

APPENDIX

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App. 1

APPENDIX A

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

No. 22-2549

[Filed April 11, 2023]

Seneca Lovett Engel)
)
<i>Plaintiff-Appellant</i>)
)
v.)
)
Derek Engel; Miller Police Department;)
City of Miller, South Dakota; Jim Henson,)
Miller Police Department, officially and)
individually; Shannon Speck,)
Miller Police Department, officially)
and individually; Various John and Jane)
Does, Miller Police Department, officially)
and individually)
)
<i>Defendants-Appellees</i>)

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Appeal from United States District Court
for the District of South Dakota - Central

Submitted: March 23, 2023
Filed: April 11, 2023
[Unpublished]

Before BENTON, SHEPHERD, and ERICKSON,
Circuit Judges.

PER CURIAM.

South Dakota resident Seneca Lovett Engel appeals the district court's¹ dismissal of her pro se complaint for failure to state a claim. After careful de novo review, see Levy v. Ohl, 477 F.3d 988, 991 (8th Cir. 2007) (standard of review), we find no basis for reversal. Accordingly, we affirm. See 8th Cir. R. 47B.

¹ The Honorable Roberto Lange, Chief Judge, United States District Court for the District of South Dakota.

APPENDIX B

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION**

3:21-CV-03020-RAL

[Filed June 21, 2022]

SENECA LOVETT ENGEL,)
)
Plaintiff,)
)
vs.)
)
DEREK ENGEL, MILLER POLICE)
DEPARTMENT, CITY OF MILLER,)
SOUTH DAKOTA, JIM HENSON,)
MILLER POLICE DEPARTMENT,)
OFFICIALLY AND INDIVIDUALLY;)
SHANNON SPECK, MILLER POLICE)
DEPARTMENT, OFFICIALLY AND)
INDIVIDUALLY; AND VARIOUS)
JOHN AND JANE DOES,)
MILLER POLICE DEPARTMENT,)
OFFICIALLY AND INDIVIDUALLY;))
)
Defendants.)

**OPINION AND ORDER GRANTING
DEFENDANTS' MOTIONS TO DISMISS**

The Defendants in this case have filed motions to dismiss. Although Plaintiff appears to have legitimate state-law claims against at least one defendant, the absence of a viable claim within federal court jurisdiction requires dismissal of the case.

I. Factual Background¹

This case arises from an incident that occurred in Hand County, South Dakota, in the fall of 2019. Doc. 1 at ¶¶ 3, 12. Plaintiff Seneca Lovett Engel (“Seneca”), an African American female, alleges that Derek Engel (“Derek”), her then husband² and one of the Defendants named in the complaint, believed Seneca was involved in an extra-marital affair. Doc. 1 at ¶ 12. Seneca alleges that Derek took her phone while she was grocery shopping in Miller, South Dakota, on October 29, 2019. Doc. 1 at ¶ 13. Later that day, Seneca and Derek met at the Miller airport and began arguing about the phone and alleged infidelity. Doc. 1 at ¶ 14. Seneca claims that Derek grabbed her by the neck and slammed her against the side of a pickup truck

¹ In ruling on these motions to dismiss, this Court takes the well-pleaded allegations of the complaint as true. This Court is not making any findings of fact through this Opinion and Order.

² Seneca and Derek had been married for approximately three years when the incident took place. Doc. 1 at ¶ 13. They have a son. Doc. 1 at ¶ 14.

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ripping her coat, cutting her finger, and causing pain in her back and neck. Doc. 1 at ¶ 14.

After the altercation and with Derek still possessing her phone, Seneca traveled to the Miller Police Department to report the incident. Doc. 1 at ¶ 15. Derek, while following Seneca to the police department, called Defendant Jim Henson (“Henson”), an officer for Defendant Miller Police Department, to report that Derek and Seneca would be arriving at the police department to discuss a domestic incident. Doc. 1 at ¶ 15.

When they arrived at the police department, Henson spoke with both Derek and Seneca about the incident. According to Seneca, Derek admitted to taking her phone and grabbing and shoving her at the airport. Doc. 1 at ¶¶ 16-17. She said the couple’s four-year-old son witnessed the altercation and verified to police her claims. Doc. 1 at ¶¶ 14, 20. She also told Henson that she had been the victim of physical abuse repeatedly throughout the relationship and requested law enforcement take action to return her phone and to pursue a domestic assault criminal complaint. Doc. 1 at ¶¶ 18-19. Henson consulted with Defendant Shannon Speck, Chief of the Miller Police Department. Doc. 1 at ¶ 21. According to Seneca, the Miller Police Department ultimately failed to take any action. Doc. 1 at ¶ 22.

According to Seneca, Derek accessed personal material including social media accounts and email on her phone after he was allowed to leave the police station with possession of it. Doc. 1 at ¶ 23. Seneca claims that Derek

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used this access to impersonate her while contacting third parties on Snapchat, Facebook and Instagram. Doc. 1 at ¶ 26. Derek also accessed other personal content on the phone such as photos of her that were sexual in nature and personal information about her private life, sending such material to Seneca's family, friends and others in the Miller community. Doc. 1 at ¶ 27. According to Seneca, Derek told friends, family, co-workers, and church and community members that Seneca was a drug addict and prostitute with mental health issues. Doc. 1 at ¶ 30. Seneca thereafter felt that this allegation forced her to resign from her positions at a church and as a board member at a daycare. Doc. 1 at ¶ 31. She claims the allegations compromised her EEOC complaint against a former employer resulting in a less favorable settlement. Doc. 1 at ¶ 33. She also claims Derek harassed her by sending her photos of dead animals, setting off her car alarm, and being verbally abusive when exchanging custody of their son. Doc. 1 at ¶ 35. Seneca felt forced to seek home employment due to fear for her safety. Doc. 1 at ¶ 35.

Seneca obtained a temporary restraining order against Derek on October 30, 2019, and began staying in a nearby town. Doc. 1 at ¶¶ 124-25. Seneca reported Derek's behavior to Henson and Speck. Doc. 1 at ¶ 28. Despite these reports, the Miller Police Department failed to properly act upon and investigate the matter. Doc. 1 at ¶ 29. Seneca received another temporary restraining order against Derek on January 21, 2020. Doc. 1 at ¶ 36.

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Seneca filed this action against Engel, the Miller Police Department, City of Miller, Henson, Speck and the various John and Jane Does of the Miller Police Department officially and in their individual capacities (collectively “Defendants”). Doc. 1. Seneca asserts multiple causes of action including assault and battery (against Derek), defamation (against Derek), invasion of privacy (against all Defendants), intentional infliction of emotional distress (against all Defendants), negligent infliction of emotional distress, (against Miller Police Department, City of Miller, Henson, Speck and various John and Jane Does of Miller Police Department (collectively “the Miller Defendants”)), negligent hiring, training, supervision and retention (against the Miller Defendants), conspiracy under 42 U.S.C. § 1985 (against all Defendants), and conspiracy under 42 U.S.C § 1983 (against all Defendants). Doc. 1 at ¶¶ 38-100. The Miller Defendants answered, Docs. 9, 15, and Derek and the Miller Defendants filed separate motions to dismiss and supporting briefs. Docs. 16, 17, 24, 25. Seneca opposed the motions to dismiss.³ Docs. 18, 26, to which Defendants replied. Docs. 21, 30. After reviewing the files and records, this Court grants Defendants’ motions to dismiss for failure to state a claim under Rule 12(b)(6) for the reasons set forth below.

³ Seneca also filed a Motion for Judicial Notice, Doc. 20, seeking to have the Court take judicial notice of the petition, affidavit, temporary protective order, and transcript of hearing. Doc. 19. This Court accepts as true all well-pleaded allegations, including that Seneca sought and received such a protective order.

II. Standard of Review

To survive a motion to dismiss for failure to state a claim under Rule 12(b)(6), a complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Courts must accept the plaintiffs factual allegations as true and construe all inferences in the plaintiffs favor, but need not accept the plaintiffs legal conclusions. Retro Television Network, Inc. v. Luken Commc’ns, LLC, 696 F.3d 766, 768–69 (8th Cir. 2012). Although detailed factual allegations are unnecessary, the plaintiff must plead enough facts to “state a claim to relief that is plausible on its face[.]” meaning “the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Therefore, the “factual allegations must be sufficient to raise a right to relief above the speculative level.” Cook v. George’s, Inc., 952 F.3d 935, 938 (8th Cir. 2020) (cleaned up and citation omitted). Courts are to construe complaints liberally. Id.

III. Discussion

A. 42 U.S.C § 1983

Section 1983 provides that “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of

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any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured.” 42 U.S.C. § 1983. Seneca claims that the Defendants acted with reckless indifference to her constitutional rights. Doc. 1 at ¶¶ 92-100. “Liability for damages for a federal constitutional tort is personal, so each defendant’s conduct must be independently assessed.” Faulk v. City of St. Louis, 30 F.4th 739, 744 (8th Cir. 2022) (citation omitted). Therefore, this Court will address each Defendant in turn, grouping them together when appropriate.

1. Derek

Derek asserts that as a private individual, he cannot be held liable under § 1983. Docs. 17, 21. Seneca responds that Derek acted under the color of state law because he acted with the help, and in conspiracy with, the Miller Defendants. Doc. 18. The parties agree that a § 1983 claim requires that the Defendants: 1) acted under the color of state law, and 2) deprived the plaintiff of a federal right secured by the Constitution or laws of the United States. See Docs. 17, 18 (citing West v. Atkins, 487 U.S. 42, 48 (1988)). However, the parties disagree on what test this Court should apply to determine whether Derek acted under the color of state law. See Docs. 17, 18. Derek also contests whether he deprived Seneca of any constitutional rights. Doc. 17.

Derek cites to Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974), for the proposition that a private individual only acts under the color of state law if “there is a sufficiently close nexus between the State and the

challenged action of the [actor] so that the action of the latter may be fairly treated as that of the State itself.” See Doc. 17. However, Seneca cites to Mark v. Borough of Hatboro, 51 F.3d 1137, 1142 (3rd Cir. 1995), to contend the Supreme Court has at times applied different tests and to argue that this Court should instead ask “whether the private party has acted with the help of or in concert with state officials.” Doc. 18 (citing Mark, 51 F.3d at 1142). The Eighth Circuit has stated that a private actor “may be liable under § 1983 only if she is a willing participant in joint action with the State or its agents.” Miller v. Compton, 122 F.3d 1094, 1098 (8th Cir. 1997) (cleaned up and citations omitted). This requires alleging at least a meeting of the minds to overcome a motion to dismiss. *Id.* Moreover, a person may fairly be said to be a state actor if they “acted together with or . . . obtained significant aid from state officials in furtherance of the challenged action.” Wickersham v. City of Columbia, 481 F.3d 591, 597 (8th Cir. 2007) (cleaned up and citation omitted). “The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.” Parker v. Boyer, 93 F.3d 445, 447–48 (8th Cir. 1996) (cleaned up and citation omitted).

Regardless of what test this Court uses to analyze the color-of-law element, Seneca’s complaint falls short of stating sufficient facts to establish that Derek’s actions were under color of state law. Seneca points to the facts that Derek was the first to contact the Miller Defendants

about the domestic altercation and to speak with them at the police station as proof that Derek acted in concert with the Miller Defendants to deprive Seneca of her phone, which in turn allowed Derek the opportunity to commit the alleged tortuous acts of defamation, assault and invasion of privacy. Doc. 18. She also states that the Miller Defendants' failure to respond to Derek's tortious conduct when they had probable cause to investigate him further demonstrates that Derek and the Miller Defendants acted together under the color of law. Doc. 18.

Seneca's factual claims, even taken as true, do not establish that Derek acted under the color of state law. The Eighth Circuit has said that "[t]o impose § 1983 liability on a private actor for merely answering a law enforcement official's questions regarding a case would have obvious and unfortunate consequences and has no support in precedent or common sense." Miller, 122 F.3d at 1098. As one court has noted, "the summoning of police officers or the provision of information to police officers, even if that information is false or results in the officers taking affirmative action, is not sufficient to constitute joint action with state actors for purposes of Section 1983." Carrillos v. Inc. Vill. of Hempstead, 87 F. Supp. 3d 357, 371 (E.D.N.Y. 2015) (listing cases). Derek made the first report and spoke with the Miller Defendants about the domestic altercation, no doubt providing his own gloss on what occurred. But this does not transform him into an actor under color of state law simply because the Miller Defendants believed him or failed to act based on conflicting accounts of a domestic dispute. See Benavidez

v. Gunnell, 722 F.2d 615, 618 (10th Cir. 1983) (furnishing information to police does not constitute joint action under color of state law for §§ 1983 and 1985). Indeed, as Derek argues, see Doc. 17 at 6, Seneca has not alleged that Derek took any action on behalf of the state or acted with their authority, and Seneca admits that the Miller Defendants' actions of deliberate indifference at most only "tacitly authorized" Derek's actions. See Doc. 18 at 5. Without factual enhancement, Seneca's allegations about Derek being a state actor are "merely legal conclusions." Faulk, 30 F.4th at 747 (cleaned up and citation omitted). Seneca cannot establish that an agreement was made or that a meeting of the minds occurred between the Miller Defendants and Derek. The facts provided only prove that Derek first communicated with the Miller Defendants and persuaded them not to seize the phone or investigate or arrest him.

Nor does Seneca state a claim for a § 1983 conspiracy between Derek and the Miller Defendants. To prove a 42 U.S.C. § 1983 conspiracy claim, a plaintiff must show: (1) that the defendant conspired with others to deprive him of constitutional rights; (2) that at least one of the alleged co-conspirators engaged in an overt act in furtherance of the conspiracy; and (3) that the overt act injured the plaintiff." Faulk, 30 F.4th at 747 (cleaned up and citation omitted). A viable conspiracy claim "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." Id. at 748. Seneca does not state what agreement the Miller Defendants made with Derek or help they provided that allowed Derek to commit the

alleged offenses other than failing to retrieve her phone and failing to investigate and arrest Derek. Based on the facts provided, it appears that the Miller Defendants plausibly may have been negligent in failing to seize the phone and properly investigate Derek, but not working in concert or conspiring with Derek to deprive Seneca of any constitutional right. See Daniels v. Williams, 474 U.S. 327, 332 (1986) (lack of due care does not deprive a constitutional right under the Fourteenth Amendment); see also Lane v. Sarpy Cnty., 165 F.3d 623, 624 (8th Cir. 1999) (negligent conduct does not establish § 1983 complaint). “[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not shown – that the pleader is entitled to relief.” Iqbal, 556 U.S. at 679 (cleaned up).

Even accepting Seneca’s factual allegations as true, she has failed to establish that Derek acted under the color of state law and therefore has not met her burden under § 1983. Derek’s motion to dismiss as to the § 1983 claim is granted under Rule 12(b)(6).

2. The Miller Defendants

The Miller Defendants assert that due to qualified immunity, they cannot be held liable under 42 U.S.C. § 1983 in this case. “Qualified immunity ensures that government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would

have known.” Faulk, 30 F.4th at 744 (cleaned up and citation omitted). At the Rule 12(b)(6) stage, a defendant must show they are “entitled to qualified immunity on the face of the complaint.” Bradford v. Huckabee, 394 F.3d 1012, 1015 (8th Cir. 2005). To defeat qualified immunity, the plaintiff must show “(1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct.”⁴ Faulk, 30 F.4th at 744.

Seneca has named the Miller Defendants in both their individual and official capacities. “Official capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent.” Mortensbak v. Butler, 102 F. Supp. 3d 1085, 1100–01 (D.S.D. 2015) (cleaned up and citation omitted). Thus, “a § 1983 suit against an officer in his official capacity is functionally equivalent to a suit against the employing governmental entity and must be dismissed as redundant to the claims asserted against the government entity.” Powers v. City of Ferguson, 229 F. Supp. 3d 894, 899 (E.D. Mo. 2017) (citing Veatch v. Bartels Lutheran Home, 627 F.3d 1254, 1257 (8th Cir. 2010)). Therefore, this Court dismisses the claims against the Miller Defendants in their official capacity and will address Seneca’s claims regarding the municipality below. Likewise, Seneca’s claims against the Miller Police Department are dismissed as they are properly analyzed as against the municipality.

⁴ Courts may alter the sequence of the analysis to determine if the test is met. Pearson v. Callahan, 555 U.S. 223, 236 (2009).

See Ketchum v. City of W. Memphis, Ark., 974 F.2d 81, 82 (8th Cir. 1992). In addition, defendants “cannot be held liable merely because they were employed by [a police department] on the night some members of that department may have violated plaintiffs’ rights -- liability under § 1983 requires proof of a causal link between *each* defendant and the *specific wrongs* that defendant committed.” Faulk, 30 F.4th at 745 (cleaned up and citation omitted). Therefore, Seneca’s claims against the John and Jane Does of the Miller Police Department are dismissed as no specific allegations have been levied against them. This Court will discuss separately the remaining individual capacity claims against each of the Miller Defendants.

First, Seneca contends that Henson and Speck violated her statutory and constitutional rights by failing to arrest Derek, failing to secure her phone, and failing to properly investigate her repeated reports concerning Derek’s alleged offenses following the issuance of a protective order. Doc. 26 at 3. Seneca argues that these actions violated her Fourth Amendment rights to privacy and to be free from seizure, Fifth Amendment right prohibiting the state from depriving her of “life, liberty, property, without due process of law,” and Fourteenth Amendment right to equal protection of the law. Doc. 26 at 4.

Seneca’s claims against Henson and Speck fail to state a claim because she has not plausibly alleged that the Miller Defendants agreed to a conspiracy with Derek to commit the alleged offenses eliminating her Fourth Amendment claim to privacy and Fifth Amendment claim

to “life, liberty and property.” After all, Derek was the one who invaded Seneca’s privacy and took other actions to the detriment of her “life, liberty and property.” The mere failure to investigate and arrest Derek and retrieve her phone do not thereby support the inference that the Miller Defendants violated her Fourth or Fifth Amendment rights. See Clemmons v. Armantrout, 477 F.3d 962, 967 (8th Cir. 2007) (“Liability under section 1983 requires a causal link to, and direct responsibility for, the deprivation of rights.” (citation omitted)); see also Danielson v. Huether, 355 F. Supp. 3d 849, 860 n.2 (D.S.D. 2018) (“The law is clear that there is no independent constitutional right to the investigation of another.”).

Seneca’s Fourteenth Amendment claims, whether based in equal protection or due process, fail for much the same reason. Regarding the equal protection claims, “[a] police department’s failure to protect victims of domestic violence can amount to an equal protection violation actionable under 42 U.S.C. § 1983.” Villanueva v. City of Scottsbluff, 779 F.3d 507, 511 (8th Cir. 2015). The test the Eighth Circuit has adopted, albeit at the summary judgment stage, to allow a § 1983 equal protection claim against the police states:

[A] plaintiff must proffer sufficient evidence that would allow a reasonable jury to infer that it is the policy or custom of the police to provide less protection to victims of domestic violence than to other victims of violence, that discrimination against women was a motivating factor, and that the plaintiff was injured by the policy or custom.

Ricketts v. City of Columbia, 36 F.3d 775, 779 (8th Cir. 1994). Here, Seneca has not alleged any facts that she faced discrimination based on gender or race and does not allege any facts that would allow this Court to infer it was a policy or custom of the Miller Defendants to provide less protection to women, women of color, or victims of domestic violence.

To support her due process claims, Seneca points to the Miller Defendants' failure to investigate her allegations against Derek as proof she was denied substantive due process. "The Supreme Court has noted that the right to access the courts finds support in many parts of the Constitution, including the Due Process Clause." Scheeler v. City of St. Cloud, Minn., 402 F.3d 826, 831 (8th Cir. 2005). However, "as a general matter, [a] State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." Villanueva, 779 F.3d at 512 (cleaned up and citation omitted); see also DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 195 (1989) ("[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors."); Danielson, 355 F. Supp. 3d at 860 n.2 (no constitutional right to the investigation of another).

The Eighth Circuit has recognized one exception: the "state-created-danger theory" under which the state owes a duty to protect individuals if it created the danger to which the individuals are subjected." Villanueva, 779 F.3d

at 512 (cleaned up and citation omitted). To establish the “state-created-danger theory,” the plaintiff must prove:

(1) that she was a member of a limited, precisely definable group, (2) that the municipality’s conduct put her at a significant risk of serious, immediate, and proximate harm, (3) that the risk was obvious or known to the municipality, (4) that the municipality acted recklessly in conscious disregard of the risk, and (5) that in total, the municipality’s conduct shocks the conscience.

Id. (citation omitted). But the Eighth Circuit and other courts, in applying this test, have refused to find a state-created danger when an officer uses his or her discretion in evaluating domestic violence allegations and chooses not to investigate. See id. at 513; Brown v. Grabowski, 922 F.2d 1097, 1114 (3d Cir. 1990) (applying state-created-danger theory and finding no due process violation when police failed to investigate allegations that victim had been kidnapped for three days and other threats of domestic violence where victim was later killed by intimate partner); Hansell v. City of Atl. City, 152 F. Supp. 2d 589, 608 (D.N.J. 2001) (finding no due process violation when police officers took no affirmative act that placed plaintiff in danger in failing to investigate domestic violence complaint); Sheets v. Mullins, 287 F.3d 581, 588 (6th Cir. 2002) (officer’s failure to further investigate a domestic violence complaint alleging the plaintiffs boyfriend threatened to kill her and their child did not violate the plaintiffs due process rights, even though her boyfriend later killed their daughter).

Seneca claims the officers' "deliberate indifference" violated her constitutional right to access the courts. Doc. 26 at 7. The Eighth Circuit has held that a failure to investigate can create a due process violation if the defendants displayed "deliberate indifference" to the plaintiffs fundamental right to the degree that it "shocks the conscience." Scheeler, 402 F.3d at 831. But the Eighth Circuit has also stated that "[a]n officer's negligent failure to investigate inconsistencies or other leads is insufficient to establish conscience-shocking misconduct." Akins v. Epperly, 588 F.3d 1178, 1184 (8th Cir. 2009); see also Wilson v. Lawrence Cnty., 260 F.3d 946, 955 (8th Cir. 2001) ("Negligent failure to investigate other leads or suspects does not violate due process."). "Even allegations of gross negligence fail to establish a constitutional violation. Only reckless or intentional failure to investigate other leads offends a defendant's due process rights." Clemmons, 477 F.3d at 966 (cleaned up and quotation omitted).

Here, the officers met with Derek and Seneca separately and simply chose not to take any further action regarding the situation. This is not the "conscious shocking" behavior that violates a constitutional right. Compare Villanueva, 779 F.3d at 512 (finding no conscious shocking behavior where police failed to issue written report and prosecute based on victim's allegations) with Rogers v. City of Little Rock, Ark., 152 F.3d 790, 797 (8th Cir. 1998) (finding conscious shocking behavior from police officer who raped woman coercing her into a sexual act with his position of authority); see also Montgomery v. City

of Ames, 749 F.3d 689, 695 (8th Cir. 2014) (finding no reckless or conscious shocking behavior where officer was faced with conflicting accounts of domestic violence accusations and chose not to further investigate).

As the Eighth Circuit has stated, “[h]olding that an officer’s failure to arrest for one incident of harassment *causes* a subsequent incident of harassment or violence would essentially take away the officer’s discretion to determine when to arrest—a fundamental part of our criminal system.” Ricketts, 36 F.3d at 780. And because “[d]iscretion is essential to the criminal justice process, [] officers cannot be expected to make an arrest or initiate a formal investigation in response to every complaint.” Villanueva, 779 F.3d at 513 (cleaned up and citation omitted). While failing to investigate serious accusations of domestic violence reflects poorly on the officers of the Miller Police Department, Seneca has failed to allege conduct by the Miller Defendants that shocks the conscience. At most, Seneca has pleaded facts to infer superficiality, lethargy, neglect and disinterest by the Miller Defendants, but insufficient facts to allow an inference that the failure to investigate was intentional or reckless.

The same analysis above applies to the last of the Miller Defendants, the City of Miller. “[I]n a section 1983 action, a municipality may only be held liable for constitutional violations which result from a policy or custom of the municipality.” Scheeler, 402 F.3d at 832 (citation omitted). “There must exist a prior pattern of unconstitutional conduct that is so ‘persistent and

widespread’ as to have the effect and force of law.” Andrews v. Fowler, 98 F.3d 1069, 1075 (8th Cir. 1996). Even if Seneca were able to point to a specific constitutional violation resulting from the failure to investigate her domestic violence allegations, she cannot point to any pattern, custom or policy within the Miller Police Department causing such violations and therefore she cannot establish a valid § 1983 complaint against the municipality. See Mortensbak, 102 F. Supp. 3d at 1100–01 (granting summary judgment on issue of qualified immunity to municipality where plaintiff presented no evidence that violation was anything “more than a one-time incident or that it was carried out in accordance with an unconstitutional custom or policy”). Therefore, the Miller Defendants’ motion to dismiss the § 1983 claims must be granted.

B. 42 U.S.C. § 1985

Seneca contends Defendants engaged in a conspiracy in violation of § 1985(3). Docs. 1, 26 at 10. “In order to state a claim for conspiracy under § 1985, a plaintiff must allege with particularity and specifically demonstrate with material facts that the defendants reached an agreement.” Kelly v. City of Omaha, 813 F.3d 1070, 1077 (8th Cir. 2016) (cleaned up and citation omitted). “This standard requires that allegations of a conspiracy be pleaded with sufficient specificity and factual support to suggest a meeting of the minds directed toward an unconstitutional action.” Id. (cleaned up and citation omitted).

While Seneca argues that she only needs to allege enough to “suggest” a conspiracy to overcome a Rule 12(b)(6) motion to dismiss, she has not alleged sufficient facts. See Doc. 26 at 12. Seneca’s only allegations about any agreement between Derek and the Miller Defendants are the sequence of communications on the day of the incident and the failure of the Miller Defendants to follow up on her allegations of domestic abuse. As previously discussed, these allegations are too speculative to establish a “meeting of the minds” between Derek and the Miller Defendants. Without material facts supporting such an allegation, Seneca’s § 1985 claim is properly dismissed.

Seneca cites to Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970), Doc. 26 at 12, as support that the sequence of communications between two parties can create a suggestion of a conspiracy, but the case is readily distinguishable.⁵ Adickes involved a challenge to the public accommodations provisions of the 1964 Civil Rights Act, when an African American plaintiff was refused service at a restaurant and then was arrested afterwards on a charge of vagrancy. One of the defendants admitted in a deposition that he had “ordered the food counter supervisor to see that Miss Adickes was refused service only because he was fearful of a riot in the store by customers angered at seeing a ‘mixed group’ of whites and blacks eating together.” Adickes, 398 U.S. at 154. The

⁵ It is worth noting that Iqbal, 556 U.S. at 662, and Twombly, 550 U.S. at 554, which created a more demanding standard for conspiracy allegations at the pleading stage was decided decades after Adickes.

Supreme Court identified that the crucial issue in the case was whether a police officer was present in the store because “[i]f a policeman were present, we think it would be open to a jury, in light of the sequence that followed, to infer from the circumstances that the policeman and a Kress employee had a ‘meeting of the minds[.]’” Id. at 158. But in Adickes, the policeman in question did not deny the possibility that “upon seeing petitioner with Negroes, he communicated his disapproval to a Kress employee, thereby influencing the decision not to serve petitioner.” Id. And there was testimony that the chief of police had previously spoken with the store owner and that the arresting policeman had visited the store everyday creating the inference of a preexisting relationship. Id. at 153 n.8.

Here, there is no allegation that Derek had a preexisting relationship with any members of the Miller Police Department. While it is undisputed that Derek (having taken Seneca’s phone) spoke with Henson before Seneca had a chance to lodge her domestic violence complaint, Derek and Henson’s communication was in the ordinary course of Henson’s position as a police officer and was in conjunction with and directly related to the domestic incident that had occurred earlier that day. Seneca claims that the only reasonable explanation why her constitutional rights were violated is because she is a woman or woman of color. See Doc. 26 at 11 n.10. But this statement is a legal conclusion rather than supported with indicia of invidious discrimination; by contrast in Adickes, the intention of the conspiracy to discriminate—to refuse

service to mixed race dining parties—was obvious and supported with some evidence that the police exhibited racial animosity. Seneca has failed to plead facts that suggest a meeting of the minds between Derek and the Miller Defendants and thus her § 1985 claim fails.

Any conspiracy alleged among the Miller Defendants themselves to deny Seneca her constitutional rights fails because of the intracorporate conspiracy doctrine which precludes conspiracy claims against government institutions. Kelly, 813 F.3d at 1078. “Because a conspiracy by its nature involves multiple parties, this doctrine provides that a local government entity cannot conspire with itself through its agents acting within the scope of their employment.” Id. at 1078 (citation omitted). Therefore, Defendants are dismissed from Seneca’s § 1985 claim.

C. Supplemental jurisdiction

Seneca’s remaining claims against Derek are based in state, not federal, law, and there is no complete diversity of citizenship here. Therefore, this Court would have to exercise supplemental jurisdiction under 28 U.S.C. § 1367(a) which permits a district court to handle state law claims that are a part of the same case or controversy as the claims that fall within the district court’s original jurisdiction. However, a federal court generally, under 28 U.S.C. § 1367(c)(3), declines to exercise supplemental jurisdiction if “the district court has dismissed all claims over which it has original jurisdiction” unless the case is close to or in the midst of trial or other such reasons exist

to retain jurisdiction See Zutz v. Nelson, 601 F.3d 842, 850 (8th Cir. 2010) (cleaned up and citation omitted). “The district court is afforded broad discretion in determining whether to exercise supplemental jurisdiction.” Crest Constr. II, Inc. v. Doe, 660 F.3d 346, 359 (8th Cir. 2011). “In determining whether to exercise supplemental jurisdiction, courts considers judicial efficiency, convenience, and fairness to litigators.” Magee v. Trs. of the Hamline Univ., 957 F. Supp. 2d 1047, 1060 (D. Minn. 2013). “In assessing efficiency, convenience, and fairness, courts look to a number of factors, including the stage of the litigation; the difficulty of the state claim; the amount of time and energy necessary for the claim’s resolution; and the availability of a state forum.” Id. (cleaned up and citation omitted). “Courts should exercise judicial restraint and avoid state law issues wherever possible . . .” Id. The stage of this case is “before any substantial preparation has gone into the dependent claims,” which provides a “fair” reason to decline to exercise supplemental jurisdiction. Id. (cleaned up and citation omitted).

Because Seneca has not stated a viable claim within original jurisdiction in federal court, this Court declines to exercise supplemental jurisdiction over Seneca’s state law claims. See Mountain Home Flight Serv., Inc. v. Baxter Cnty., 758 F.3d 1038, 1045 (8th Cir. 2014) (district court acted within its discretion declining to exercise supplemental jurisdiction after dismissing § 1983 claims); see also Hansell v. City of Atl. City, 152 F. Supp. 2d 589, 602–03 (D.N.J. 2001), (“[Section] 1983 does not create a cause of action based upon violations of state statutes.”).

Dismissing these claims at an early stage of litigation will allow Seneca to pursue relief in state court against Derek if she so chooses. See Jennings v. City of Stillwater, 383 F.3d 1199, 1205 (10th Cir. 2004) (“[F]ederal courts are not entrusted with the responsibility of ensuring the effective enforcement of state criminal laws; that role falls to state and local law enforcement authorities.”).

IV. Conclusion

For the reasons discussed above, it is

ORDERED that Derek’s motion to dismiss, Doc. 16, is granted without prejudice to Seneca refiling in state court. It is further

ORDERED that Miller Defendants’ motion to dismiss, Doc. 24, is granted. It is finally

ORDERED that this Court declines to exercise supplemental jurisdiction over the state law claims.

DATED this 21st day of June, 2022.

BY THE COURT:

/s/ _____
ROBERTO A. LANGE
CHIEF JUDGE

APPENDIX C

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION**

3:21-CV-03020-RAL

[Filed June 21, 2022]

SENECA LOVETT ENGEL,)
)
Plaintiff,)
)
vs.)
)
DEREK ENGEL, MILLER POLICE)
DEPARTMENT, CITY OF MILLER,)
SOUTH DAKOTA, JIM HENSON,)
MILLER POLICE DEPARTMENT,)
OFFICIALLY AND INDIVIDUALLY;)
SHANNON SPECK, MILLER POLICE)
DEPARTMENT, OFFICIALLY AND)
INDIVIDUALLY; AND VARIOUS)
JOHN AND JANE DOES,)
MILLER POLICE DEPARTMENT,)
OFFICIALLY AND INDIVIDUALLY;))
)
Defendants.)

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JUDGMENT OF DISMISSAL

For the reasons explained in the Opinion and Order Granting Defendants' Motions to Dismiss, it is hereby

ORDERED, ADJUDGED and DECREED that Petitioner's claims are dismissed and that judgment enters for Defendants under Rules 54 and 58 of the Federal Rules of Civil Procedure.

DATED this 21st day of June, 2022.

BY THE COURT:

/s/_____
ROBERTO A. LANGE
CHIEF JUDGE

App. 29

APPENDIX D

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

No. 22-2549

[Filed May 18, 2023]

Seneca Lovett Engel)
)
Appellant)
)
v.)
)
Derek Engel, et al.)
)
Appellees)

Appeal from U.S. District Court for the District of
South Dakota - Central (3:21-cv-03020-RAL)

ORDER

The petition for rehearing en banc is denied. The
petition for rehearing by the panel is also denied.

May 18, 2023

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Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX E

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION**

3:21-CV-3020

[Filed January 31, 2022]

SENECA LOVETT ENGEL,)
Plaintiff,)
)
vs.)
)
DEREK ENGEL, MILLER POLICE)
DEPARTMENT, CITY OF MILLER,)
SOUTH DAKOTA, AND JIM HENSON,)
SHANNON SPECK, AND VARIOUS)
JOHN AND JANE DOES OF THE,)
MILLER POLICE DEPARTMENT,)
OFFICIALLY AND INDIVIDUALLY;)
JOINTLY AND SEVERALLY,)
Defendants.)

AFFIDAVIT OF TUCKER J. VOLESKY

STATE OF SOUTH DAKOTA)
	: ss
COUNTY OF BEADLE)

Tucker J. Volesky, attorney for the above named Plaintiff, being first duly sworn on oath, deposes and state as follows:

1. I am the attorney representing Plaintiff Seneca Lovett Engel and I make this affidavit upon my personal information and knowledge. This affidavit and its exhibits are submitted in order to supply the Court with the information needed to take judicial notice, as requested by Plaintiffs Motion for Judicial Notice.
2. Attached as Exhibits are true and correct copies of the following court records in the action filed in the Circuit Court for the Third Judicial Circuit, Hand County, South Dakota, entitled Seneca Lovett Engel, Petitioner, vs. Derek Engel, Respondent, 29TPO20-000001:
 1. Petition and Affidavit for a Protection Order;
 2. Protection Order Hearing Transcript; and
 3. Order for Protection.

Dated the 31st day of January, 2022.

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Subscribed and sworn to before
Me this 31st day of January, 2022.

/s/ _____
Notary Public, South Dakota

My Commission Expires: 1-19-2023

[SEAL]

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EXHIBIT 2

[illegible]

IN CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
CASE NO. 29TPO20-000001

SENECA LOVETT ENGEL,)
))
Petitioner,)
))
vs.)
))
DEREK ENGEL,)
))
Respondent.))

PERMANENT ORDER HEARING

PROCEEDINGS: Taken on Tuesday, March 24, 2020, at the Hand County Courthouse, in Miller, South Dakota, at the hour of 10:01 a.m.

BEFORE: The Honorable PATRICK T. PARDY,
Circuit Judge.

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APPEARANCES:

FOR PETITIONER SENECA LOVETT ENGEL:

SENECA LOVETT ENGEL Pro Se

FOR RESPONDENT DEREK ENGEL:

MELISSA E. NEVILLE, ESQ.
Bantz, Gosch & Cremer, LLC
306 Sixth Avenue
Aberdeen, South Dakota 57401
605.225.2232

ALSO PRESENT:

CARLA GLYNN, Intern
DEREK ENGEL

--o0o--

Daniel P. Feldhaus Reporting
P.O. Box 467, Madison, SD 57042 605.256.5285

[pp.95-101]

officer?

THE WITNESS: An officer.

Q (BY MS. NEVILLE) I'm sorry, Officer Henson.

Was there an incident in late October that involved
you?

A Yes.

Q And can you tell me what day that the first call was made?

A That was Tuesday, October 29th, 2019.

Q And how were you contacted?

A Derek Engel called me by phone. I was out on patrol.

Q Are you personal friends with Derek Engel?

A No. I had never met Derek or Seneca before that day.

Q Okay. And did you then meet Derek at the Police Department -- or police station?

A Yes, I did. Mr. Engel called me and asked if I could meet him and his wife at the office.

Q Okay.

A I was a few blocks away, so I arrived at the office within a few minutes. And they were sitting outside, waiting.

Q Did he ask you why -- or did he tell you why he wanted you to meet him at the office?

A Yes. Derek told me he and his wife were having some marital problems, and he wanted to speak to me, with her present, to avoid any domestic situation -- domestic-violence situation.

Q So allegations of domestic violence?

A Yes.

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Q Okay. So you said you drove up and they were both sitting there in the vehicles?

A Yes, separate vehicles.

Q Okay. Did you invite them into your office, or did you talk to them in their vehicles? Or how did you --

A I opened the office and invited them in. I invited them to sit down. Derek sat down. Seneca chose to stand, which was perfectly fine with me. However she felt the most comfortable.

Q Okay. What was their demeanor at the time?

A Seneca was agitated. She was upset because Derek wouldn't give her her phone back.

I didn't get the feeling when I drove up, that they had been in any sort of very heated discussion.

Q Okay.

A Neither one of them seemed extremely upset. Seneca wasn't crying or anything like that.

She was, like I said, upset because she wanted her phone back.

Q Okay. Was Seneca's finger bleeding?

A I didn't notice that.

After Derek mentioned it, I did notice she had a Band-Aid on her finger.

Q Okay. And was Seneca -- did she look disheveled or her coat torn?

A Not that I noticed, no.

Q Okay. So did you ask them to explain what was going on?

A I did. I asked Derek to step into another office so I could speak to him privately. And at this time, Derek asked if Seneca could leave and pick up their other son from school, and I said that was fine, she was free to come and go as she pleased.

She left and came back within about ten minutes with her other son.

Q Okay. So what did you understand was the argument over the phone? Where did Derek get the phone?

A Derek told me -- he had driven by the grocery store and saw Seneca's car parked in front; and he wanted to speak to her.

He walked up to the car, and her son was in the car. And Seneca's phone was being charged in the car. And that's when he took the phone. He wanted to try and get into her phone, to see if she had been contacting any men.

Q Okay. And whose phone is it? Who owns the phone?

A Derek told me he bought the phone and was paying for the service.

I consulted with Chief Speck; and he said as long as Derek owns the phone and is paying for the service, it's his phone.

Q Okay. So you said that Seneca kept asking for the phone back.

Did she get the phone back that day?

A She did not, no.

Q Okay. And was she ever denied using a phone to call 911, or ask anyone for help?

A No. Never.

Q What did Derek tell you happened before they had a -- right immediately before they had arrived at the police station?

A Derek said, while he was talking to Seneca, I guess after their conversation was pretty much over, he wanted to get in the pickup and leave. And she stood in front of the door to block his way, and he kept asking her to move so he could leave. He said at one point he must have turned or something, and that's when she caught her fingernail on his coat, or whatever, and tore the nail. And that's when he got her the Band-Aid.

Q Okay.

A Then he said, after some more argument, he grabbed her coat and moved her to the side so he could leave.

App. 40

And he said he did push her up against the car so he could get by her and get in the pickup.

Q Okay, because the two vehicles were parked next to each other?

A Yes.

Q Did Seneca have any bruises or injuries other than her fingernail?

A None that I noted.

Q And why was Seneca standing in her way -- or in Derek's way?

A Because she wanted her phone.

Q Oh. So then when you met with Seneca, what did Seneca tell you?

A She told me that they hadn't been getting along for approximately three months, and that Derek had threatened her. She said she had video on her phone of him screaming at her; and there were holes in the walls of their apartment.

I asked her if she wanted to take pictures -- wanted me to go take pictures of the apartment, and she -- at about the same time, she wanted to call her mother. And I offered her the use of the office phone. And I told her I would dial her mother's number. And at that point, she became very nervous; and she said, "I just want to get

App. 41

out of here right now.” And she and the children left immediately.

Q Okay. Did you offer to go and take photographs of her apartment or anything like that?

A I did, but she left.

Q Okay. She didn’t take you up on that offer?

A No.

Q Did you have a phone call from a man named Jesse Fanning after that?

A I did. Approximately ten -- I have to look that up.

Q 10:23 a.m.?

A Yes, on Wednesday, October 30th.

9:13 a.m.

Q And what was -- without telling me what Jesse said, what was the purpose of his phone call?

A He was telling me, I had no right to take Seneca’s phone, and that amounted to kidnapping.

Q Okay. Did Sheriff Shane Croeni then address the concerns raised by Jesse?

A He called me later.

After I spoke to Jesse and after he left, about 10:23 a.m. Jesse called back and asked to call -- talk to Chief Speck. Chief Speck wasn't in the office; and he hung up.

And a minute or so later, Sheriff Croeni called me and said that Jesse was in his office complaining about the way I spoke to him.

Q Did you also have the phone in your possession?

A I don't believe I had it in my possession at that time.

Derek came back, and we talked about turning the phone over to the DCI so they could get whatever information off. And he left it with me, and came back about 8:00 a.m.

Q The next day?

A I believe it was the next day.

Q Okay. So he left it with you on that evening of Wednesday, October 30th; and you had it until the next day, which was the 31st?

A Yeah, I believe -- yes. About 4:15 Derek was at the office, asking me about the process to obtain a protection order. And that's when he left me the phone.

He came back the next morning and said he had spoken to his attorney, and was advised to take the phone so they could retrieve the information for this case.

Q At Computer Forensic Resources in Sioux Falls?

A Yes.

And I gave the phone back to him.

Q Okay.

A I also advised him -- I didn't know for sure, but I believe if -- once the phone is out of my possession, the DCI probably would question the --

Q Content?

A -- the content, the usefulness of them getting it later.

Q On Thursday, October 31st of 2019, did you also receive a call from somebody at Child Protective Services?

* * *

[pp.106-109]

Did you ask to see it at all, from the Defendant?

A I don't believe I did.

At about that same time, you said you wanted to call your mother, and I offered you the use of the phone that was in the office where we were speaking privately. And I asked you what her number was, and you immediately said, "I -- I just got to get out of here." And you grabbed your kids, and you were out the door.

Q Okay. And I don't know how it works with asking little ones what happened; but I don't know if you remember my youngest saying -- do you remember what he said?

A I do not.

Q Making a comment that daddy had grabbed --

MS. NEVILLE: I'm going to object to entering any statements about what the children --

MS. LOVETT ENGEL: Okay.

THE COURT: He's already answered it. He said he did not.

Go ahead, continue.

Q (BY MS. LOVETT ENGEL) Okay. And you said that the phone was in your custody after the 30th of October?

A I received the phone on Wednesday, October 30th, at about 4:15 p.m.

Q Okay. And do you remember me coming in before that, and letting you know that he had distributed my personal photographs against my knowledge and without my permission?

A I do remember talking to you about that.

Q And do you remember me asking you if there was something you could do to stop this, because he had also had other people's photos on my phone that he was sending out?

A I believe -- yes, I do. I didn't know if there was anything I could do about that or not.

Q Okay.

A The phone was -- to my knowledge, it was his.

Q Okay. And the way it works with property, if he pays for it but it's in my possession for the last four years, is it still -- is what I'm just asking.

A I was -- I was told that because he was paying -- he bought the phone and because he was paying for the service, that it was technically his phone.

Q Okay.

MS. LOVETT ENGEL: Okay, that's all I've got.

Thank you.

THE COURT: Do you have anything further?

MS. NEVILLE: Nothing further.

THE COURT: I've got a couple questions, and I think it's important, and I want to understand.

What interest would the DCI have in this phone? Why was that even a consideration?

THE WITNESS: When we get a phone, I don't know how to get into it without a password. They do --

THE COURT: Why would you want to get into it?

THE WITNESS: For evidence.

Derek told me there were, by his words, hundreds of contacts with other men.

THE COURT: Is that illegal?

THE WITNESS: No. Pictures of nude photos of her that she had texted to these other men.

THE COURT: Is that illegal?

THE WITNESS: I don't know. Is sexting illegal?

THE COURT: For adults, as far as I know.

I'm just trying to figure out why in the world the DCI was even a consideration.

THE WITNESS: That's what Chief -- Chief Speck advised me to do.

THE COURT: Well, this is a whole different matter, but that whole conversation blows my mind with an adult person.

And the other thing I'm trying to figure out -- and this is for you as well -- so if a married couple -- if my wife has a phone, and maybe I pay the bill, we've been married for 20 years, if I abuse her and take her phone and destroy it, she doesn't have any right to that phone? That's not preventing a call, since it's my property?

THE WITNESS: Well, while she was at the office, she had --

App. 47

THE COURT: No, I'm just trying to figure out what the thought process was on this phone.

I guess I'm going to leave it at this: If I was you, I would talk to your State's Attorney, because I think this whole thing was -- this part -- you don't have to answer. I'm just saying, I think you're getting bad advice.

THE WITNESS: Okay.

THE COURT: All right, we will continue.

You can step down.

(The witness was excused.)

THE COURT: You can call your next witness.

MS. NEVILLE: Thank you, Your Honor.

We'd call Nicole Gortmaker.

--oOo--

NICOLE GORTMAKER,

called as a witness in said cause, being duly sworn by the Court to tell the truth, the whole truth, and nothing but the truth, testified as follows:

--oOo--

DIRECT EXAMINATION BY MS. NEVILLE

Q Hi, Nicole. I'm Melissa Neville. I'm Derek Engel's attorney.

App. 48

Can you state your full name, please?

A Nicole Lynn Gortmaker.

Q And how do you know Derek?

* * *

[pp.147-149]

them that the two of you do. It is sad.

Now, there's not a box for me to check to take these kids from you; but if there was, I'd consider it because they deserve better.

So if you love them, the two of you are going to figure out how to treat each other with respect.

You can hate each other, that's fine. It's part of life. But you don't have to hate each other in front of your children.

In fact, if you want to turn this around -- Father's Day is coming up, Mother's Day is coming up, your birthdays are coming up -- say to your kids, "Hey, do you need 10 bucks to get your mom a present?" Let them buy the present. Don't say one mean word. Let them deliver it.

Now, you can hope she chokes on it, but let the kids not know that. And you can do the same thing going the other way. But you guys got to find a way that, in front of your children, that they learn it's okay to love the two of you. So this isn't divorce court, this isn't a custody matter; but that is the first thing that just hit me in the face.

As I go through this record, I will just be honest with you: You taking her phone just blows my mind. It's marital property. You've been married for years. It's her phone for at least four, I think I heard the testimony. And then somehow, you think, "Well, I pay the bill, so it's my phone." That blows me away that that's a thought process in this day and age.

So in this matter, I am going to issue a protection order.

First, I do find that stalking has taken place. I think that you have gone out of your way to inflict embarrassment and shame and revenge on your ex. And I specifically find that by verbal and electronic and digital media, that you have repeatedly followed and harassed your ex.

I look at the e-mail from Stephanie Pochop, who is the attorney for the Petitioner in Exhibit A. And the things that you've said to her and did, and in contacting her ex-employer, when she's not even working there anymore, that is for nothing less than vengeance and revenge. You weren't trying to help or save anybody. So I do find that stalking has taken place.

And by your own testimony, you have admitted to violence on your ex -- or soon-to-be ex. And I find that admission to be credible.

You are therefore commanded not to harass, follow the Petitioner, or make any credible threat with the intent to place her in fear of death or bodily injury.

You are not to harass her by means of verbal, electronic, digital media, mechanical, telegraphic, or written communication, or cause any injury.

You shall not come within a distance of 150 feet of her or her residence.

You cannot make any phone calls, e-mails, third-party contact, including correspondence, direct or indirect, that are not -- and let me ask this question, because these would be evidence: Are the parties okay with, as it relates to the children, that there be text messages? Obviously, if it's not the children, that would be a violation and you could be arrested; but there would be proof of it.

MS. NEVILLE: I would prefer that the parties enroll in something like Our Family Wizard, Your Honor. It's just too easy to fire off a text one way or the other.

THE COURT: Are you in agreement with that?

MS. LOVETT ENGEL: Absolutely.

THE COURT: And is your client in agreement with that?

MS. NEVILLE: Yes, Your Honor.

THE COURT: And it's "R," as in just the letter "R"?

MS. NEVILLE: "Our."

THE COURT: "Our"?

App. 51

MS. NEVILLE: “Our Family Wizard.” That’s an app that the parties can post everything from schedules, to medical

* * *

APPENDIX F

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION**

3:21-CV-3020

[Filed January 31, 2022]

SENECA LOVETT ENGEL,)
Plaintiff,)
)
vs.)
)
DEREK ENGEL; MILLER POLICE)
DEPARTMENT, CITY OF MILLER,)
SOUTH DAKOTA, AND JIM HENSON,)
SHANNON SPECK, AND VARIOUS)
JOHN AND JANE DOES OF THE,)
MILLER POLICE DEPARTMENT,)
OFFICIALLY AND INDIVIDUALLY;)
JOINTLY AND SEVERALLY,)
Defendants.)
)

MOTION FOR JUDICIAL NOTICE

COMES NOW, the above-named Plaintiff by and through her undersigned attorney and, pursuant to Fed. R. Evid. 201(c)(2), hereby moves the Court to take judicial

notice of the following records in the action filed in the Circuit Court for the Third Judicial Circuit, Hand County, South Dakota, entitled Seneca Lovett Engel, Petitioner, vs. Derek Engel, Respondent, 29TPO20-000001:

1. Petition and Affidavit for a Protection Order
2. Protection Order Hearing Transcript
3. Order for Protection

This Motion is supported by the pleadings and files herein; and the Affidavit of Tucker J. Volesky, to which these court documents are attached, and which is served and filed herewith.

Dated the 31st day of January, 2022.

/s/ _____
Tucker J. Volesky
Attorney for the Plaintiff
356 Dakota Ave. S.
Huron, South Dakota 57350
(605) 352-2126
Tucker.volesky@outlook.com

APPENDIX G

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION**

3:21-CV-3020

[Filed October 19, 2021]

SENECA LOVETT ENGEL,)
Plaintiff,)
)
vs.)
)
DEREK ENGEL; MILLER POLICE)
DEPARTMENT, CITY OF MILLER,)
SOUTH DAKOTA, AND JIM HENSON,)
SHANNON SPECK, AND VARIOUS)
JOHN AND JANE DOES OF THE,)
MILLER POLICE DEPARTMENT,)
OFFICIALLY AND INDIVIDUALLY;))
JOINTLY AND SEVERALLY,)
Defendants.)

COMES NOW, the above-named Plaintiff by and through her undersigned attorney, and for her claims and causes of action against Defendants, demands a jury trial and states and alleges as follows:

JURISDICTION AND VENUE

1. That this Complaint asserts a civil action arising under federal law for which this Court has original jurisdiction pursuant to 28 U.S.C. Section 1331 and 28 U.S.C. Section 1343.
2. That all other claims asserted in this Complaint are so related to the claim within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution such that this Court has supplement jurisdiction pursuant to 28 U.S.C. Section 1367.
3. That the events giving rise to the causes of action alleged in this Complaint occurred in Hand County, South Dakota.

PARTIES

4. That PLAINTIFF SENECA LOVETT ENGEL, a black female, at the times relevant to this Complaint was a resident of Hand County, South Dakota and is now a resident of Beadle County, South Dakota.
5. That, upon information and belief, DEFENDANT DEREK ENGEL is a resident of Hand County, South Dakota.
6. That, upon information and belief, DEFENDANT MILLER POLICE DEPARTMENT (hereinafter sometimes referred to as "Miller PD") is a law enforcement agency of the CITY OF MILLER,

SOUTH DAKOTA, a municipality chartered under the Constitution of the State of South Dakota and doing business in Miller, Hand County, South Dakota.

7. That, upon information and belief, DEFENDANT JIM HENSON is a law enforcement officer employed by Defendant Miller Police Department of the City of Miller, South Dakota.
8. That, upon information and belief, DEFENDANT SHANNON SPECK is employed as the Chief of Police by Defendant Miller Police Department of the City of Miller, South Dakota.
9. That, upon information and belief, various JOHN AND JANE DOES, DEFENDANTS, are employed by Defendant Miller Police Department, City of Miller, South Dakota, to perform certain duties including law enforcement and the supervision of officers employed by the Miller Police Department.
10. Defendant Miller Police Department, City of Miller, South Dakota and its agents, servants and/or employees, or such other individuals and/or officials as may have been hired by, contracted with or otherwise directed, authorized, or controlled by, the Defendant governmental entity, whether in their official and/or individual capacities, Jointly and Severally as to each and all defendants herein.

FACTS

11. Plaintiff restates and realleges the foregoing allegations of paragraphs 1 through 10 as though fully set forth herein.
12. In late October 2019, Defendant Derek Engel heard from a co-worker that his wife, the above-named Plaintiff, was rumored to be involved in extra-marital activity.
13. On October 29, 2019, Defendant Engel took Plaintiff's phone from her car while she was grocery shopping at a local store in Miller, South Dakota. While Plaintiff and Defendant Engel had been married for approximately three years by this time, Plaintiff's phone was associated with a number she had been using the past eight years.
14. Later that day, Plaintiff and Defendant Engel met at the Miller airport and began arguing over the phone and Plaintiff's alleged infidelity. A physical altercation ensued wherein Defendant Engel grabbed Plaintiff by the neck and slammed her against the side of a pick-up truck resulting in Plaintiff's coat to be ripped, finger to be cut and bloodied, and pain in her neck and back. The couples' four year old son was present during the altercation.
15. Upon being released from Defendant Engel's grasp, Plaintiff immediately proceeded to the Miller Police Department to report the incident as Defendant still

had possession of Plaintiff's phone which prohibited Plaintiff from calling 911. Defendant Engel followed Plaintiff to the police station in a separate vehicle. En route, Defendant Engel called Defendant Jim Henson, an officer for Defendant Miller Police Department, to advise that he and Plaintiff would soon be arriving to discuss a domestic situation.

16. At the police station, Defendant Engel admitted to Defendant Henson that he took the phone from Plaintiff's car while she was grocery shopping and that he was refusing to give it back.
17. Defendant Engel also described the domestic altercation occurring at the airport admitting to Defendant Henson that he grabbed and pushed Plaintiff.
18. Thereafter, Defendant Henson spoke with Plaintiff who reported that Defendant Engel had assaulted her by grabbing her neck and slamming her against a truck at the airport. Plaintiff also reported other instances of physical domestic abuse occurring repeatedly throughout the relationship.
19. Plaintiff further reported that Defendant Engel had stolen her phone and requested that law enforcement take action to get the phone back and pursue the domestic assault as a criminal matter. Plaintiff advised Defendant Henson that evidence of domestic abuse was contained on her phone that

Defendant Engel had in his possession and was refusing to return to Plaintiff.

20. Plaintiff and Defendant Engel's son also reported to Defendant Henson that "daddy grabbed and pushed mommy."
21. Defendant Henson consulted with Defendant Shannon Speck, Chief of the Miller Police Department, regarding how to proceed in light of the situation.
22. Thereafter, Defendant Miller Police Department failed to take any action to retrieve Plaintiff's phone, and failed to properly act upon, investigate, and pursue Plaintiff's report of domestic assault.
23. Defendant Engel was allowed to leave the Miller Police Station on October 29, 2019, with Plaintiff's phone in his possession. As a result, Defendant Engel was able to gain full access to Plaintiff's social media accounts and the email associated with those accounts as that information was stored on the phone.
24. Due to law enforcement inaction, Plaintiff went to a nearby town to stay with a friend out of fear for her safety.
25. The next day, October 30, 2019, Plaintiff was granted a temporary protection order against Defendant Engel.

26. After taking possession of Plaintiff's phone on October 29, 2019, Defendant Engel began accessing Plaintiff's social media accounts pretending to be Plaintiff while contacting third parties, impersonated Plaintiff on Snapchat, Facebook, and Instagram, and changed Plaintiff's passwords so that Plaintiff could no longer access the accounts.
27. Defendant Engel also accessed other content on Plaintiff's phone including extremely personal, private photographs, intimate in nature, of Plaintiff's body exposed in manners sexual and erotic as well as intimate clothing, and personal messages containing information about Plaintiff's private life, as well as that of her friends and family. Defendant Engel then sent this previously described content to others including Plaintiff's family, friends, and others in the Miller community and elsewhere, including to individuals Plaintiff did not know personally.
28. Plaintiff further reported the foregoing allegation of paragraphs 23 through 27, as well as those contained in paragraphs 29 through 35 below, to Defendant Henson on October 30, 2019, and Defendant Speck on November 5 and 6, 2019.
29. Despite Plaintiff's continued reports of domestic violence and abuse as well as Plaintiff's reports of identity theft and cybersexploitation, the Miller PD failed to properly act upon and investigate the reports and pursue the perpetrator; the Miller PD

failed to interview witnesses, prepare an incident report, follow-up with an investigation, afford crime victim rights, and make an arrest.

30. Coinciding with the previously described disclosures, Defendant Engel contacted Plaintiff's friends, family, co-workers, fellow church goers, professional and community service associates, and employers as well as school staff; Defendant Engel made false allegations to said third parties that Plaintiff is a drug addict and prostitute with mental health issues and federal criminal charges pending, among other false statements.
31. During the same time, Defendant Engel contacted Hand in Hand Daycare, where Plaintiff was a board member at the time, and told the director that Plaintiff was a prostitute with a drug habit and would be arrested and charged that day. As a result, Plaintiff was pressured to resign from the board.
32. During the same time, Defendant Engel contacted Trinity Lutheran Church, where Plaintiff was a Sunday school teacher, and told the pastor that Plaintiff was a prostitute with a drug habit and would be arrested on federal charges imminently. Although Plaintiff had been a teacher in the Sunday School Program for two years, assisted with other programs and camps, and sat on the Trinity Lutheran Women's Council Pre-Lenten Tea Committee, Plaintiff was pressured to resign from these activities as a result.

33. During the same time, Plaintiff was engaged in an EEOC complaint against her former employer the Good Samaritan Center and was being represented by legal counsel. Defendant Engel contacted Plaintiff's legal counsel as well as the EEOC investigators to falsely allege that Plaintiff was a mentally unstable drug addict and prostitute with federal criminal charges pending and that Plaintiff used a sample of her child's urine to pass a mandatory employment drug test. As a result, Plaintiff's settlement on her EEOC complaint was diminished greatly.
34. Defendant Engel proceeded to engage in a course of conduct involving willful, malicious, and repeated harassing and threatening contacts to Plaintiff, including pictures of dead animals, causing Plaintiff to fear for her life and safety.
35. Defendant Engel persisted in said conduct intentionally setting off Plaintiff's car alarm and engaging in verbally abusive threats against Plaintiff when exchanging custody of the children as well as at Plaintiff's place of employment and residence. As a result, Plaintiff was in a high state of fear constantly checking the locks on her doors as well as all the rooms, closets, and the shower whenever returning home, and eventually, Plaintiff was forced to seek employment where she could work from home due to the continuing threat posed by Defendant Engel.

36. On January 21, 2020, Plaintiff was granted another temporary protection order restraining Defendant Engel from “following or harassing Petitioner, or making any credible threat with the intent to place Petitioner in reasonable fear of death or bodily injury, SDCL 22-19A-1 ; [and] harassing Petitioner by means of any verbal, electronic, digital media, mechanical, telegraphic, or written communication, SDCL 22-19A-1.” After a contested hearing held on March 23, 2020, where Plaintiff appeared personally and without counsel, and Defendant appeared personally and was represented by counsel, the circuit court extended the protection order against Defendant Engel.
37. As a result, Plaintiff suffered physical injury, pain and suffering, great mental anguish and emotional distress, loss of enjoyment of life, harm to economic reputational and dignitary interests, a deprivation of constitutional and statutory rights, and is it entitled to general, special, and other damages.

CAUSES OF ACTION

I. ASSAULT AND BATTERY – as to Defendant Derek Engel

38. Plaintiff restates and realleges the foregoing allegations of paragraphs 1 through 37 as though fully set forth herein.
39. Defendant Engel intentionally acted to put Plaintiff under a reasonable apprehension of immediate

harmful or offensive contact which did create such a reasonable apprehension in Plaintiff.

40. Defendant Engel intentionally made harmful and offensive contact to Plaintiff's person.
41. Defendant Engel's actions against Plaintiff were committed willfully, wantonly and maliciously.
42. As a result, Plaintiff suffered physical injury, mental anguish and emotional distress, pain and suffering, and general, special, and other damages.

II. DEFAMATION – as to Defendant Engel

43. Plaintiff restates and realleges the foregoing allegations of paragraphs 1 through 42 as though fully set forth herein.
44. Defendant Engel made defamatory statements of and concerning Plaintiff and published those statements to third persons.
45. Defendant Engel made and published the defamatory statements of and concerning Plaintiff intentionally and maliciously.
46. As a result, Plaintiff suffered harm to her economic and dignitary interests, pecuniary loss, reputational harm, and other general, special, and other damages in an amount to be determined by a jury at trial.

III. INVASION OF PRIVACY – as to all Defendants

47. Plaintiff restates and realleges the foregoing allegations of paragraphs 1 through 46 as though fully set forth herein.
48. Defendants intruded upon Plaintiff's private affairs and seclusion.
49. Defendants published content concerning Plaintiff intending to place Plaintiff in a false light. Said publication was highly offensive under the circumstances and done maliciously.
50. Defendants made public disclosures of private matters concerning Plaintiff. Said public disclosures were highly offensive to ordinary sensibilities and done maliciously.
51. Defendants' conduct was the proximate and actual cause of the invasion of Plaintiff's interest in privacy.
52. As a result, Plaintiff suffered emotional distress and mental anguish, harm to her economic, dignitary, pecuniary, and reputational interests, and other damages, in an amount to be determined by the jury.

IV. INTENTIONAL INFLICTION OF
EMOTIONAL DISTRESS – as to all
Defendants

- 53. Plaintiff restates and realleges the foregoing allegations of paragraphs 1 through 52 as though fully set forth herein.
- 54. Defendants' acts and failures to act amount to extreme and outrageous conduct.
- 55. Defendants' acts and failures to act were committed intentionally or recklessly.
- 56. Defendants' acts and failures to act caused Plaintiff severe emotional distress.
- 57. As a result, Plaintiff suffered severe emotional distress and other damages in an amount to be proved at trial.

V. NEGLIGENCE/NEGLIGENT INFLICTION OF
EMOTIONAL DISTRESS – as to Defendants
Miller Police Department, City of Miller, South
Dakota, Henson, Speck and various John and
Jane Does of the Miller Police Department,
officially and individually

- 58. Plaintiff restates and realleges the foregoing allegations of paragraphs 1 through 57 as though fully set forth herein.
- 59. Defendants owed a duty to Plaintiff by virtue of a special relationship; Plaintiff was a crime victim

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who reported domestic assault, theft, and cybercrime to Defendants.

60. Defendants owed a duty to investigate, pursue, and apprehend the perpetrator of the criminal violations committed against Plaintiff.
61. Defendants' owed Plaintiff special, statutory duties pursuant to SDCL 23-3 and SDCL 25-10 because Plaintiff was a victim of domestic abuse. Specifically, SDCL 25-10-36 provides: "If any law enforcement officer who is responding to domestic abuse call has probable cause to believe that a crime has been committed, the law enforcement officer shall arrest the person who is suspected of committing the crime and make a complete report of any action taken."
62. Defendants affirmatively acted to receive reports from Plaintiff of domestic violence and other crimes committed by Defendant Engel.
63. Defendants had actual knowledge that Plaintiff was a victim of domestic violence and other crimes and that Defendant Engel was the perpetrator.
64. Plaintiff reasonably relied upon Defendants to protect her from Defendant Engel, and to pursue the criminal investigation, arrest, and prosecution of Defendant Engel.

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65. Defendants failed to meet their special, statutory duties owed to Plaintiff under SDCL 23-3 and SDCL 25-10, and under Marcy's Law.
66. Defendants' actions and/or inaction increased the risk of harm posed to Plaintiff by Defendant Engel.
67. Defendants failed to investigate, pursue, and apprehend the Plaintiff's perpetrator, which allowed Plaintiff's perpetrator to engage in further acts against the Plaintiff, causing Plaintiff severe emotional distress.
68. Defendants' actions and/or inaction contributed to, or was a substantial factor in causing, Defendant Engel's illegal and tortious conduct including, but not limited to, harassment, identity theft, defamation, and invasion of privacy.
69. As a result, Plaintiff suffered emotional distress and mental anguish and other damages, general and special, and is entitled to such and other additional damages in an amount to be determined by a jury at trial.

VI. NEGLIGENT HIRING, TRAINING, SUPERVISION, AND RETENTION – as to Defendants Miller Police Department, City of Miller, South Dakota, Henson, Speck and various John and Jane Does of the Miller Police Department, officially and individually

70. Plaintiff restates and realleges the foregoing allegations of paragraphs 1 through 69 as though fully set forth herein.
71. At all times relevant to the events described in this Complaint, Defendants owed a duty of care to make a reasonable inquiry into the background of their employees including, Defendant Henson and various John and Jane Does, to determine their fitness in the performance of their duties.
72. At all times relevant to the events described in this Complaint, Defendants owed a duty of care to properly and reasonably train their employees to, among other things, observe and enforce South Dakota law, respond to reports of crime, protect victims of crime, and pursue perpetrators of crime.
73. At all times relevant to the events described in this Complaint, Defendants owed a duty of care to properly and reasonable supervise their employees to, among other things, observe and enforce South Dakota law, respond to reports of crime, protect victims of crime, and pursue perpetrators of crime.

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- 74. At all times relevant to the events described in this Complaint, Defendants owed a duty of care to properly and reasonably retain their employees who, among other things, observe and enforce South Dakota law, respond to reports of crime, protect victims of crime, and pursue perpetrators of crime.
- 75. Defendants, in failing to properly and reasonably train, hire, supervise, and /or retain its employees, agents, and servants, breached said duties.
- 76. All acts and/or omissions by the Defendants were committed within the authority of and within the scope of their employment within the respective governmental entity employer, as well as their individual capacity.
- 77. Defendants' actions and/or omissions, and the consequential results therefrom, were the direct and proximate cause of the statutory and constitutional violations, and injuries and damages suffered by Plaintiff.
- 78. As a result, Plaintiff has been damaged in an amount to be determined by a jury at trial.

VII. CONSPIRACY – as to all Defendants

- 79. Plaintiff restates and realleges the foregoing allegations of paragraphs 1 through 78 as though fully set forth herein.
- 80. 42 U.S.C. § 1985 provides a cause of action for Conspiracy to interfere with civil rights.

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81. Defendants participated in a conspiracy-causing damage to Plaintiff.
82. Defendants acted in furtherance of the conspiracy for the purpose of depriving, either directly or indirectly, Plaintiff equal protection of the laws.
83. Defendants were aware of previous reports of domestic abuse made by alleged victims and failed to properly act thereon in violation of the rights of those victims.
84. Defendants conspired to cover-up and ignore reports of domestic violence made by alleged victims, thus endangering certain populations of South Dakota.
85. Defendants engaged in a policy and custom of ignoring reports of domestic violence in violation of victims' rights.
86. Defendants participated in violating Plaintiff's statutory and constitutional rights.
87. Defendants were directly responsible for the violations of Plaintiff's statutory and constitutional rights.
88. Defendants had actual knowledge of and were deliberately indifferent to and tacitly authorized the acts violative of Plaintiff's statutory and constitutional rights.
89. Defendants' actions and/or omissions were the direct and proximate cause of the statutory and

constitutional violations, and injuries and other damages, suffered by Plaintiff.

90. As a result, Plaintiff was injured in her person and property, and suffered a deprivation of her statutory and constitutional rights.
91. Plaintiff suffered damages, general and special, and is entitled to such and other damages in an amount to be determined by a jury at trial.

VIII. 42 U.S.C. § 1983 – as to all Defendants

92. Plaintiff restates and realleges the foregoing allegations of paragraphs 1 through 91 as though fully set forth herein.
93. Defendants operated under the statutes, usage, custom, ordinances and regulations, and otherwise under the color of law, of the State of South Dakota, the City of Miller and other applicable local, state, and federal Laws and/or Guidelines, and deprived Plaintiff of constitutional and statutory rights, privileges, and immunities, including, but not limited to, rights to equal protection, due process, privacy, property, and liberty.
94. Defendants acted with intentional, deliberate, or reckless indifference to Plaintiff's rights.
95. Defendants engaged in willful and wanton conduct.
96. Defendants' actions and/or omissions were the direct and proximate cause of Plaintiff's damages.

97. Defendants had actual knowledge of and were deliberately indifferent to and tacitly authorized the acts violative of Plaintiff's statutory and constitutional rights, and Defendants have engaged in such policy and custom.
98. Defendants caused Plaintiff to suffer flagrant violations of her constitutional rights including, but not limited to, equal protection, due process, privacy, property, and liberty. Existing remedies do not redress her injuries, and equitable relief is wholly inadequate to protect Plaintiff's rights or redress her injuries.
99. Plaintiff suffered emotional distress, mental anguish, reputational harm, violations of her basic human dignity, deprivations of her constitutional and statutory rights and is entitled to damages, general, special, and other, in an amount to be determined by a jury at trial.
100. Plaintiff is also entitled to recover from the Defendants reasonable attorney's fees under 42 U.S.C. § 1988.

WHEREFORE, Plaintiff prays for judgment against Defendants as follows:

- (1) Judgment against each and all of the Defendants, jointly and severally against each, in the total sum to be determined by a jury at trial;

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- (2) Award to the Plaintiff for actual expenses, attorney fees and costs, and prejudgment and post-judgment interest on any special and any compensatory damages;
- (3) For such monetary compensation as shall fully compensate Plaintiff for the physical and mental pain, suffering, and anguish and emotional distress, and damage to economic and dignitary interests, as well as pecuniary loss and reputational harm, in an amount to be determined by the jury in this case;
- (4) For an award of exemplary damages against Defendants, plus such interest as may be awarded by the jury;
- (5) For costs and disbursements herein;
- (6) For an award of damages for compensatory, special, pecuniary, punitive and other damages, including interest, against each and every Defendant, whether officially and /or individually, and jointly and severally as to each, in a sum to be determined by the jury in this case; and
- (7) For such other and further relief as is found to be appropriate in this matter.

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Dated the 19th day of October, 2021.

/s/

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