' ability to satisfy this element, Mark Phillips was also in a close personal relationship with Ferderbar, with whom Michalski was infatuated. Tush and Craig were
243 aware of this connection. *243 Moreover, Mark Phillips was specifically contemplated in Michalski's threatened violence. Complaint at paragraph 40. Therefore, Phillips has adequately alleged that there was a relationship between plaintiff and the state for purposes of the state-created danger theory.

E.

In sum, the District Court erred in dismissing the state-created danger claims against defendants Tush and Craig. Although we find no error in the dismissal of the state-created danger claims against defendants Nussbaum, Ging, Zurcher and Cestra, we will remand to the District Court with instructions to permit Phillips an opportunity to amend her claims against defendant Nussbaum to allege — if she can — an affirmative act by Nussbaum. We conclude that it would be futile to permit amendment as to the remaining defendants because we conclude that Phillips cannot plead foreseeability on their part.

IV.

Phillips' complaint additionally alleges violations of equal protection (Counts One and Two). Specifically, the complaint alleges that defendants' actions "were intentional and/or constituted willful disregard, gross recklessness and deliberate indifference for [Mark] Phillips' personal safety, well-being and right to life in derogation of the . . . Equal Protection clause . . . of the Fourteenth Amendment of the United States Constitution." The District Court recognized that Phillips raised a "class of one" equal protection claim, which is governed by the Supreme Court's holding in *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000), but dismissed the complaint because Phillips failed to allege that the Defendants intentionally treated Mark Phillips differently from other similarly situated persons.

In *Olech*, a municipality conditioned water service for a property on the plaintiff-owner's granting a 33-foot easement, even though it required only a 15-foot easement from every other property owner. *Id.* at 563, 120 S.Ct. 1073. The Supreme Court allowed the plaintiff to proceed on the class-of-one theory, recognizing claims where a "plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Id.* at 564, 120 S.Ct. 1073. The Supreme Court stated that allegations of irrational and wholly arbitrary treatment, even without allegations of improper subjective motive, were sufficient to state a claim for relief under equal protection analysis. *Id.* at 565, 120 S.Ct. 1073.

We have little jurisprudence discussing this "class of one" theory. Our only precedential opinion to discuss such claims held that

> Our court has not had the opportunity to consider the equal protection "class of one" theory at any length. From the text of *Olech* itself, however, it is clear that, at the very least, to state a claim under that theory, a plaintiff must allege that (1) the defendant treated him differently from others similarly situated, (2) the defendant did so intentionally, and (3) there was no rational basis for the difference in treatment.

Hill v. Borough of Kutztown, 455 F.3d 225 (3d Cir. 2006). So, to state a claim for "class of one" equal protection, a plaintiff must at a minimum allege that he was intentionally treated differently from others similarly situated by the defendant and that there was no rational basis for such treatment. *244

Although our jurisprudence does not discuss class-of-one equal protection claims in detail, the Court of Appeals for the Second Circuit has gone further and we find its analysis of pleading requirements for these type of claims persuasive. In *DeMuria v. Hawkes*, 328 F.3d 704 (2d Cir. 2003), the Court of Appeals for the Second Circuit reversed a district court's determination that DeMuria had failed to adequately plead a "class of one" equal protection violation. *DeMuria* involved a neighbor-to-neighbor dispute concerning water run-off. The plaintiffs had made a "general" and "relatively bare" allegation that the defendant police officer gave them a different standard of police protection than that typically afforded a resident [of the town] and alleged facts that the officer was in violation of his duty as an officer. *DeMuria*, 328 F.3d at 707. The District Court found the allegation that the police officer had treated the

DeMurias differently from other citizens to be insufficiently specific for the purpose of maintaining an equal protection claim because the DeMurias did not name any similarly situated individuals or identify any differently-handled disputes.

The Court of Appeals reversed and held that the Supreme Court's holding in *Olech* does not establish a requirement that a plaintiff identify in a complaint actual instances where others have been treated differently for purposes of equal protection. *Id.* at 707. The Supreme Court pointed out that "[i]ndeed, it appears that Olech herself did not `name names' in her complaint, but made the more general allegation that similarly situated property owners had been asked for a different easement." *Id.* The Supreme Court determined that such an allegation could "fairly be construed" as a sufficient allegation for stating an equal protection claim. *Id.* quoting *Olech*, 528 U.S. at 565, 120 S.Ct. 1073. In *DeMuria*, the plaintiffs made a general allegation that defendant Hawkes gave them a different standard of police protection than that typically afforded a resident of the town. The Court of Appeals found this general allegation to be sufficient and we agree with that determination.

Although *DeMuria* does relax the "class of one" pleading requirements by negating the need for specificity, an allegation of an equal protection violation still must contain a claim that a plaintiff has been treated differently from others who are similarly situated. The District Court here dismissed the complaint because it determined that Phillips had not alleged that the defendants treated the decedent differently from others similarly situated. Phillips' complaint does raise very general accusations. For example, Count One alleges claims against Allegheny County and the Allegheny County 911 Services. In Paragraph 45 of Count One, Phillips alleges that "the actions of the defendant were intentional and/or constituted willful disregard, gross recklessness and deliberate indifference for Phillips' personal safety, well-being and right to life in derogation of the Due Process and Equal Protection clauses of the Fourteenth Amendment." Count Two of the complaint alleges claims against the individual defendants Nussbaum, Tush, Craig, Deutsch, Ging, Zurcher and Cestra. In Paragraph 54, the complaint alleges that "the actions of the defendants were intentional and/or constituted willful disregard, gross recklessness and deliberate indifference for Phillips' personal safety, well-being and right to life in derogation of the Due Process Clause and Equal Protection clauses of the Fourteenth Amendment of the United States
245 Constitution." *245

Clearly, both of these counts specifically refer to the Equal Protection Clause. Furthermore, Paragraphs 50 and 58 specifically allege that the defendants' conduct deprived Phillips of his right to life in violation of the Equal Protection Clause. But, these general accusations and the invocation of the Equal Protection Clause are not enough.

We note that the *Olech* decision does not establish a requirement that a plaintiff identify in the complaint specific instances where others have been treated differently for the purposes of equal protection. *See DeMuria*, 328 F.3d at 707. Indeed, in reversing the dismissal of the complaint in *DeMuria*, the Court of Appeals indicated that while the plaintiffs in that case "face[d] a significant hurdle in finding evidence to prove their allegations of selective enforcement and unequal treatment, such concerns should not defeat their claim at the pleading stage." *Id.* Here, however, Phillips' complaint does not contain specific allegations that he was treated differently. The facts section of the Complaint (Paragraphs 17-42) reveals the egregious actions of various individuals at the 911 computer center — actions that are alleged to have led to Phillips' death. However, there is no allegation that these actions resulted in him being treated differently from other individuals — individuals whose personal information is in the 911 database. Paragraph 26 of the Complaint, for example, indicates that "Defendants Tush and Craig assisted Michalski

knowing that they were accessing unauthorized personal information that had absolutely no relationship to their functions as dispatchers and [sic] a 911 emergency call center." This allegation, however does not aver that Phillips was treated differently.

The Complaint, in Counts One and Two, does contain a specific reference to the Defendants' intentional actions, which resulted in a violation of the Phillips' rights under the Equal Protection Clause of the Fourteenth Amendment. *See e.g.* Complaint at Paragraphs 45, 54. Again, however, there is no allegation that Phillips was treated differently.

In opposition to a motion to dismiss in the District Court, and again before this Court on appeal, Phillips argues that her complaint alleges that, although other persons similarly situated had personal information accessed only for legitimate 911 purposes, [Mark Phillips] was discriminated against by the individual defendants in that they accessed his personal information to assist Michalski in his attempt to track and eventually kill him. We agree with the District Court's determination that, on the face of the complaint, no such allegation was made. Even under the less stringent pleading standards set forth in *Olech* and *DeMuria*, Phillips' class-of-one equal protection claim is inadequately pleaded. Nonetheless, dismissal at this stage was premature and hence, error.

As we indicated above, if a complaint is subject to a Rule 12(b)(6) dismissal, a district court must permit a curative amendment unless such an amendment would be inequitable or futile. *Alston v. Parker*, 363 F.3d 229, 235 (3d Cir. 2004). Moreover, we have instructed that a district court must provide the plaintiff with this opportunity even if the plaintiff does not seek leave to amend. *Id.* Accordingly, even when plaintiff does not seek leave to amend his complaint after a defendant moves to dismiss it, unless the district court finds that amendment would be inequitable or futile, the court must inform the plaintiff that he or she has leave to amend the complaint within a set period of time. *See Grayson*, 293 F.3d at 108. A district court may dismiss the action if the plaintiff does not submit an amended pleading within that time, 246 or if the plaintiff files *246 notice with the district court of his intent to stand on the complaint. *See Shane*, 213 F.3d at 116 (citation omitted).

The District Court's memorandum opinion indicates that it dismissed Phillips' Section 1983 claims with prejudice after receiving the parties' briefs on the motion to dismiss. There is no indication that the District Court informed Phillips that she would have leave to amend her complaint. Moreover, the memorandum opinion contained neither a finding that a curative amendment would be inequitable or futile, nor a finding that Phillips had failed to file a timely amended pleading or had filed notice of her intention to stand on the complaint. There is no indication that Phillips wishes to stand on the complaint for purposes of this appeal. Indeed, Phillips argues that, in the event we determine she has failed to state a claim, we remand the matter to the District Court with instructions to permit amendment. *See Batoff v. State Farm Ins. Co.*, 977 F.2d 848, 851 n. 5 (3d Cir. 1992).

V.

Standards of pleading are not the same as standards of proof. We express no opinion on whether Phillips will ultimately be able to prove her case. At this pleading stage, however, the District Court erred in several respects. Hence, we will reverse the District Court's dismissal of Tush, Craig and Nussbaum, and will remand with instructions to the District Court to permit Phillips an opportunity to amend her state-created danger claims against Nussbaum. We will affirm the District Court's dismissal of the remaining defendants.

Although we conclude that the District Court did not err in its analysis of Phillips' equal protection claim, we will remand this claim as well, once

again instructing the District Court to provide Phillips an opportunity to amend her complaint.

ROTH, Circuit Judge, Concurring:

I concur in the opinion of the majority. I write separately to note a potential issue that could be created by broad application of the "class of one doctrine."

In the context of a substantive due process claim, the Supreme Court has established that to recover a plaintiff must establish that the behavior of the government "shocks the conscience" of a reasonable observer. *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). That is, the government's behavior must be not just arbitrary and capricious, but shocking.

In contrast, a plaintiff proceeding under an equal protection "class of one" theory may recover if she can establish that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000). Phillips is proceeding here on such a theory.

A broad reading of *Olech* could allow any plaintiff with an insufficiently shocking due process claim to resurrect her constitutional claim by repleading her case as representing a "class of one" victimized by the particular government action at issue.[8] I do not believe that the Supreme Court intended *Olech* to undermine *Lewis* in this 247 fashion, and I would urge the District *247 Court to be mindful of this issue as it conducts further proceedings in this case.

[8] On the facts of Lewis itself, the representatives of the deceased motorcycle passenger could argue that while the officer's actions in beginning a high speed pursuit might not shock the conscience, the officer did treat that particular motorcyclist differently than other similarly situated motorcyclists and that there was no rational basis for such a decision.

ATTACHMENT

Dismissal-Opinion, **District Court of New Jersey,** Case No. [3:19-cv-05945], [Dkt.61].

Case 3:19-cv-05945-FLW-DEA, Document 61, Filed 05/18/20, Page 1 of 23, PageID: 952-974

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

GINA RUSSOMANNO, Plaintiff, v. SUNOVION PHARMACEUTICALS and IQVIA INC., Defendants.	Civil Action No. 19-5945 (FLW) **OPINION**

WOLFSON, Chief Judge:

Plaintiff Gina Russomanno ("Plaintiff"), proceeding *pro se*, brings this employment action against her former employer, Sunovion Pharmaceuticals Inc. ("Sunovion"), and IQVIA, Inc., ("IQVIA"), (cumulatively, "Defendants"). Pending before the Court are the following: (1) each Defendant's separate Motion to dismiss Plaintiff's Complaint, wherein Plaintiff alleges a claim for "wrongful termination, without real just cause, by Covenant of Good Faith (and fair dealing) Exception"; and (2) Plaintiff's Motion for Reconsideration of a prior Court Order that denied her request for remand. For the reasons expressed herein, Defendants' Motions to Dismiss are **GRANTED**, and Plaintiff's Motion for reconsideration is **DENIED**.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The following facts are drawn from the Complaint and are assumed to be true for the purpose of this Motion.[1] On August 15, 2016, Plaintiff received a formal written job offer from

[1] I note that the Plaintiff attaches voluminous exhibits to the Complaint, including various signed agreements, that this Court can consider on a Motion to dismiss. *Schmidt v. Skolas*, 770 F.3d 241, 249 (3d Cir. 2014) ("To decide a motion to dismiss, courts generally consider only the

Sunovion for a position as a Therapeutic Specialist (the "Letter Offer"). Complaint ("Compl."), Ex. B. The Letter Offer, which Plaintiff signed and accepted on that same date, included information about compensation and training associated with the position of a Therapeutic Specialist. *Id.* In addition, the first page of the Letter Offer explained that Plaintiff would be hired on an at-will basis: "[p]lease note that neither this letter nor any other materials constitute a contract of employment with Sunovion; your employment with Sunovion will be on an at-will basis." *Id.*

On August 24, 2016, Plaintiff signed an "Invention, Non-Disclosure, Restricted Activity and Personal Conduct Agreement" (the "NDA"). The NDA contained a non-compete clause, and various terms and provisions that Plaintiff was required to adhere to during the course of her tenure at Sunovion. *Id.* Moreover, the NDA reiterated Plaintiff's at-will status under a section entitled "No Employment Contract": "I understand that this Agreement, alone or in conjunction with any other document agreement whether written or oral, does not constitute a contract of employment and does not imply that [my] employment will continue for any period of time." *Id.*

As a Therapeutic Specialist, Plaintiff conducted "customer engagement" telephone calls, and sold pharmaceutical products to consumers who resided in New Brunswick, New Jersey. *Id.*, Ex. B. In performing these tasks, Plaintiff alleges that she was required to meet sales quotas each quarter, and Sunovion assessed her performance based on data that it received from IQVIA. *Id.* at I, 13. While she worked at Sunovion, Plaintiff alleges that she maintained "acceptable goal attainment percentages," ranging from "80%" to "over 85%." *Id.* at 2. Nevertheless, Plaintiff avers that her manager, Jenna Yackish ("Ms. Yackish"), placed her on a performance

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allegations contained in the complaint, exhibits attached to the complaint and matters of public record.").

improvement plan ("PIP") for failing to reach 100% of her quotas for eight consecutive quarters.[2] *Id.* at 13.

The PIP was implemented with a timeline that spanned from October 24, 2018 to January 8, 2019. *Id.*, Ex., B. However, the plan's first paragraph informed Plaintiff that, "[a]t any time either during or after the PIP's conclusion . . . management may make a decision about your continued employment, up to and including termination[.]" *Id.* Moreover, a similar warning was contained in the last section of the plan, under the heading "Consequences of Continued Non-Performance": "[f]ailure to comply with the expectations [herein] and to sustain this performance . . . may result in further disciplinary action, up to and including termination. All employment at Sunovion is at will. Employees are subject to discharge at any time with or without cause or notice." *Id.*

While the PIP was in effect, Ms. Yackish held progress "updates" with Plaintiff once a week. *Id.* at 17. During their meetings, Plaintiff alleges that Ms. Yackish made the following statements which are characterized as "oral agreements" in the Complaint: "[w]e don't want to let you go"; "[w]e want you to succeed"; "I want you to succeed"; "[d]o you want this. If you do then I want this for you"; "[t]his is going to be your quarter, I can feel it"; "I want this for you"; "[t]he PIP can be extended"; "[t]he PIP doesn't necessarily mean termination. It can always be extended if you still don't make goal." *Id.* Despite these encouraging remarks, however, according to Plaintiff, Ms. Yackish "shut[] [her] down" on "field rides" and "debat[ed] Plaintiff's action[s] toward success." *Id.* Thereafter, Plaintiff alleges that she was terminated

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[2] An Exhibit attached to the Complaint indicates that Plaintiff fell short of her sales goals, as she attained the following percentages during the first eight quarters of her tenure at Sunovion: 97.75%; 79.73%; 89.19%; 93.52%; 99.05%; 84.91%; 84.33%; 87.57%. *See* Compl., Ex. B.

from Sunovion on January 4, 2019, before "the documented PIP end date" on January 9, 2019. *Id.* at 5.

Prior to her termination, Plaintiff alleges that she raised a concern about the calculation of her sales quotas to Sunovion. *Id.* at 4, 16. In particular, according to Plaintiff, she informed Sunovion that her geographic market, *i.e.*, New Brunswick is a "long-standing, unchanged" region with a "conforming footprint," unlike other cities in the tri-state area which, for example, had "undergone multiple realignment shifts in footprint" that "affect the formula settings for sales history, market potential, and volumes[.]" *Id.* at 4. For reasons that are unclear from the Complaint, Plaintiff alleges that these geographical differences had an impact on her performance. *Id.* at 4, 16. However, Plaintiff states that Sunovion investigated these alleged matters, and concluded that the quota calculations for her geographic market were, in fact, accurate.

Separate and apart from Sunovion's own alleged miscalculations, Plaintiff alleges that it received inaccurate statistical data from IQVIA that impacted Sunovion's assessment of her job performance. *Id.* at II-IV. In particular, Plaintiff alleges that on January 4, 2019, Sunovion held a conference call with its "salesforce" to explain that IQVIA had furnished inaccurate data to Sunovion during the prior two years. *Id.* at II, 6. However, rather than discuss these alleged issues with her, Plaintiff alleges that Sunovion placed her on a PIP with the intention of terminating her, "to avoid . . . addressing how IQVIA['s] negligent reporting and other Sunovion miscalculations" impacted her performance in her assigned market of New Brunswick. *Id.* at III-IV, 3.

On January 11, 2019, Plaintiff filed a Complaint in the Superior Court of New Jersey, Law Division, Monmouth County, asserting a claim for "wrongful termination, without real just

cause, by Covenant of Food Faith (and fair dealing) Exception," against Sunovion and IQVIA. On February 15, 2019, Defendants removed that case to this Court, on the basis of diversity jurisdiction pursuant to 28 U.S.C. § 1441(a). On February 22, 2019, Plaintiff filed a motion to remand that this Court denied, finding that Defendants' removal of this action was proper. On October 3, 2019, Plaintiff moved for reconsideration of the Court's prior remand denial Order. On October 11, 2019, Defendants filed separate motions to dismiss Plaintiff's Complaint for the failure to state a viable cause of action. I first address Plaintiff's motion for reconsideration.

II. MOTION FOR RECONSIDERATION

In the prior Order, the Court denied Plaintiff's motion to remand for lack of diversity, finding that Defendants had satisfied their burden of establishing complete diversity, on the basis of sworn certifications that each submitted. Indeed, in those certifications, Defendants attested as follows: (1) Sunovion is incorporated in Delaware, with its principal place of business in Massachusetts; and (2) IQVIA, too, is a Delaware corporation that maintains "dual corporate headquarters" in Connecticut and North Carolina, and the "key business leaders" for the "business at issue" are employed in Pennsylvania. In moving for reconsideration, Plaintiff argues that the Court overlooked various documents which reveal that IQVIA maintains a principal place of business, or a "nerve center," in this State.

Fed. R. Civ. P. 59(e) and Local Civil Rule 7.1 govern motions for reconsideration. In particular, pursuant to Local Civil Rule 7.1(i), a litigant that is moving for reconsideration is required to "set[] forth concisely the matter or controlling decisions which the party believes the Judge or Magistrate Judge has overlooked[.]" L. Civ. R. 7.1(i). Moreover, motions for reconsideration are considered "extremely limited procedural vehicle[s]." *Resorts Int'l v. Greate Bay Hotel & Casino*, 830 F. Supp. 826, 831 (D.N.J. 1992); *see also Leja v. Schmidt Mfg.*, 743 F.

Supp. 2d 444, 456 (D.N.J. 2010). Indeed, requests seeking reconsideration "are not to be used as an opportunity to relitigate the case; rather, they may be used only to correct manifest errors of law or fact or to present newly discovered evidence." *Blystone v. Horn*, 664 F.3d 397, 415 (3d Cir. 2011) (citing *Howard Hess Dental Labs., Inc. v. Dentsply Int'l Inc.*, 602 F.3d 237, 251 (3d Cir. 2010)); *see also N. River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995).

A "judgment may be altered or amended [only] if the party seeking reconsideration shows at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion for summary judgment; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." *Blystone*, 664 F.3d at 415 (quotations omitted). "A party seeking reconsideration must show more than a disagreement with the Court's decision, and 'recapitulation of the cases and arguments considered by the court before rendering its original decision fails to carry the moving party's burden.'" *G-69 v. Degnan*, 748 F. Supp. 274, 275 (D.N.J. 1990) (citations omitted). That is, "a motion for reconsideration should not provide the parties with an opportunity for a second bite at the apple." *Tischio v. Bontex, Inc.*, 16 F. Supp. 2d 511, 533 (D.N.J. 1998). Rather, a difference of opinion with the court's decision should be dealt with through the appellate process. *Florham Park Chevron, Inc. v. Chevron U.S.A., Inc.*, 680 F. Supp. 159, 162 (D.N.J. 1998).

In seeking reconsideration, Plaintiff disputes the Court's previous finding of complete diversity, and argues that IQVIA is a New Jersey citizen. As a threshold matter, however, I note that Plaintiff does not advance valid grounds for reconsideration, such as a change in law, new evidence, or manifest error. Instead, she relies upon the same documents that this Court

considered and rejected in the previous Order. Therefore, while Plaintiff's request can be denied on these grounds alone, *see Oritani Sav. & Loan Ass'n v. Fidelity & Deposit Co.*, 744 F. Supp. 1311, 1314 (D.N.J. 1990) (explaining that "[a] motion for reconsideration is improper when it is used to ask the Court to rethink what is had already thought through—rightly or wrongly") (internal quotations and citation omitted), the consideration of Plaintiff's new arguments would not otherwise change the outcome of this action. For Plaintiff's benefit, I will once again explain my rulings.

As explained in the previous Order, to establish jurisdiction under 28 U.S.C. § 1332(a), the amount in controversy must exceed $75,000, and there must be complete diversity of citizenship among the adverse parties. As to the latter requirement, each plaintiff must be a citizen of a different state from each defendant. *See Owen Equip. and Erection Co. v. Kroger*, 437 U.S. 365 (1978). Courts determine the citizenship of a corporation on the basis of the company's "place of incorporation" and its "principal place of business." *See* 28 U.S.C. §1332(c)(1). Moreover, a corporation's principal place of business is its "nerve center," or the location from which "a corporation's high level officers direct, control, and coordinate the corporation's activities." *Hertz Corp. v. Friend*, 559 U.S. 77, 80, 93 (2010) (explaining that, "in practice [the nerve center] should normally be the place where the corporation maintains its headquarters . . . . "); *see also Brooks-McCollum v. State Farm Ins. Co.*, 376 Fed. Appx. 217, 219 (3d Cir. 2010).

Here, as in her previous remand motion, Plaintiff attaches "New Jersey Business Gateway" status reports for IQVIA and IQVIA Medical Communications and Consulting, Inc. ("IQMCC"), a non-defendant. In particular, the report for IQVIA shows that it is registered as a "Foreign Profit Corporation" in this State, with a "Home Jurisdiction" of Delaware. Moreover,

the IQVIA report lists two separate addresses, including an out-of-state "Main Business Address" in Connecticut, and a "Principal Business Address" in New Jersey. In addition, and unlike the documents for IQVIA, the IQMCC report specifies a "Domestic Profit Corporation" registration status, with a New Jersey "Home Jurisdiction" and "Main Business Address." Based on these records, Plaintiff again contends that IQVIA operates a principal place or business in New Jersey. In that connection, because she resides in this State, Plaintiff maintains that the Court erred in finding that the parties to this action are diverse. However, Plaintiff's position lacks merit.

At most, Plaintiff has shown that IQVIA maintains an office in this State in adherence to the regulations governing foreign corporate entities. *See* N.J.S.A. § 14A:4-1(1). However, as I explained in the previous Order, registering as a "Foreign Profit Corporation" to conduct business in this State does not suffice to establish New Jersey citizenship. *See e.g.*, *Display Works, LLC v. Bartley*, 182 F. Supp. 3d 166, 179 (D.N.J. 2016) (holding that "New Jersey's registration and service statutes do not constitute consent to general jurisdiction[.]"); *McClung v. 3M Co.*, No. 16-2301, 2018 U.S. Dist. LEXIS 220393, at *12 (D.N.J. July 5, 2018) (finding that the "mere registration of a business does not amount to consent to general jurisdiction in New Jersey."); *Boswell v. Cable Servs. Co.*, No. 16-4498, 2017 U.S. Dist. LEXIS 100708, at *14 (D.N.J. June 29, 2017) (concluding that the defendant's "registration to do business in New Jersey does not mean it consented to general jurisdiction in New Jersey."). Thus, to the extent that Plaintiff raises this position, these grounds fail to provide an appropriate basis for reconsideration.

Moreover, Plaintiff's reliance on the "Domestic Profit Corporation" registration status for IQMCC is misplaced. Indeed, because IQMCC is not named as a defendant in this action, its

state of incorporation is irrelevant for jurisdictional purposes. And, regardless of whether some kind of affiliation exists, in contrast to Plaintiff's position, the Court cannot find that IQVIA operates a principal place of business in this State, based on the mere presence of a related corporation such as IQMCC. *See Mellon Bank, N.A. v. Metro Communications, Inc.*, 945 F.2d 635, 643 (3d Cir. 1991) ("[T]here is a presumption that a corporation, even when it is a wholly owned subsidiary of another, is a separate entity."). Rather, imputing IQMCC's principal place of business to IQVIA, as Plaintiff purports to do, requires her to demonstrate that the entities are alter egos. However, Plaintiff has not conducted the required fact intensive examination[3] to support such a finding, either in her initial remand motion or in the current reconsideration motion. Thus, IQMCC's presence in this State, too, fails to provide proper grounds for reconsideration.[4]

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[3] The Third Circuit has set forth several factors in determining whether entities are alter egos, including: "gross undercapitalization . . . 'failure to observe corporate formalities, non-payment of dividends, the insolvency of the debtor corporation at the time, siphoning of funds of the corporation by the dominant stockholder, non-functioning of other officers or directors, absence of corporate records, and the fact that the corporation is merely a facade for the operations of the dominant stockholder or stockholders.'" *Bd. of Trs. v. Foodtown, Inc.*, 296 F.3d 164, 172 (3d Cir. 2002) (citation omitted). Rather than address each of these elements, Plaintiff emphasizes that IQVIA and IQMCC share a corporate executive named Eric Sherbert. However, as I explained in the previous Order, an overlapping board of directors, with nothing more, does not suffice to establish a corporate alter ego. *See United States v. Bestfoods*, 524 U.S. 51, 69 (1998) ("It is a well-established principle [of corporate law] that directors and officers holding positions with a parent and its subsidiary can and do 'change hats' to represent the two corporations separately, despite their common ownership."); *see also Leo v. Kerr-McGee*, No. 93-1107, 1996 U.S. Dist. LEXIS 6698, at *6 (D.N.J. May 10, 1996) ("A significant degree of overlap between directors and officers of a parent and its subsidiary does not establish an alter ego relationship.").

[4] As explained in greater detail below, even if IQVIA operates a principal place of business in this State, Plaintiff's failure to assert connections between IQVIA and her wrongful termination, particularly since there are a dearth of factual allegations as to IQVIA, support the fact that Plaintiff has fraudulently joined IQVIA in this action. *See Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 302 (2d Cir. 2004) ("The doctrine of fraudulent joinder is meant to prevent plaintiffs from joining non-diverse parties in an effort to defeat federal [diversity] jurisdiction."); *see, e.g., Sussman v. Capital One, N.A.*, 14-01945, 2014 U.S. Dist.

Accordingly, the Court's findings in the prior remand Order remain unchanged. I proceed to address whether Plaintiff has alleged a cognizable wrongful termination claim against Sunovion and IQVIA.

III. MOTION TO DISMISS

A. Standard of Review

Under Fed. R. Civ. P. 12(b)(6), a complaint can be dismissed for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In reviewing a dismissal motion, courts "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008) (citation and quotations omitted). Under this standard, the factual allegations set forth in a complaint "must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Indeed, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "[A] complaint must do more than allege the plaintiff's entitlement to relief. A complaint has to 'show' such an entitlement with its facts." *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009).

However, Rule 12(b)(6) only requires a "short and plain statement of the claim showing that the pleader is entitled to relief" in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555. The complaint must include "enough factual matter (taken as true) to suggest the required element. This does not impose a probability requirement at the pleading stage, but instead simply calls for enough facts

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LEXIS 151866, at *19 (D.N.J. Oct. 24, 2014) (finding fraudulent joinder where there were "simply no allegations" in the plaintiff's complaint to substantiate a claim against a named defendant). In that connection, IQVIA's citizenship could be disregarded for diversity purposes.

to raise a reasonable expectation that discovery will reveal evidence of the necessary element." *Phillips*, 515 F.3d at 234 (citation and quotations omitted); *Covington v. Int'l Ass'n of Approved Basketball Officials*, 710 F.3d 114, 118 (3d Cir. 2013) ("[A] claimant does not have to set out in detail the facts upon which he bases his claim. The pleading standard is not akin to a probability requirement; to survive a motion to dismiss, a complaint merely has to state a plausible claim for relief.") (quotations and citations omitted).

In sum, under the current pleading regime, when a court considers a dismissal motion, three sequential steps must be taken: first, "it must take note of the elements the plaintiff must plead to state a claim." *Connelly v. Lane Constr. Corp.*, 809 F.3d 780, 787 (3d Cir. 2016) (citation, quotations, and brackets omitted). Next, the court "should identify allegations that, because they are no more than conclusions, are not entitled to the assumption of truth." Id. (citations and quotations omitted). Lastly, "when there are well-pleaded factual allegations, the court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Id. (citations, quotations and brackets omitted); *Robinson v. Family Dollar, Inc.*, 679 Fed. Appx. 126, 132 (3d Cir. 2017).

B. SUNOVION

i. Wrongful Termination

In the Complaint, Plaintiff asserts a claim for "wrongful termination, without real just cause, by Covenant of Good Faith (and fair dealing) Exception."[5] *See* Compl. In support, Plaintiff avers that "[t]he covenant of good faith means that the employer and employee have to

[5] In her opposition brief, Plaintiff confirms that her wrongful termination claim is pled in contract, not tort. Plaintiff's Opp., at 1 ("Plaintiff entered original complaint for wrongful termination by Covenant of Good Faith (and Fair Dealing) Exception as per New Jersey state law."). In addition, on the "Civil Case Information Statement" that accompanies her Complaint, Plaintiff identifies this action as arising under common law, as opposed to the "Conscientious Employees Protection Act" or Law Against Discrimination LAD." *See* Notice of Removal, Exhibit A.

be fair and forthright with each other, and employers must have 'just cause' to fire someone." Plaintiff's Opp., at 10. Despite these obligations, Plaintiff argues that Sunovion created "a new rule under new management" to "fabricate[]" a reason for her termination. *Id.* However, despite acknowledging that her "poor performance" and "missed" sales quotas were based on inaccurate data from IQVIA, Sunovion, Plaintiff contends, did not recalculate her performance measures, and instead, terminated her without "legitimate just cause." *Id.* at 10, 14-16.

At the outset, I cannot discern whether Plaintiff has alleged two separate causes of action in the Complaint. Indeed, Plaintiff appears to assert a wrongful termination claim, because, according to her, she was discharged from Sunovion without just cause. In addition, as a separate and independent basis, Plaintiff seems to allege that Sunovion breached the covenant of good faith and fair dealing by fabricating a basis for her termination. Nevertheless, even if the Court, out of an abundance of caution, construed Plaintiff's Complaint to plead two different causes of action, both claims fail for the same reason—she has not alleged the existence of an express or implied contractual obligation that Sunovion violated.

Under New Jersey law, it is axiomatic that "employment is presumed to be 'at will' unless an employment contract states otherwise." *Varrallo v. Hammond, Inc.*, 94 F.3d 842, 845 (3d Cir. 1996) (citing *Witkowski v. Thomas J. Lipton, Inc.*, 136 N.J. 385, 396 (1994)); *see Witkowski*, 136 N.J. at 397 ("An employment relationship remains terminable at the will of either an employer or employee, unless an agreement exists that provides otherwise."); *McCrone v. Acme Mkts.*, 561 Fed. Appx. 169, 172 (3d Cir. 2014) ("While exceptions to this doctrine do exist, [t]oday, both employers and employees commonly and reasonably expect employment to be at-will, unless specifically stated in explicit, contractual terms.") (quotations and citation omitted).[6]

[6] For purposes of completeness, I note that there are certain legislative and judicial exceptions to the at-will rule, neither of which Plaintiff has alleged here. For example, an

In an at-will relationship, a worker can be terminated "for good reason, bad reason, or no reason at all." *Witkowski*, 136 N.J. at 397 (citing *English v. College of Medicine & Dentistry*, 73 N.J. 20, 23 (1977)); *see Velantzas v. Colgate-Palmolive Co.*, 109 N.J. 189, 191 (1988) ("An employer can fire an at-will employee for no specific reason or simply because an employee is bothering the boss.").

In the absence of an express agreement, a plaintiff can assert a wrongful termination claim on the basis of an implied contract. For instance, in *Woolley v. Hoffmann-La Roche*, 99 N.J. 284, 285 (1985), the NJ Supreme Court held that barring "a clear and prominent disclaimer," a handbook or manual can create an "implied promise" to refrain from terminating an employee unless just cause exists. *Id.* at 285-86. The Court explained that an actionable breach can arise from an at-will termination when an employer hires an employee without an "individual employment contract," and "widely distribute[s,] among a large workforce," a handbook that includes "definite and comprehensive" provisions regarding "job security." *Id.* at 294, 302; *see Witkowski*, 136 N.J. at 396. Such provisions, the Court held, include those which list specific examples of "terminable offenses," or designate "a set of detailed procedures" to implement before an employee is discharged. *See Woolley*, 99 N.J. at 308; *see Witkowski*, 136 N.J. at 394.

In addition to corporate-wide policies, a verbal promise or representation to an individual employee can serve as grounds for an implied contract. For example, in *Shebar v. Sanyo Bus. Sys. Corp.*, 111 N.J. 276 (1988), the plaintiff was hired on an at-will basis. *Id.* However, after the

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employer cannot discharge "a worker for a discriminatory reason." *Witkowski*, 136 N.J. at 398 (citing N.J.S.A. 10:5-1 to -28). In addition, "an employer may not fire an employee if the 'discharge is contrary to a clear mandate of public policy[.]'" *Id.* (quoting *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 73 (1980)); *see also Pierce*, 84 N.J. at 73 ("[E]mployers will know that unless they act contrary to public policy, they may discharge employees at will for any reason.").

plaintiff attempted to resign and accepted another job offer, his supervisor promised to refrain from firing the plaintiff without cause, if the plaintiff continued to work for his current organization. *Id.* at 280. Despite agreeing, the plaintiff was discharged about four months later, following which he filed a wrongful termination suit on the basis of a verbal contract. *Id.* at 283. In considering the plaintiff's claims, the Court recognized the "enforceability of an oral contract of employment," and held that a cause of action arising therefrom "should be analyzed by those contractual principles that apply when the claim is one that an oral employment contract exists." *Id.* at 288 (citing *Shiddell v. Electro Rust-Proofing Corp.*, 34 N.J. Super. 278, 290 (App. Div.1954)).

Here, the factual allegations in the Complaint fail to establish that an employment contract exists between Plaintiff and her employer. Indeed, a review of the exhibits to the Complaint reveals that Plaintiff, in two separate agreements, acknowledged her at-will status in explicit terms. First, on August 15, 2016, before she began her tenure as a Therapeutic Specialist, Plaintiff executed a Letter Offer from Sunovion that included the following language on the first page: "[p]lease note that neither this letter nor any other materials constitute a contract of employment with Sunovion; your employment with Sunovion will be on an at will basis." Compl., Ex. B. Less than two weeks later, on August 24, 2016, Plaintiff acknowledged her at-will status for a second time in a binding NDA. In fact, under a section entitled "No Employment Contract," the NDA contained an explicit disclaimer which provided: "I understand that this Agreement, alone or in conjunction with any other document or agreement whether written or oral, does not constitute a contract of employment and does not imply that my employment will continue for any period of time." *Id.* Thus, Plaintiff has not alleged the existence of an express agreement that would require cause for her termination.

In addition, Plaintiff has not pled that an implied agreement existed that would have altered her at-will status at Sunovion. Although the New Jersey Supreme Court has recognized that an implied contract can arise from a handbook or a verbal promise, neither are alleged in the Complaint. For instance, Plaintiff does not assert that Sunovion circulated a handbook throughout its workforce that included, for example, a list of "terminable offenses," or designated "a set of detailed [disciplinary] procedures" that could be construed to require just cause before she was discharged. Rather, Plaintiff claims that she was placed on a PIP and that Sunovion "terminated Plaintiff earlier than the documented PIP end date." Compl., 5. However, the allegations of such a program, as a result of Plaintiff's "performance concerns," do not amount to an agreement that modified her at-will status. Indeed, the PIP, attached to the Complaint, reiterates in its first and last paragraphs Plaintiff's at-will status, and warned that she could be terminated while the plan was in effect: "[at] any time either during or after the PIP's conclusion . . . employment is at will or management may make a decision about your continued employment, up to and including termination from the company." Compl., Ex. B. As such, Plaintiff has not pled factual allegations to conclude that she was fired in breach of an implied contract.

Moreover, the alleged "oral agreements" in the Complaint do not suffice to create an implied contract. In particular, the pleadings assert that Ms. Yackish made the following remarks during Plaintiff's tenure at Sunovion: "[w]e don't want to let you go"; "[w]e want you to succeed"; "I want you to succeed"; "[d]o you want this. If you do then I want this for you"; "[t]his is going to be your quarter, I can feel it"; "I want this for you"; "[t]he PIP can be extended"; "[t]he PIP doesn't necessarily mean termination. It can always be extended if you still don't make goal." *Id.* However, these alleged statements differ from those at issue in *Shebar*,

wherein the at-will plaintiff rejected a job offer, because his supervisor assured him that he would not be fired without just cause, if he continued his employment. In contrast, the alleged "oral agreements" that Plaintiff has referenced in her Complaint, here, present nothing more than encouraging remarks that do not suffice to create an enforceable oral contract between Plaintiff and Sunovion. *See e.g., Bell v. KA Indus. Servs., LLC*, 567 F. Supp. 2d 701, 710 (D.N.J. 2008) (dismissing a *Shebar* claim where the plaintiff did not allege "facts that if proven true, would support a conclusion that the implied contract was supported by consideration.").

However, even if Plaintiff alleged the existence of an implied agreement, the fact that Plaintiff has acknowledged, on multiple occasions, that she was an at-will employee dooms her implied contract claims. For example, the Third Circuit's decision in *Radwan. v. Beecham Laboratories, Div. of Beecham, Inc.*, 850 F.2d 147 (3d. Cir. 1998) illustrates this point. In that case, the plaintiff alleged that certain provisions in his handbook created an implied promise that was breached, when he was discharged without just cause. *Id.* at 148. However, the Third Circuit rejected the plaintiff's claims, finding that his "employment application" included an express provision that set forth his at-will status, stating: "I understand and agree that my employment is for no definite period and may, regardless of the date of payment of my wages and salary, be terminated at any time without previous notice." *Id.* at 148-149. Indeed, because the plaintiff accepted "a term of employment providing without qualification that he could be terminated at any time without previous notice," the Third Circuit explained that "he could hardly have any reasonable expectation that [his] manual granted him the right only to be discharged for cause." *Id.* at 150.

Like the employee in *Radwan*, Plaintiff, here, acknowledged her at-will status in two separate agreements, including the Letter Offer and the NDA. Thus, because Plaintiff's "tenure

was specifically dealt with in writing when [she] was hired," she could not reasonably believe that, for example, a handbook or a similar resource modified her at-will status. *Id.*; *see, e.g.*, *Schlichtig v. Inacom Corp.*, 271 F. Supp. 2d 597, 606 (D.N.J. 2003) (rejecting a breach of an implied contract claim, where the plaintiff, prior to the commencement of his employment, signed a contract stating that he "could be 'terminated with or without cause or notice at any time.'"); *McDermott v. Chilton Co.*, 938 F. Supp. 240, 245 (D.N.J. 1995) (finding the plaintiff's breach of an implied contract claim failed, because the plaintiff signed an "application form" when he started working that read "I specifically agree that my employment may be terminated, with or without cause or notice, at any time at the option of either the Company or myself."); *D'Alessandro v. Variable Annuity Life Ins. Co.*, 89-2052, 1990 U.S. Dist. LEXIS 16092, at *4, 10 (D.N.J. Nov. 20, 1990) (holding that a "standard practice memoranda" that the defendants distributed throughout the workforce did not create an enforceable agreement, because the plaintiff executed a contract that stated that it could "be terminated by either party for any reason").

In sum, Plaintiff has not sufficiently alleged that her job at Sunovion was anything other than an at-will employment.[7] Nor has she pled that Sunovion discharged her in breach of an express of verbal implied contract. Therefore, because the Complaint describes northing more than an at-will relationship, Plaintiff's wrongful termination claim arising from Sunovion's

[7] Plaintiff's opposition attaches an unsigned Severance Agreement that she received from Sunovion. The terms of the Agreement contain a general release provision that encompasses claims arising under "the implied obligation of good faith and fair dealing; or any express, implied, oral, or written contract." Pl.'s Opp., at 2. Moreover, according to Plaintiff, the general release provision in the Severance Agreement demonstrates Sunovion's "admitted acknowledgment relating to a contract and contract obligations for plaintiff['s] employment." Pl.'s Opp., at 3. However, Plaintiff's position is without merit. Indeed, the general release provision in the Severance Agreement does not establish that an employment contract existed between her and Sunovion, particularly since, as explained *supra*, Plaintiff executed two separate agreements, including the Letter Offer and NDA, which set forth her at-will status in explicit terms.

alleged failure to establish cause is dismissed. *See, e.g., Day v. Wells Fargo & Co.*, No. 17-6237, 2018 U.S. Dist. LEXIS 66807, at *14 (D.N.J. April 20, 2018) ("In short, the Court concludes that a plaintiff cannot plead an action under the common law of New Jersey for wrongful discharge in breach of an implied term of an employment contract in the absence of an employment contract."). I next address Plaintiff's allegations as to the alleged breach of the covenant of good faith and fair dealing.

ii. The Covenant of good faith and fair dealing.

In New Jersey, contracting parties are "bound by a duty of good faith and fair dealing in both the performance and enforcement of the contract." *Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs.*, 182 N.J. 210, 224 (2005). While the concept of good faith is difficult to define in precise terms, "[g]ood faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party[.]" *Wilson v. Amerada Hess Corp.*, 168 N.J. 236, 245 (2001). To allege such a claim, a plaintiff must assert: "(1) a contract exists between the plaintiff and the defendant; (2) the plaintiff performed under the terms of the contract . . . ; (3) the defendant engaged in conduct, apart from its contractual obligations, without good faith and for the purpose of depriving the plaintiff of the rights and benefits under the contract; and (4) the defendant's conduct caused the plaintiff to suffer injury, damage, loss or harm." *Wade v. Kessler Inst.*, 343 N.J. Super. 338, 347 (App. Div. 2001).

As such, a claim based on a "[b]reach of the implied covenant of good faith and fair dealing is not a free-standing cause of action; such a covenant is an implied covenant *of a contract.*" *Luongo v. Vill. Supermarket, Inc.*, 261 F. Supp. 3d 520, 532 (D.N.J. 2017) (emphasis in original); *Wade v. Kessler Inst.*, 172 N.J. 327, 345 (2002) ("To the extent plaintiff contends

that a breach of the implied covenant may arise absent an express or implied contract, that contention finds no support in our case law. In that respect, we agree with the court below that an implied contract must be found before the jury could find that the implied covenant of good faith and fair dealing had been breached."); *Noye v. Hoffmann-La Roche Inc.*, 238 N.J. Super. 430, 433 (App. Div. 1990) ("In the absence of a contract, there can be no breach of an implied covenant of good faith and fair dealing.") (citing *McQuitty v. General Dynamics Corp.*, 204 N.J. Super. 514, 519-20 (App.Div.1985)); *see also Varrallo v. Hammond Inc.*, 94 F.3d 842, 848 (3d Cir. 1996).

Here, because Plaintiff has not alleged the existence of an express or implied contract, she cannot assert a wrongful termination claim based on Sunovion's purported breach of the implied covenant; indeed, a breach of the implied covenant cannot occur in the absence of a contractual agreement. *See Schlichtig v. Inacom Corp.*, 271 F. Supp. 2d 597, 606 (D.N.J. 2003) ("[B]ecause the Court has concluded that the terms of this employee manual could not have given rise to an implied contract of employment, it necessarily follows that the manual's provisions do not contain an implied covenant of good faith and fair dealing."); *Barone v. Leukemia Society of America*, 42 F. Supp. 2d 452, 457 (D.N.J. 1998) ("In the absence of a contract, there is no implied covenant of good faith and fair dealing which might be used as a basis for finding a right to continued employment."); *McDermott*, 938 F. Supp. at ("Under New Jersey law, an implied covenant of good faith and fair dealing may not be invoked to restrict the authority of employers to fire at-will employees."); *Argush v. LPL Fin. LLC*, No. 13-7821, 2014 U.S. Dist. LEXIS 107148, at *10 (D.N.J. Aug. 5, 2014) ("[I]t is well settled that the implied term of fair dealing will not work to constrain an employer's discretion to terminate an at-will employee.") (quotations and citations omitted); *Alessandro*, 1990 U.S. Dist. LEXIS 16092, at

*14 ("New Jersey courts have uniformly 'rejected the proposition that there is an implied covenant of good faith and fair dealing between an employer and employee in an at-will situation.'").

C. IQVIA

IQVIA challenges the pleadings under Fed. R. Civ. P. 8(a)(2). Rule 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). To meet the pleading requirements of Rule 8(a)(2) in multiple defendant actions, such as the one here, "the complaint must clearly specify the claims with which each individual defendant is charged." *Kounelis v. Sherrer*, No. 04-4714, 2005 U.S. Dist. LEXIS 20070, at *11 (D.N.J. Sept. 6, 2005); *see Major Tours, Inc. v. Colorel*, 720 F. Supp. 2d 587, 604 (D.N.J. 2010) ("Because the Complaint involves multiple claims and multiple defendants, the Court must carefully determine whether the Complaint provides each defendant with the requisite notice required by Rule 8 for each claim, and whether the claim itself presents a plausible basis for relief."); *Pushkin v. Nussbaum*, No. 12-0324, 2014 U.S. Dist. LEXIS 52349, at *14 (D.N.J. April 15, 2014) ("Rule 8(a) . . . 'requires that a complaint against multiple defendants indicate clearly the defendants against whom relief is sought and the basis upon which the relief is sought against the particular defendants.'") (quoting *Poling v. K. Hovnanian Enterprises*, 99 F. Supp. 2d 502, 517-18 (D.N.J. 2000)).

Here, the factual allegations in the Complaint do not assert a viable claim against IQVIA. For instance, the first paragraph of the pleadings state that the instant action arises not from the alleged conduct of IQVIA—a corporation that Plaintiff does not work for—but from Sunovion's purported "wrongful termination, without real just cause by Covenant of Good Faith (and fair dealing) Exception . . . ." Compl., pg. 1-2. In addition, throughout the Complaint, Plaintiff

alleges Sunovion's failure to establish "just cause" for her discharge, and the bad-faith conduct that Sunovion exhibited towards Plaintiff, in breach of the implied convent of good faith and fair dealing. Indeed, time and time again, the pleadings state that Plaintiff was harmed as a result of Sunovion's alleged conduct, with no mention of a specific, actionable wrongdoing that IQVIA performed. In fact, Plaintiff pleads no factual allegations that IQVIA should be held liable for her alleged wrongful termination. Rather, as to IQVIA, the Complaint alleges that IQVIA supplied certain data to Sunovion, which Sunovion then used to assess the performance of its workers. *Id.* at I. However, Plaintiff cannot assert a wrongful termination claim against IQVIA on the basis of its business relationship with Sunovion.[8] Therefore, IQVIA is dismissed as a defendant to this action.

Nonetheless, I note that the pleadings include passing references to IQVIA's alleged "negligent reporting." *Id.* at II-IV. Assuming that Plaintiff is asserting a claim for negligence against IQVIA, that cause of action cannot stand. To assert such a claim, a litigant must allege four elements: "(1) [a] duty of care, (2) [a] breach of [that] duty, (3) proximate cause, and (4) actual damages[.]" *Brunson v. Affinity Federal Credit Union*, 199 N.J. 381, 400 (2009) (quotations and citations omitted). Here, because no relationship whatsoever is pled between Plaintiff and IQVIA, she has not alleged the first element of a negligence claim. *See NCP Litig. Trust v. KPMG LLP*, 187 N.J. 353, 901 (2006) ("Ultimately, the duty owed to another is defined by the relationship between the parties."); *see also Willekes v. Serengeti Trading Co.*, No. 13-7498, 2016 U.S. Dist. LEXIS 129404, *49-50 (D.N.J. Sept. 21, 2016) ("In determining the

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[8] I note that, even if Plaintiff asserts that IQVIA is liable for her alleged wrongful termination, her claim still fails. Indeed, it is axiomatic that an at-will employee's wrongful termination claim lies against his or her employer. *See Velantzas v. Colgate-Palmolive Co.*, 109 N.J. 189, 191-192 (1988) ("[A] terminated at-will employee has a cause of action against the employer for wrongful termination . . . . ") (citing *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58 (1980)).

existence of a duty of care . . . [t]he relationship between the parties is itself a critical factor."); *Magnum LTL, Inc. v. CIT Group/Bus. Credit, Inc.*, No. 08-5345, 2009 U.S. Dist. LEXIS 32340, at *4 (D.N.J. Apr. 16, 2009) ("Based on the Complaint, no relationship between [the plaintiff] and [the defendant] exists. Lacking such a relationship, [the plaintiff] cannot establish a duty of care, a breach of that duty, or any other of the . . . necessary elements for a negligence claim."). Thus, to the extent such a claim has been plead, Plaintiff's negligence cause of action is dismissed.

Moreover, in contrast to Plaintiff's contentions, IQVIA is not a "necessary party." Compl., pg. 2. Rule 19(a), which governs the joinder of indispensible persons, provides that parties are required to be joined in an action when: "(A) in that person's absence, the court cannot accord complete relief among existing parties . . . . " Fed. R. Civ. P. 19(a). "Under Rule 19(a)(1), the Court must consider whether—in the absence of an un-joined party—complete relief can be granted to the persons already parties to the lawsuit." *Huber v. Taylor*, 532 F.3d 237, 248 (3d Cir. 2008). Here, Plaintiff claims that she was terminated without "legitimate just cause," as a result of Sunovion's alleged conduct—no other harms are identified in the Complaint. Moreover, the pleadings do not assert that IQVIA is somehow responsible for Plaintiff's alleged wrongful termination from Sunovion; Plaintiff has not asserted that she works for IQVIA, or that IQVIA was involved in the decision making process that lead to Plaintiff's termination from Sunovion. Therefore, based on the pleadings, the relief which Plaintiff seeks for the alleged wrongdoing in the Complaint can only be obtained from Sunovion, her employer.

Having determined that Plaintiff has not alleged a plausible claim against IQVIA, and that Sunovion is the only appropriate defendant in this action, IQVIA is dismissed from this lawsuit.

IV. CONCLUSION

For the reasons set forth above, Defendants' Motions to dismiss are **GRANTED**, and Plaintiff's Motion for reconsideration is **DENIED**. Plaintiff's claims are dismissed with prejudice.

DATED: May 18, 2020

/s/ Freda L. Wolfson
Freda L. Wolfson
U.S. Chief District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

GINA RUSSOMANNO	:	
Plaintiff,	:	Civil Action No.: 19-5945 (FLW)
vs.	:	
SUNOVION PHARMACEUTICALS and IQVIA INC.,	:	**ORDER**
Defendants,	:	

THIS MATTER having been opened to the Court by Ivan R. Novich, Esq., and Dana B. Klinges, Esq., counsel for Defendants Sunovion Pharmaceuticals Inc. and IQVIA Inc. ("Defendants"), respectively, on separate Motions to dismiss the Complaint of pro se Plaintiff Gina Russomanno ("Plaintiff"); it appearing that Plaintiff opposes the Motions and moves for reconsideration of the Court's prior Order that denied her request for remand; it appearing that the Court having considered the parties' submissions in connection with the Motions pursuant to Fed. R. Civ. P. 78, for the reasons set forth in the Opinion filed on this date, and for good cause shown;

IT IS on this 18th day of May, 2020,

ORDERED that Defendants' Motions to Dismiss are **GRANTED**, and Plaintiff's Motion for reconsideration is **DENIED**; and it is further

ORDERED that Plaintiff's claims are dismissed with prejudice.

/s/ Freda L. Wolfson
Freda L. Wolfson
U.S. Chief District Judge

CERTIFICATE OF COMPLIANCE

No._____

Gina Russomanno,

Petitioner

~against~

Sunovion Pharmaceuticals, Inc. and IQV IA Inc.; **and**

Dan Dugan, Jenna Yackish, Trevor Voltz, Erik Weeden, and Sunovion Pharmaceuticals, Inc.

Respondent(s)

As required by Supreme Court Rule 33.1(h), I certify that the Petitioners Application to Individual Justice, Chief Justice, John G. Roberts, per USSC Rule 22 has been prepared using Microsoft Word, Century Schoolbook,12 pt. Type Space and contains 2745 words, excluding the parts of the Reply that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: May 16, 2023

/s/Gina Russomanno
Pro Se Petitioner

STATEMENT OF NOTIFICATION OF SERVICE

No._____

IN THE SUPREME COURT OF THE UNITED STATES

GINA RUSSOMANNO – PETTITIONER

VS.

SUNOVION PHARMACEUTICALS INC, & IQVIA INC, and

DAN DUGAN, JENNA YACKISH, TREVOR VOLTZ, ERIK WEEDEN, AND SUNOVION PHARMACEUTICALS, INC. -

– RESPONDANT(S)

PROOF OF SERVICE

I, Gina Russomanno, do swear or declare that on this date, **May 16, 2023**, as required by Supreme Court Rule 29, I served the enclosed by Rule 22- APPLICATION to Individual Justice, Chief Justice, John G. Roberts, by mailing copies of the above documents, properly addressed, for Fed Ex 3-day delivery

TO: Clerk: United States Supreme Court
1 First Street, NE
Washington DC 20543

TO: *Littler Mendelson, P.C.*
One Newark Center 8th Floor
Newark, NJ 07102
Ivan Novich, Esq., Christie Pazdzierski, Esq.
ATTORNEY FOR THE RESPONDANTS

TO: Duane Morris, LLP
30 South 17th Street
Philadelphia, PA 19103
Dana Klinges, Sarah Felm-Stewart, Robert Palumbos,
ATTORNEY FOR THE RESPONDANTS

I declare under penalty of perjury that the above is true and correct.

/S/Gina Russomanno
Plaintiff Petitioner, Pro Se

Dated: May 16, 2023