SERVICES, INC., KENMOREHOUSING DEVELOPMENT FUND CORPORATION, KENMORE ASSOCIATES, L.P., CITY UNIVERSITY OF NEW YORK, KENMORE HOUSING CORPORATION, NEW YORK STATE ATTORNEY GENERAL, NEW YORK CITY TRANSIT AUTHORITY, Defendants-Appellees, VERIZON COMMUNICATIONS, INC., NEWYORK CITY HEALTH AND HOSPITALS CORPORATION (BELLEVUE), NEW YORKPOLICE DEPARTMENT, NEW YORK CITY FIRE DEPARTMENT, RYAN CAMIRE, L.C.S.W., TRANSPORT WORKERS UNION LOCAL 100, MADELINE O'BRIEN, M.D., JOHN/JANE DOE, et al., DERICK ECHEVARRIA, JOHNSON CONTROLS, INC., CITY OF NEW YORK, Defendants.

For Plaintiff-Appellant: BRIAN BURKE, pro se, New York, NY. For Defendants-Appellees Housing and Services, Inc., Kenmore Housing Development Fund Corporation, Kenmore Associates, L.P., and Kenmore Housing Corporation: Jeffrey N. Rejan, Malapero Prisco & Klauber LLP, New York, NY. For Defendants-Appellees City University of New York and New York State Attorney General: Barbara D. Underwood, Solicitor General, Judith N. Vale, Deputy Solicitor General, David Lawrence III, Assistant Solicitor General, for Letitia James, Attorney General for the State of New York, New York, NY. For Defendant-Appellee New York City Transit Authority: David I. Farber, General Counsel, Robert K. Drinan, Executive Agency Counsel, New York City Transit Authority, Brooklyn, NY. Appeal from a judgment of the United States District Court for the Southern District of New York (Paul G. Gardephe, Judge). UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the March 16, 2023 judgment of the district court is AFFIRMED. Brian

Burke, proceeding pro se, appeals from a judgment of the district court dismissing his claims against various defendants – including his former employer, his landlord, the City of New York, hospital employees, and emergency workers – who allegedly caused him to lose his job, deprived him of his pension benefits, attempted to evict him from his apartment, and defamed him in his hospital records. We assume the parties' familiarity with the underlying facts, procedural history, and issues in dispute, to which we refer only as necessary to resolve this appeal. I. March 29, 2019 and November 6, 2020 Orders Granting Motions To Dismiss Burke first challenges the district court's March 2019 and November 2020 orders dismissing his claims against the New York State Attorney General, the City of New York (the "City"), New York City Health & Hospitals ("Bellevue"), the Transport Workers Union Local 100 (the "Union"), and the New York City Transit Authority (the "Transit Authority").1 "We review de novo a district court's dismissal of a complaint for lack of standing and for failure to state a claim." *Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 88 (2d Cir. 2009) (citations omitted). Burke contends that the district court erred in dismissing his claims against the Attorney General – by which he sought to enjoin enforcement of New York Labor Law § 190(3) – for lack of standing. Burke forfeited this argument, however, when he failed to object to the portion of the magistrate judge's report and recommendation that proposed dismissal of this claim on standing grounds. See *Smith v. Campbell*, 782 F.3d 93, 102 (2d Cir. 2015) ("Where parties receive clear notice of the consequences, failure to timely object to a magistrate's report and 1 The district court's orders also dismissed Burke's claims against Verizon Communications, Inc., the New York City Police Department (the "NYPD"), the New York City Fire

Department ("FDNY"), Ryan Camire, Madeline O'Brien, Derick Echevarria, Johnson Controls, Inc., and several John and Jane Does. On appeal, Burke expressly abandoned his claims against the NYPD, the FDNY, Johnson Controls, and Echevarria. Moreover, Burke's brief does not advance any argument challenging the dismissal of his claims against Verizon, Camire, O'Brien, or the Doe defendants, and he thus forfeited any appeal as to those claims. See *Terry v. Inc. Vill. of Patchogue,* 826 F.3d 631, 632 (2d Cir. 2016) ("Although we accord filings from pro se litigants a high degree of solicitude, even a litigant representing himself is obliged to set out identifiable arguments in his principal brief." (internal quotation marks omitted)). recommendation operates as a [forfeiture] of further judicial review of the magistrate's decision."). Burke next argues that the district court erred by refusing to toll the statute of limitations for his defamation and medical malpractice claims against the City and Bellevue. But equitable tolling requires a showing that "the defendant actively misled the plaintiff," which Burke did not plausibly allege in his amended complaint. *O'Hara v. Bayliner, 89 N.Y.*2d 636, 646 (1997). As to Burke's breach-of-contract claims against the Transit Authority, his former employer, Burke now argues that the district court should have excused his failure to exhaust administrative remedies because such exhaustion would have been futile. Yet Burke never raised this argument when opposing the Transit Authority's motion to dismiss. As a result, he has forfeited that argument on appeal. *See Anderson Grp., LLC v. City of Saratoga Springs*, 805 F.3d 34, 50 (2d Cir. 2015) ("It is well settled that arguments not presented to the district court are considered [forfeited] and generally will not be considered for the first time on appeal."). And while Burke contends that the district court erred in dismissing his

claim against the Transit Authority under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964(c), he argues only that RICO should apply to public agencies. That argument "fails to address adequately the merits" of the district court's dismissal of his RICO claim, which was based on Burke's failure to allege a pattern of racketeering activity. *Terry v. Inc. Vill. of Patchogue*, 826 F.3d 631, 632–33 (2d Cir. 2016) (rejecting non-responsive argument because "even a litigant representing himself is obliged to set out identifiable arguments in his principal brief" (internal quotation marks omitted)). Finally, Burke argues that the Union breached its duty of fair representation by failing to schedule an arbitration for him. It is well settled, however, that public employees like Burke cannot bring claims of this sort under the Labor Management Relations Act. See *Green v. Dep't of Educ. of N.Y.C.*, 16 F.4th 1070, 1075 (2d Cir. 2021) ("As the statute makes clear, however, public employees are not covered by the [Labor Management Relations Act]."). For all these reasons, the district court did not err in dismissing Burke's claims against the Attorney General, the City, Bellevue, the Transit Authority, and the Union. II. March 16, 2023 Order Granting Summary Judgment Burke also challenges the district court's grant of summary judgment dismissing his remaining claims against Housing and Services, Inc., Kenmore Housing Development Fund Corporation, Kenmore Associates, L.P., and Kenmore Housing Corporation (collectively, "Kenmore"). We review a grant of summary judgment de novo, "resolv[ing] all ambiguities and draw[ing] all inferences against the moving party." *Garcia v. Hartford Police Dep't*, 706 F.3d 120, 126–27 (2d Cir. 2013). "Summary judgment is proper only when, construing the evidence in the light most favorable to the non-movant, 'there is no genuine dispute

as to any material fact and the movant is entitled to judgment as a matter of law.'" *Doninger v. Niehoff*, 642 F.3d 334, 344 (2d Cir. 2011) (quoting Fed. R. Civ. P. 56(a)). Burke argues that the district court erred in granting summary judgment on his RICO and section 1983 claims because Kenmore did not negotiate with Burke in good faith during court-ordered mediation. But Kenmore's good faith – or lack thereof – during mediation had no bearing on the district court's grant of summary judgment, which instead turned on the fact that Burke failed to demonstrate that Kenmore was a state actor or had committed RICO predicate acts. See Terry, 826 F.3d at 632–33 (rejecting argument that failed to address the merits of the district court's decision). In light of his failure to raise any argument as to how the district court erred, Burke has forfeited any challenge to the district court's summary judgment order. * * *We have considered Burke's remaining arguments and find them to be without merit. Accordingly, we AFFIRM the judgment of the district court. FOR THE COURT: Catherine O'Hagan Wolfe, Clerk of Court United States Court of Appeals for the Second Circuit Thurgood Marshall U.S. Courthouse 40 Foley Square New York, NY 10007 DEBRA ANN LIVINGSTON CHIEF JUDGE CATHERINE O'HAGAN WOLFE CLERK OF COURT Date: May 16, 2024 Docket #: 23-635cv Short Title: *Burke v. Verizon Communications, Inc.* DC Docket #: 18-cv-4496 DC Court: SDNY (NEW YORK CITY) DC Judge: Gorenstein DC Judge: Gardephe the original and two copies. United States Court of Appeals for the Second Circuit Thurgood Marshall U.S. Courthouse 40 Foley Square New York, NY 10007 DEBRA ANN LIVINGSTON CHIEF JUDGE CATHERINE O'HAGAN WOLF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX B 2ND CIRCUIT 01/28/24

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 28th day of June, two thousand twenty-four. _____Brian Burke, Plaintiff - Appellant, v. Housing and Services, Inc., Kenmore Housing Development Fund Corporation, Kenmore Associates, L.P., City University of New York, Kenmore Housing Corporation, New York State Attorney General, New York City Transit Authority, Defendants - Appellees, Verizon Communications, Inc., New York City Health and Hospitals Corporation, (Bellevue), New York Police Department, New York City Fire Department, Ryan Camire, L.C.S.W., Transport Workers Union Local 100, Madeline O'Brien, M.D., John/Jane Doe, et al., Derick Echevarria, Johnson Controls, Inc., City of New York, Defendants.

_____ORDER Docket No: 23-635 Appellant, Brian Burke, filed a petition for panel rehearing, or, in the alternative, for rehearing en banc. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing en banc. IT IS HEREBY ORDERED that the petition is denied. FOR THE COURT: Catherine O'Hagan Wolfe, Clerk Case 23- 635, Document 156, 06/28/2024, 3627914,

APPENDIX C SDNY ORDER 03/16/23

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK----------
---------- BRIAN BURKE, Plaintiff-against-18

CIVIL 4496 (PGG)(GWG) **JUDGMENT** VERIZON COMMUNICATIONS, INC.; HOUSING & SERVICES, INC.; KENMORE HOUSING DEVELOPMENT FUND CORPORATION; KENMORE HOUSING CORPORATION; KENMORE ASSOCIATES, L.P.; NEW YORK CITY TRANSIT AUTHORITY; NEW YORK CITY HEALTH & HOSPITALS CORPORATION (BELLEVUE); NEW YORK CITY POLICE DEPARTMENT; NEW YORK CITY FIRE DEPARTMENT; RYAN CAMIRE L.C.S.W.; CITY UNIVERSITY OF NEW YORK; TRANSPORT WORKERS UNION LOCAL 100; MADELINE OF NEW YORK; AND THE ATTORNEY GENERAL OF NEW YORK, Defendants ---------- ---------- X It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Order dated March 16, 2023, this Court has adopted the R&R's recommendations that the Kenmore Defendants' motion for summary judgment be granted as to Burke's claims under the False Claims Act, HIPAA, and the ADA, and that this Court decline to exercise supplemental jurisdiction over Burke's pendent state law claims. The Kenmore Defendants' motion for summary judgment is granted. All of Burke's claims against named Defendants have been dismissed; accordingly, the case is closed. **Dated:** New York, New York UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK BRIAN BURKE, -against-Plaintiff, **ORDER** VERIZON COMMUNICATIONS, INC.; HOUSING & SERVICES, INC.; KENMORE HOUSING DEVELOPMENT FUND CORPORATION; KENMORE HOUSING CORPORATION; KENMORE ASSOCIATES, L.P.; NEW YORK CITY TRANSIT AUTHORITY; NEW YORK CITY HEALTH & HOSPITALS CORPORATION (BELLEVUE); NEW YORK CITY POLICE DEPARTMENT; NEW YORK CITY FIRE

DEPARTMENT; RYAN CAMIRE L.C.S.W.; CITY UNIVERSITY OF NEW YORK; TRANSPORT WORKERS UNIONLOCAL 100; MADELINE O'BRIEN; JOHN/JANE DOE; DERICK ECHEVARRIA; JOHNSON CONTROLS, INC.; THE CITY OF NEW YORK; AND THE ATTORNEY GENERAL OF NEW YORK Defendants.18 Civ. 4496 (PGG) (GWPAUL G. GARDEPHE, U.S.D.J.: Pro se Plaintiff Brian Burke has asserted numerous federal and state law claims against more than a dozen defendants, including Housing & Services, Inc. ("HSI"); Kenmore Housing Development Fund Corporation; Kenmore Housing Corporation; and Kenmore Associates, L.P. (collectively, the "Kenmore Defendants"). On September 14, 2021, the Kenmore Defendants moved for summary judgment. (See Dkt. No. 177) On November 10, 2021, this Court referred the Kenmore Defendants' motion to Magistrate Judge Gabriel W. Gorenstein for a Report and Recommendation (R&R"). (Dkt. No. 186) On March 25, 2022, Judge Gorenstein issued an R&R recommending that the Kenmore Defendants' motion for summary judgment be granted. (R&R (Dkt. No. 190)) Plaintiff has filed objections to the R&R. (Pltf. Obj. (Dkt. No. 192)) For the reasons stated below, Plaintiff's objections will be overruled, and the R&R will be adopted in its entirety. **BACKGROUND**1**I.THE AMENDED COMPLAINT'S ALLEGATIONS AND THE R&R'S FACTUAL STATEMENT**2 The Kenmore Defendants and former Defendant Verizon are allegedly the "putative owners" of a building at 145 East 23rd Street in Manhattan – known as the "Kenmore" – where Burke has lived since 1989. (R&R (Dkt. No. 190) at 3)3 Burke's claims against the Kenmore Defendants relate primarily to two incidents: (1) a visit by two social workers to Burke's apartment, which resulted in an allegedly defamatory medical report containing a false diagnosis of

~~"delusional disorder," wh~~ich Burke alleges was wrongfully shared with his employer; and (2) efforts by the Kenmore Defendants to replace a defective smoke detector in Burke's apartment. (Id. at 3-7) Burke alleges that Verizon hired HSI to act as Verizon's "'Managing Agent' . . . and that HSI 'has continuously engaged in [] willful, intentional (with scienter) unlawful, harmful, dangerous, fraudulent, etc., misconduct'" with respect to the Kenmore. (Id. (quoting 1 The Amended Complaint's allegations are discussed in greater detail in two prior orders granting other Defendants' motions to dismiss. (See Mar. 29, 2019 Order (Dkt. No. 107) at 2-6; Nov. 6, 2020 Order (Dkt. No. 153) at 2-3) 2 Plaintiff has objected to certain portions of Judge Gorenstein's factual statement. (Pltf. Obj. (Dkt. No. 192)) Plaintiff 's objections will be overruled for reasons explained below. Accordingly, this Court adopts Judge Gorenstein's factual statement in full. 3 The page numbers of documents referenced in this Order correspond to the page numbers designated by this District's Electronic Case Files ("ECF") system. Am. Cmplt. (Dkt. No. 38) ¶ 6) Plaintiff has been "in litigation with [HSI,] Verizon's Shell Company, for most of this century." (Am. Cmplt. (Dkt. No. 38) ¶ 7) In retaliation for attempting to contact Verizon about HSI's criminal activity at the Kenmore, Defendant Francesca Rossi (a social worker employed by HSI) "ordered/ instructed Bellevue Hospital [New York City Health & Hospitals Corporation] . . . to perform witting, intentional Defamation/Defamation per se/Medical Malpractice . . . and attempted to have Plaintiff removed from [his] home without [a] court order" (id. ¶ 8), and to terminate Burke's employment with the New York City Transit Authority (the "NYCTA") as a train operator. (R&R (Dkt. No. 190) at 4) Burke further alleges that New York City Health & Hospitals Corporation (Bellevue) social worker Ryan

Camire and Rossi appeared at his home between 10:00 and 10:30 a.m. on February 7, 2014, and – after speaking with him – prepared a defamatory mental health report stating, inter alia, that Plaintiff had "previously been hospitalized for psychosis, [suffered from delusions,] and that [D]efendants communicated this inaccurate information to Burke's then-employer, the NYCTA." (Id.) Judge Gorenstein notes that Burke has produced (1) "some relevant medical records, including Camire's report from his wellness check of Burke" (id.); (2) "an affidavit from his sister stating that she never told Bellevue Hospital, the Kenmore [D]efendants, or their employees that Burke had been hospitalized for psychosis" (id. at 5 (citing Pltf. Opp., Ex. C (Kelly A. Burke Aff.) (Dkt. No. 184) at 36-40)); (3) "an affidavit from Burke's brother-in-law stating his belief that Burke is a 'moral, sane, fair, intelligent person'" (id. (quoting Pltf. Opp., Ex. B (Dann M. Church Aff.) (Dkt. No. 184) at 35)); and (4) "a letter from [Burke's] psychologist [Dr. Kari Sherman] stating that Burke 'has beliefs that against doctors' orders Ms. Rossi may have released information to his employer.'" (Id. (quoting Apr. 5, 2021 Affm. of Service, Ex. C (Sherman Ltr.) (Dkt. No. 169) at 19-20)) The R&R notes however that Burke has provided "no evidence of any communication between [the Kenmore Defendants] and the NYCTA." (Id.) According to the Kenmore Defendants, in a February 3, 2014 email to more than a hundred individuals – including Verizon and HSI employees, and local, state, and federal officials – Burke "expressed [his] frustration with attempts by HSI maintenance workers to perform work in his apartment." (Id. at 6) On February 7, 2014, Rossi contacted the New York City Health Department, and asked that the "mobile crisis unit assess" Burke. (Id.) This appears to be the visit that led to the allegedly defamatory mental health report

prepared by social worker Camire. Burke also alleges that the Kenmore Defendants "'swatted' him 'and gave NYPD/FDNY a false 911 call to gain unwarranted access'" to his apartment in relation to a "smoke alarm" that malfunctioned on July 24, 2016. (Id. at 5 (quoting Am. Cmplt. (Dkt. No. 38) 32) Burke claims that this conduct constitutes "'a pattern of unconstitutional denial of Due Process, or Equal Protection.'" (Id. at 6 (quoting Am. Cmplt. (Dkt. No. 38) 32)) In support of this claim, Burke has submitted (1) a January 31, 2019 email from Francesca Rossi which references Burke's request for a "reasonable accommodation" that no smoke alarm work be completed in his apartment (id. (citing Pltf. Opp., Ex. D (Dkt. No. 184) at 41)); (2) a June 6, 2018 email from Almir Lalicic which references an incident in which the police were called by HSI employees in order to gain access to Burke's apartment to complete smoke alarm related work (see id. at 5-6 (citing Ptlf. Opp., Ex. E (Dkt. No. 184) at 42); and (3) a transcript of a administrative hearing regarding citations issued to Kenmore Associates for performing electrical and plumbing work without a permit. (Id. at 6 (citing Pltf. Opp., Ex. F (Dkt. No. 184) at 43-53).4 The Kenmore Defendants have submitted an incident report which describes an HSI employee and technician's efforts to enter Burke's apartment on July 14, 2016 and replace a smoke detector. (Id. at 7) After Burke refused entry, the HSI employee contacted the New York City Police Department, and Burke then allowed the work to be completed. (Id.) Judge Gorenstein interprets "Burke's § 1983, Racketeer Influenced and Corrupt Organizations Act ("RICO"), False Claims Act, and [Health Insurance Portability and Accountability Act ("HIPAA")] claims to be premised on [the Kenmore Defendants'] request for a wellness check on Burke and their alleged communication of his health information to

~~the NYCTA." (Id. at 7) Judge~~ Gorenstein understands Burke's Americans with Disabilities Act ("ADA") "claim to be premised on [the Kenmore Defendants'] attempts to install and/or maintain a smoke detector in Burke's apartment." (Id. at 7-8) **II.PROCEDURAL HISTORY**
The Complaint was filed on May 21, 2018 and asserts federal and state law claims against more than a dozen defendants. (Cmplt. (Dkt. No. 1)) The Amended Complaint was filed on July 18, 2018. (Am. Cmplt. (Dkt. No. 38)) All Defendants other than the Kenmore Defendants moved to dismiss, and this Court granted those motions to dismiss. (See Mar. 29, 2019 Order (Dkt. No. 107) (dismissing claims against Verizon, the New York City Transit Authority, Bellevue Hospital, Ryan Camire, Local 100 of the Transport Workers Union, Madeline O'Brien, Derick Echevarria, the City of New York, the New York City Police4 As to the administrative hearing transcript, Judge Gorenstein notes that "it is not clear which of [Burke's] claims this evidence is intended to support." (Id.) Department, the New York City Fire Department, and Johnson Controls); Nov. 6, 2020 Order (Dkt. No. 153) (dismissing claims against the Attorney General of the State of New York and the City University of New York)) The Kenmore Defendants filed an answer to the Amended Complaint on August 7, 2018 (Kenmore Ans. (Dkt. No. 49)), and moved for summary judgment on September 14, 2021. (Dkt. No. 177) On November 10, 2021, this Court referred the motion to Judge Gorenstein for an R&R. (Dkt. No. 186) On March 25, 2022, Judge Gorenstein issued an R&R recommending that this Court grant the Kenmore Defendants' summary judgment motion. (R&R (Dkt. No. 190)) Plaintiff filed objections to the R&R on May 26, 2022. (Pltf. Obj. (Dkt. No. 192)) The Kenmore Defendants filed an opposition to Plaintiff's objections on April 25,

~~2022.5 (Def. Opp. (Dkt.~~ No. 191)) **DISCUSSION**

I. LEGAL STANDARDS A. Review of a Magistrate Judge's Report and Recommendation A district court reviewing a magistrate judge's report and recommendation "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). "'The district judge evaluating a magistrate judge's recommendation may adopt those portions of the recommendation, without further review, where no specific objection is made, as long as they are not clearly erroneous.'" Gilmore v. Comm'r of Soc. Sec., 2011 WL 611826, at *1 (S.D.N.Y. Feb. 18, 2011) (quoting Chimarev v. 5 The Kenmore Defendants represent that they received Plaintiff's objections by mail on April 13, 2022, although they did not appear on the docket until May 26, 2022. (Def. Opp. (Dkt. No. 191) at 1) TD Waterhouse Inv. Servs., 280 F. Supp. 2d 208, 212 (S.D.N.Y. 2003)). A decision is "clearly erroneous" when, "upon review of the entire record, [the court is] left with the definite and firm conviction that a mistake has been committed." United States v. Snow, 462 F.3d 55, 72 (2d Cir. 2006) (quotation marks and citation omitted). Where a timely objection has been made to a magistrate judge's recommendation, the district judge "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). However, "[o]bjections that are 'merely perfunctory responses argued in an attempt to engage the district court in a rehashing of the same arguments set forth in the original [papers] will not suffice to invoke de novo review.'" Phillips v. Reed Grp., Ltd., 955 F. Supp. 2d 201, 211 (S.D.N.Y. 2013) (second alteration in original) (quoting Vega v. Artuz, 2002 WL 31174466, at *1 (S.D.N.Y. Sept. 30, 2002)). "To the extent . . . that the party . . . simply reiterates the original

arguments, [courts] will review the Report strictly for clear error." IndyMac Bank, F.S.B. v. Nat'l Settlement Agency, Inc., 2008 WL 4810043, at *1 (S.D.N.Y. Nov. 3, 2008) (citing Pearson-Fraser v. Bell Atl., 2003 WL 43367, at *1 (S.D.N.Y. Jan. 6, 2003) and Camardo v. Gen. Motors Hourly-Rate Emp. Pension Plan, 806 F. Supp. 380, 382 (W.D.N.Y. 1992)); see also Ortiz v. Barkley, 558 F. Supp. 2d 444, 451 (S.D.N.Y. 2008) ("Reviewing courts should review a report and recommendation for clear error where objections are merely perfunctory responses, . . . rehashing . . . the same arguments set forth in the original petition." (quotation marks and citations omitted)). **B.Summary Judgment Standard** Summary judgment is warranted where the moving party "shows that there is no genuine dispute as to any material fact" and that that party "is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A dispute about a 'genuine issue' exists for summary judgment purposes where the evidence is such that a reasonable jury could decide in the non-movant's favor." Beyer v. Cnty. of Nassau, 524 F.3d 160, 163 (2d Cir. 2008) (citation omitted). "'[W]here the non[-]moving party will bear the burden of proof at trial, Rule 56 permits the moving party to point to an absence of evidence to support an essential element of the non[-]moving party's claim.'" Lesavoy v. Lane, 2008 WL 2704393, at *7 (S.D.N.Y. July 10, 2008) (quoting Bay v. Times Mirror Mags., Inc., 936 F.2d 112, 116 (2d Cir. 1991)). In deciding a summary judgment motion, the Court "resolve[s] all ambiguities, and credit[s] all factual inferences that could rationally be drawn, in favor of the party opposing summary judgment." Spinelli v. City of New York, 579 F.3d 160, 166 (2d Cir. 2009) (quotation marks and citation omitted). However, a "party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary

judgment. Mere conclusory allegations or denials . . . cannot by themselves create a genuine issue of material fact where none would otherwise exist." Hicks v. Baines, 593 F.3d 159, 166 (2d Cir. 2010) (quotation marks, alterations, and citation omitted). "'Assessments of credibility and choices between conflicting versions of the events are matters for the jury, not for the court on summary judgment.'" Eviner v. Eng, 2015 WL 4600541, at *6 (E.D.N.Y. July 29, 2015) (quoting Rule v. Brine, Inc., 85 F.3d 1002, 1011 (2d Cir. 1996)). A moving party can demonstrate the absence of a genuine issue of material fact "in either of two ways: (1) by submitting evidence that negates an essential element of the non-moving party's claim, or (2) by demonstrating that the non-moving party's evidence is insufficient to establish an essential element of the non-moving party's claim." Nick's Garage, Inc. v. Progressive Cas. Ins. Co., 875 F.3d 107, 114 (2d Cir. 2017) (quotation marks and citation omitted Pro se submissions are "construed liberally and interpreted to raise the strongest arguments that they suggest." Triestman v. Fed. Bureau of Prisons, 470 F.3d 471, 474 (2d Cir. 2006) (quotation marks, emphasis, and citation omitted). A pro se litigant must, however, still "meet the requirements necessary to defeat a motion for summary judgment." Jorgensen v. Epic/Sony Recs., 351 F.3d 46, 50 (2d Cir. 2003) (quotation marks and citation omitted). **II.ANALYSIS A.Objections to the R&R's Factual Statement** Burke objects to certain aspects of Judge Gorenstein's factual statement. (Pltf. Obj. (Dkt. No. 192) at 3-7) None of Burke's objections has merit. In the R&R, Judge Gorenstein states that (1) "[t]he amended complaint is difficult to understand as it is replete with disjointed and meandering discussions of numerous discussions and topics"; and (2) "it is difficult to tell what claims [the Amended Complaint] makes against the

Kenmore Defendants." (Id. at 3-4 (quoting R&R (Dkt. No. 190) at 2-3)) Having reviewed the Amended Complaint, this Court finds Judge Gorenstein's description entirely accurate.6 To the extent that Burke suggests that the Amended Complaint's lack of clarity would be cured in a second amended complaint, there is no reason to believe that further amendment would be productive, given "Plaintiff's well-established pattern of filing meritless lawsuits" and his habit of "'repeating arguments that have already been rejected by this Court.'" (Nov. 6, 2020 Order (Dkt. No. 153) at 15-16 (quoting Mar. 22, 2020 Order (Dkt. No. 129) at 18))) To the extent that Burke suggests that discovery should be re-opened (Pltf. Obj. (Dkt. No. 192) at 4), Judge Gorenstein correctly rejected that application. In a July 2, 2021 order rejecting Plaintiff's motion to compel discovery from the Kenmore Defendants, Judge Gorenstein notes that the discovery deadline had previously been extended from February 26, 2021 to May 21, 2021. (July 2, 2021 (Dkt. No. 165)) Judge Gorenstein also states that he had previously told the parties that the discovery deadline would not be extended again and that "'[u]ntimely [discovery] applications will be denied." (Id. (citing Oct. 27, 2020 Order (Dkt. No. 152))) Judge Gorenstein also notes that during discovery Plaintiff "made no applications to this Court concerning [the Kenmore] [D]efendants' purported failure to comply with any discovery requests." (Id.) In denying Burke's motion to compel, Judge Gorenstein concludes that Burke had "not shown any good cause for failing to raise the disputes before" the close of discovery. On July 19, 2021, Burke also objects to Judge Gorenstein's statement that "Burke alleges that Rossi contacted Bellevue in an attempt to 'establish . . . probable cause to kidnap/remove [Burke] in order to' evict him and end his employment with the NYCTA." (Pltf. Obj. (Dkt. No. 192) at 4- 5); R&R

(Dkt. No. 190) at 4 (quoting Am. Cmplt. (Dkt. No. 38) ¶ 9)) Burke complains that "[i]n fact [he] has alleged that HSI [] contacted Bellevue [and] that this crime[] . . . was orchestrated at the highest level of HSI, by Ms. Mattimore." (Pltf. Obj. (Dkt. No. 192) at 4-5) But Judge Gorenstein accurately summarizes Burke's claim in Paragraph 9 of the Amended Complaint, which reads, in relevant part, as follows: On February 7, 2014 at approximately 10-1030am Mr. Ryan Camire, LCSW knocked on Petitioner's door . . . [O]n Information and Belief Mr. Camire (and Ms. Rossi), . . . performed [the wellness check and medical evaluation] for [the] Verizon Defendants to establish (unlawful, Due Process Clause Violating) "probable cause" to kidnap/remove Tenant/Civil Servant in order to (illegally) evict/terminate from employment..... Petitioner recorded a brief "evaluation" with Mr. Camire, in order not to be removed/tased/ arrested/drugged that day, etc., for this clearly malicious, unwarranted, retaliatory [visit] Am. Cmplt. (Dkt. No. 38) ¶ 9) Given that Burke also pleads in the Amended Complaint that "the Verizon Defendants (Ms. Rossi and/or others) went to Plaintiff's employer, conveying their false, conjured Defamation, in order to harm/terminate/ bankrupt, [and] evict [Burke,]" Judge Gorenstein's characterization of Burke's claim is accurate. (See Am. Cmplt. (Dkt. No. 38) ¶ 34) Pointing to a letter from his psychologist, Dr. Kari Sherman, Burke also complains about Judge Gorenstein's finding that he "'provides no evidence of any communication between [the Kenmore Defendants] and the NYCTA.'" (Pltf. Obj. (Dkt. No.) Burke moved for reconsideration of Judge Gorenstein's order denying his motion to compel. (Dkt. No. 169) Judge Gorenstein denied reconsideration because of Burke's failure to cite to any "'matter or controlling decisions' that have been 'overlooked' as required by Local Civil Rule

6.3." (Dkt. No. 170) To the extent that Burke appeals this determination, this Court finds no error in Judge Gorenstein's discovery rulings 192) at 5-6, quoting R&R (Dkt. No. 190) at 5) But Sherman's letter is not proof that the Kenmore Defendants communicated with the NYCTA; Sherman merely repeats Burke's unsupported belief that such a communication took place. (R&R (Dkt. No. 190) at 5) (referencing Dr. Sherman's letter stating that "'Burke has beliefs that against the doctors' orders Ms. Rossi may have released information to his employer'" (quoting Apr. 5, 2021 Affm. of Service, Ex. C (Sherman Ltr.) (Dkt. No. 169) at 19-20))) Finally, Burke objects to Judge Gorenstein's remark regarding a transcript Burke offers from a hearing conducted by the Office of Administrative Trials & Hearings ("OATH"). The hearing concerned "citations issued to Kenmore Associates for performing electrical and plumbing work without a permit." (Id. at 6) In his R&R, Judge Gorenstein comments that "it is not clear which of [Burke's] claims this evidence is intended to support." (Id.) In his objections, Burke contends that the transcript demonstrates that the Kenmore Defendants "conspired to Defraud OATH [and Burke] . . . by submitting two forged/false instruments," which Burke labels as "Civil RICO acts." (Pltf. Obj. (Dkt. No. 192) at 6-7) This objection is likewise without merit. As an initial matter, Judge Gorenstein's remark about the transcript is not a proposed finding or recommendation, and thus provides no basis for an objection. See Fed. R. Civ. P. 72(b)(2). Moreover, for reasons explained below, the transcript is not evidence of fraud, of a RICO predicate, or any other form of malfeasance. Accordingly, Burke's objections to Judge Gorenstein's factual statement are overruled **B. Objections to Recommendation that the Kenmore Defendants be Granted Summary Judgment1.Section 1983 Claim** As Judge Gorenstein

notes, for a plaintiff to prevail on a Section 1983 claim, he must show that a "state actor" or a "person acting under the color of state law" violated a right secured by the Constitution or laws of the United States. (R&R (Dkt. No. 190) at 10) (citing West v. Atkins, 487 U.S. 42, 48-49 (1988))) While the Kenmore Defendants are "not alleged to be governmental entities," there are "three bases for finding a private entity has acted under color of state law" (1) when the entity acts pursuant to the coercive power of the state or is controlled by the state ("the compulsion test"); (2) when the state provides significant encouragement to the entity, the entity is a willful participant in joint activity with the state, or the entity's functions are entwined with state policies ("the joint action test" or "close nexus test"); or (3) when the entity has been delegated a public function by the state ("the public function test"). (Id. (quoting Sybalski v. Indep. Grp. Home Living Program, Inc., 546 F.3d 255, 257 (2d Cir. 2008)) Judge Gorenstein concludes that Burke has offered no evidence "that there are sufficient entanglements between [the Kenmore Defendants] and any government body such that they may be treated as one and the same." (Id. at 11) Nor has he shown that the Kenmore Defendants have been delegated a public function by the state. (Id. (noting that the provision of low-cost housing is "'not a public function within the meaning of section 1983, because the provision of housing, for the poor or for anyone else, has never been the exclusive preserve [of] the state'") (quoting George v. Pathways to Hous., Inc., 2012 WL 2512964, at *4 (S.D.N.Y. June 29, 2012))) Because the state action requirement is an essential element of a Section 1983 claim, Judge Gorenstein recommends that the Kenmore Defendants be granted summary judgment on Plaintiff's Section 1983 claim. (Id.) Burke objects to this recommendation, arguing that he has alleged

sufficient "entanglements" between the Kenmore Defendants and the state to demonstrate that the Kenmore Defendants "acted under color of state law" for purposes of Section 1983. (Pltf. Obj. (Dkt. No. 192) at 16-17) Burke points to (1) "the transfer of the property itself, owned prior by the People of the United States"; (2) a "long regulatory agreement governing all aspects of Kenmore (with NYC HPD)"; and (3) the "RICO acts themselves, involving [the other Defendants in this case]." (Id.) Burke's objections are not persuasive. As to the City's sale of the building to Verizon and the "long regulatory agreement" that allegedly accompanied that sale, Burke has not proffered evidence that these matters bear any relation to the injuries he allegedly suffered at the hands of the Kenmore Defendants. It "is not enough [] for a plaintiff to plead state involvement in 'some activity of the institution alleged to have inflicted injury upon a plaintiff'; rather, the plaintiff must allege that the state was involved 'with the activity that caused the injury' giving rise to the action." Sybalski, 546 F.3d at 258 (quoting Schlein v. Milford Hospital, Inc., 561 F.2d 427, 428 (2d Cir.1977) (emphasis in Sybalski). As to Burke's reference to the "RICO acts themselves" (Pltf. Obj. (Dkt. No. 192) at 16-17), this Court understands Burke to be referring to his allegation that Camire – a social worker employed by Bellevue (a state actor) – wrote the allegedly defamatory mental health report based on events that occurred when he accompanied Rossi to Burke's apartment. (Am. Cmplt. (Dkt. No. 38) ¶ 9) Even if Rossi shared Camire's report with the NYCTA – a theory that is not supported by any evidence – the fact that a Bellevue social worker prepared the mental health report does not demonstrate that Bellevue "encouraged" Rossi or the Kenmore Defendants to share Camire's report with the NYCTA. Indeed, this Court has previously found that

"Plaintiff has not alleged facts that plausibly show how any policy, custom, or practice of [Bellevue]" harmed him. (Mar. 29, 2019 Order (Dkt. No. 107) at 14) Because there is no evidence that any state actor played a role in any decision to share Burke's confidential medical information with the NYCTA, there is no basis for this Court to find the required state action. Accordingly, Plaintiff's objection on this point is overruled, and this Court will adopt Judge Gorenstein's recommendation that the Kenmore Defendants be granted summary judgment on Plaintiff's Section 1983 claim. **2.RICO Claim** As Judge Gorenstein notes, in order to maintain a civil RICO claim, a plaintiff must show "'(1) a substantive RICO violation under § 1962; (2) injury to the plaintiff's business or property, and (3) that such injury was by reason of the substantive RICO violation.'" (R&R (Dkt. No. 190) at 11-12 (quoting UFCW Local 1776 v. Eli Lilly & Co., 620 F.3d 121, 131 (2d Cir. 2010))) Moreover, "each subsection [of the RICO statute] includes as an element that the defendant commit 'at least two acts of racketeering activity' within a ten-year period." (Id. (quoting 18 U.S.C. § 1961(5))) Judge Gorenstein concludes that Burke has not proffered evidence sufficient to create a material issue of fact as to whether the Kenmore Defendants committed any predicate acts: While Burke makes complaints regarding the ownership of his residence, the repairs to his smoke alarm, invasion of privacy that he experienced in his home, and alleged defamatory statements, there are no allegations that could be viewed as constituting any of the listed predicate acts in 18 U.S.C. § 1961(1). We note further that while Burke's complaint suggests that there were financial improprieties associated with the transfer of the Kenmore's ownership from Verizon to defendants, see [Am. Cmplt.] ¶¶ 3-6, Burke provides no admissible evidence of this, let alone evidence tending to

show that the elements of any RICO predicates were satisfied by prior changes in the ownership of the Kenmore. Burke highlights the transcript of an administrative hearing in which defendants were cited for performing electrical work without a permit, see Hearing Transcript at 3, but the code violations at issue there are not predicate offenses listed within 18 U.S.C. § 1961(1), nor are they equivalents of the listed offenses. Accordingly, summary judgment must be granted to defendants as to any RICO claims. (Id.) In objecting to Judge Gorenstein's recommendation concerning his RICO claim, Burke argues – as he has throughout this litigation – that the Kenmore Defendants "concoct[ed] a knowingly false, malicious 'diagnosis'" of "delusional disorder" and transmitted that diagnosis to the NYCTA to "get [Burke] terminated from employment, and additionally seek [his] 'incarceration' under [New York's Mental Hygiene law]." (Pltf. Obj. (Dkt. No. 192) at 7-12, 14) Burke asserts that "[e]ither Ms. Rossi, or Ms. Mattimore, or some other HSI employee involved in said conspiracy, called, or emailed [the NYCTA]" to convey this false diagnosis and that this conduct constitutes the RICO predicates of mail and wire fraud. (Id. at 11-12) Burke makes similar allegations as to the Kenmore Defendants' alleged transmission of the fraudulent diagnosis to the New York City Employees' Retirement System ("NYCERS"), which allegedly resulted in Burke being denied a "'9/11' pension." (Id. at 11-15 ("The false/fraudulent 'medical documents' from Kenmore/Bellevue were the clear and sole reason for the denial..... If they did not concoct the ongoing Wire/Mail Fraud..... the knowing falsehood/fraud would not have been sent to NYCERS (mail fraud).")) Burke made these same arguments in opposing the Kenmore Defendants' motion for summary judgment. (See Pltf. Opp. (Dkt. No. 184) at 21-22, 23-26) Accordingly, the Court reviews these

objections for clear error. IndyMac Bank, F.S.B., 2008 WL 4810043, at *1 (S.D.N.Y. Nov. 3, 2008). Having reviewed those portions of the R&R addressing Burke's RICO claim, this Court finds no clear error in Judge Gorenstein's conclusion that Burke's allegations regarding the Kenmore Defendants' alleged transmission of his medical information to the NYCTA or to the NYCERS do not make out a RICO claim. There is no evidence, for example, that the Kenmore Defendants transmitted Burke's medical information to either the NYCTA or to NYCERS. Burke argues, however, that alleged burglaries of his apartment constitute predicates for his civil RICO claim. (See Pltf. Obj. (Dkt. No. 192) at 15-16; see also Am. Cmplt. (Dkt. No. 38) ¶ 32 & n.11 (citing burglaries of Burke's apartment and thefts of property in his apartment allegedly committed by the Kenmore Defendants or Verizon); id. at 49 (invoice of $24,925 from Burke to HSI for "[t]heft of escrow funds . . . [n]ot including thefts of I.D. legal documents, photographs, other evidence, etc.") Burglary is not a predicate crime for a RICO violation, however. See 18 U.S.C. § 1961(1); see also United States v. Carrillo, 229 F.3d 177, 185 (2d Cir. 2000) ("RICO includes in its definition of prohibited racketeering activity only acts prohibited by enumerated federal statutes or 'any act or threat involving murder, kidnapping, [gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical] . . . which is chargeable under State law and punishable by imprisonment for more than one year.'") (quoting 18 U.S.C. § 1961(1)) (emphasis in Carrillo). Even if burglary were a predicate offense for purposes of a RICO claim, Burke has once again not offered any evidence that these burglaries actually occurred, much less that they were committed by the Kenmore Defendants. While "a verified

pleading, to the extent that it makes allegations on the basis of the plaintiff's personal knowledge, . . . has the effect of an affidavit and may be relied on to oppose summary judgment..... a genuine issue [is not] create merely by the presentation of assertions that are conclusory." Patterson v. Cnty. of Oneida, N.Y., 375 F.3d 206, 219 (2d Cir. 2004) (citations omitted). Burke's objections repeat the same uncorroborated conclusory assertions found in his pleadings that the Kenmore Defendants burglarized his apartment. Because Burke has proffered no evidence that these alleged burglaries took place or that they were committed by the Kenmore Defendants, the Kenmore Defendants are entitled to summary judgment on his RICO claim. See Hicks, 593 F.3d at 166 ("'[A] party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment..... [M]ere conclusory allegations or denials..... cannot by themselves create a genuine issue of material fact where none would otherwise exist.'") (quoting Fletcher v. Atex, Inc., 68 F.3d 1451, 1456 (2d Cir. 1995)). Finally, Burke objects to Judge Gorenstein's finding that the building code violations that are the subject of the OATH hearing transcript do not constitute predicate offenses for purposes of Burke's RICO claim. (Pltf. Obj. (Dkt. No. 192) at 17-18 (citing R&R (Dkt. No. 190) at 12) Burke argues that the hearing transcript was submitted not as evidence of building code violations, but rather to demonstrate that the Kenmore Defendants, "through photoshop, or other means, . . . submit[ted] not one, but two knowingly false 'backdated' alleged permits, dated 2017." (Id.) According to Burke, this alleged conduct amounts to "obstruction of justice," which is a predicate offense under the RICO statute. (Id.) Obstruction of an OATH proceeding, however, does not constitute a RICO predicate offense. Section 1961(1)'s list

of predicate offenses includes "any act which is indictable under . . . title 18, United States Code: . . . section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), [and] section 1511 (relating to the obstruction of State or local law enforcement)." 18 U.S.C. § 1961(1). Section.1503 and 1510 address obstruction of federal judicial proceedings and obstruction of federal criminal investigations, however. 18 U.S.C. § 1503 ("Whoever corruptly, . . . endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States . . . or impedes . . . the due administration of justice, shall be [guilty of a crime.]"); id. § 1510 ("Whoever willfully endeavors by means of bribery to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States . . . shall be [guilty of a crime.]"). And 18 U.S.C. § 1511 makes it illegal to conspire "to obstruct the enforcement of the criminal laws of a State or political subdivision thereof, with the intent to facilitate an illegal gambling business." 18 U.S.C. § 1511. OATH hearings are New York City administrative proceedings; they do not constitute federal proceedings nor do they involve criminal matters, whether federal or state. See About OATH, https://www.nyc.gov/site/oath/about/about-oath.page ("[OATH] is the City's central, independent administrative law court. ..... Its caseload includes employee discipline and disability hearings for civil servants, Conflicts of Interest Board cases, proceedings related to the retention of seized vehicles by the police, City-issued license and regulatory enforcement, real estate, zoning and loft law violations, City contract disputes and human rights violations under the City Human Rights Law.") (last visited Mar. 15, 2023). Accordingly, obstruction of an OATH proceeding does not

fall within the predicate offenses listed in Section 1961(1). Even if obstruction of an OATH administrative proceeding could constitute a RICO predicate, Burke has not offered evidence sufficient to demonstrate that such obstruction took place. The OATH hearing concerns two summonses issued to Kenmore Associates, L.P., one of the Kenmore Defendants, for work allegedly completed without a permit. As to one of the summonses, Kenmore's counsel submitted "a copy of a Permit . . . which lists [work allegedly completed without a permit]." (Pltf. Opp., Ex. F (Dkt. No. 184) at 46) The City's counsel responded that the permit's "date of issuance . . . is 09/05/2017, before the Violation [] was even written, or existed . . . [and demanded] an explanation for that." (Id.) The hearing officer did not make a finding as to the validity of the permit. (Id. at 46-53) Even assuming that the permit was invalid, there is no evidence that it was forged or fraudulent. See Hicks, 593 F.3d at 166. Accordingly, this Court will adopt Judge Gorenstein's recommendation that the Kenmore Defendants be granted summary judgment on Burke's RICO claim. **3.Recommendations as to Which There Are No Objections** Judge Gorenstein recommends that the Kenmore Defendants be granted summary judgment on Burke's claims under the False Claims Act, HIPAA, and the ADA, and that this Court decline to exercise supplemental jurisdiction over his state law claims. No party has objected to these recommendations. Accordingly, they will be reviewed solely for clear error. See Gilmore, 2011 WL 611826 at *1. Judge Gorenstein recommends that the Kenmore Defendants be granted summary judgment on Burke's False Claims Act claim, because that statute "does not permit a pro se litigant to bring qui tam claims." (R&R (Dkt. No. 190) at 12-13 (citing United States ex rel .Mergent Servs. V. Flaherty, 540 F.3d 89, 93 (2d Cir.

2008) and Klein v. City of New York, 2012 WL 546786, at *5 (S.D.N.Y. Feb. 21, 2012))) This Court finds no clear error in Judge Gorenstein's determination. As to Burke's HIPAA claim, Judge Gorenstein notes that there is no evidence that the Kenmore Defendants disseminated his confidential medical information. (Id. at 13) In any event, "'HIPAA confers no private cause of action, express or implied' . . . [and] instead delegates enforcement authority to the Secretary of Health and Human Services." (Id. at 13-14 (quoting Meadows v. United Servs., Inc., 963 F.3d 240, 244 (2d Cir. 2020) and citing 42 U.S.C. §§ 1320d-3, 1320d-5)) This Court finds no error in Judge Gorenstein's determination. As to Burke's ADA claim, Judge Gorenstein first notes that the "ADA 'consists of three parts: Title I, 42 U.S.C. §§ 12111-17, which prohibits discrimination in employment; Title II, 42 U.S.C. §§ 12131-65, which prohibits discrimination by public entities; and Title III, 42 U.S.C. §§ 12181-89, which prohibits discrimination in access to public accommodations.'" (Id. at 14 (quoting DeJesus v. Rudolph, 2019 WL 5209599, at *2 (S.D.N.Y. Oct. 11, 2019))) Judge Gorenstein concludes that Burke is not invoking Title I, because he has not alleged that the Kenmore Defendants are his employers. (Id.) Nor does Burke allege a violation of Title II, because there is no evidence that the Kenmore Defendants are public entities or that Burke receives federal benefits. Indeed, the Kenmore Defendants have offered "evidence that [Burke's] Section 8 benefits were terminated in 2004." (Id.) Accordingly, Judge Gorenstein infers that Burke is invoking Title III, which requires a plaintiff to show that "'(1) he or she is disabled within the meaning of the ADA; (2) that the defendants own, lease, or operate a place of public accommodation; and (3) that the defendants discriminated against the plaintiff within the meaning of the ADA.'" (Id. (quoting Roberts v. Royal

Atl. Corp., 542 F.3d 363, 368 (2d Cir. 2008))) Judge Gorenstein concludes that Burke's ADA claims must be dismissed because he has not shown that the "Kenmore is a place of public accommodation." (Id. at 14-15) "The ADA defines 'public accommodation' to include most 'inn[s], hotel[s], motel[s], or other place[s] of lodging.'" (Id. at 15 (quoting 42 U.S.C. § 12181(7)(A))) However, "the term 'public accommodation' 'does not include residential facilities or apartment buildings.'" (Id. (quoting Mazzocchi v. Windsor Owners Corp., 2012 WL 3288240, at *7 (S.D.N.Y. Aug. 6, 2012))) Judge Gorenstein also notes that contracting with government entities to provide low income housing "does not render the Kenmore a public accommodation." (Id. (citing Rappo v. 94-11 59th Ave. Corp., 2011 WL 5873025, at *2 (E.D.N.Y. Nov. 21, 2011) (private residential complex was not a public accommodation, even though the complex was used for publicly subsidized housing))) This Court finds no error in Judge Gorenstein's determination. Finally, Judge Gorenstein recommends that this Court not exercise supplemental jurisdiction over Burke's state law claims: [I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine, judicial economy, convenience, fairness, and comity will point toward declining to exercise jurisdiction over the remaining state-law claims. (R&R (Dkt. No. 190) at 16 (quoting Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 n.7 (1988) (quotation marks omitted))) This Court agrees with Judge Gorenstein's recommendation. Accordingly, this Court will adopt the R&R's recommendations that the Kenmore Defendants' motion for summary judgment be granted as to Burke's claims under the False Claims Act, HIPAA, and the ADA, and that this Court decline to exercise supplement jurisdiction

over Burke's pendent state law claims. **CONCLUSION** For the reasons stated above, the Kenmore Defendants' motion for summary judgment is granted. Because all of Burke's claims against named Defendants have been dismissed, the Clerk of Court is directed to close this case. The Clerk of Court is also directed to mail a copy of this order to pro se Plaintiff. Dated: New York, New York March 16, 2023 SO ORDERED. Paul G. Gardephe United States District

APPENDIX D SDNY ORDER 11/06/20

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK
BRIAN BURKE, plaintiff -against-VERIZON COMMUNICATIONS, INC.; HOUSING & SERVICES, INC.; KENMORE HOUSING DEVELOPMENT FUND CORPORATION; KENMORE HOUSING CORPORATION; KENMORE ASSOCIATES, L.P.; NEW YORK CITY TRANSIT AUTHORITY; NEW YORK CITY L OF NEW YORK, Defendants. PAUL G. GARDEPHE, U.S.D.J.: Pro se Plaintiff Brian Burke has asserted numerous claims against more than a dozen defendants, including the Attorney General of the State of New York and the City University of New York ("CUNY") (collectively the "State Defendants"). (Am. Cmplt. (Dkt. No. 38)) On May 21, 2020, the State Defendants moved to dismiss the Amended Complaint, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (See Dkt. No. 136) On June 10, 2020, this Court referred the State Defendants' motion to Magistrate Judge Gabriel W. Gorenstein for a Report and Recommendation ("R&R"). (Dkt. No. 139) On August 17, 2020, Judge Gorenstein issued an R&R recommending that the State Defendants' motion to dismiss be granted. (R&R (Dkt. No. 142))

Plaintiff has filed objections to the R&R. (Obj. (Dkt. No. 143)) For the reasons stated below, Plaintiff's objections will be overruled, and the R&R will be adopted in its entirety. **BACKGROUNDI.FACTS** Plaintiff worked for the New York City Transit Authority for seventeen years as a train operator. (Am. Cmplt. (Dkt. No. 38) at 3)1 He has lived at 145 East 23rd Street, Apartment 4R, in Manhattan since December 7, 1989. (Id. at ¶ 1) Most of the Amended Complaint's numerous allegations relate to (1) Plaintiff's claims that he was "deprive[d] . . . of his lawful Civil Service job" (id. ¶ 33); and (2) allegedly improper efforts to evict him from his apartment. (Id. ¶ 34). Plaintiff alleges that Defendants Verizon Communications, Inc. ("Verizon"), Housing & Services, Inc., Kenmore Housing Development Fund Corporation, Kenmore Housing Corporation, and Kenmore Associates, L.P. "are the putative owners" of his apartment building. (Id. at 5) Regarding his apartment, Plaintiff alleges that the "Federal Government necessarily assumed control/title" in 1994 "due to criminal activity/hazardous conditions known/initiated" by the drug trafficker Tuong Dinh Tran. (Id. ¶¶ 2-3) Plaintiff further alleges that instead of allowing "the existing tenants to purchase their apartment[s]," the Federal Government secretly and illegally "transfer[ed] subject property to the wealthiest Corporation in New York, Verizon." (Id. ¶ 5) "Verizon paid nothing for the property," and although it "allegedly put in 8 figures for a1 All references to page numbers in this Order are as reflected in this District's Electronic Case Files ("ECF") system. Major Capital Improvement," that money was "mostly stolen by H&S, Inc. principles [sic] (including convicted Drug Trafficker Larry Oaks)." (Id.) Plaintiff alleges various misdeeds by Verizon, including retaliation against Plaintiff "via [its] employee of sub-agent H&S, I Francesca Rossi L.C.S.W., [who]

ordered/instructed Bellevue Hospital Mobile Crisis Unit to perform witting, intentional Defamation/Defamation per se/Medical Malpractice (which was done) and attempted to have Plaintiff removed from home without court order, cause, probable cause (in a corrupt misuse/attempted malpractice/maladaptation of NYS Mental Hygiene Law/Practice)." (Id. ¶ 8 (citation omitted)) The Amended Complaint alleges violations under: 42 U.S. Code § 1983, Federal R.I.C.O. and New York Penal Code Article 460, *et seq.*, Defamation, Defamation per se, (intentional/ negligent) Medical Malpractice, Fraud, Theft, Tortious Inference with Prospective Economic Advantage, Assault, Federal, NY State, NYC False Claims Act(s), New York City/State Human Rights Law(s), Retaliatory Termination and Retaliatory Attempted Eviction, NY State Civil Service Law, HIPAA, Americans with Disabilities Act, ongoing NYCTA/TWU Local 100 Employment Contract Violations, and/or Conspiracy to Commit same, etc., but not limited to. (Am. Cmplt. (Dkt. No. 38) at 3) **II.THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION** In his August 17, 2020 R&R, Judge Gorenstein recommends that the Amended Complaint be dismissed as against (1) the New York Attorney General, for failure to state a claim; and (2) CUNY, for lack of subject matter jurisdiction. Judge Gorenstein further recommends that Plaintiff's request to file a second amended complaint be denied. (R&R (Dkt. No. 142) at 9-10, 15) **A.Claims Against the New York Attorney General** The State Defendants first argue that the Attorney General is not a necessary or proper party, and that Plaintiff's claims against the Attorney General should be dismissed for failure to state a claim. (State Def. Br. (Dkt. No. 137) at 6, 11) The Amended Complaint makes only one reference to the Attorney General, which

is as follows: "The NYS Attorney General was added as a required party in order to challenge New York State Labor Law 190 as unconstitutional under the Equal Protection Clause of the 14th Amendment, Due Process Clause(s) and the Taking Clause of the Fifth Amendment . . . . Thus, again, the Attorney General is a required party to a constitutional challenge to a (NYS) Statute." (Am. Cmplt. (Dkt. No. 38) ¶ 33) Judge Gorenstein construes this language as a constitutional challenge to Section 190 of the New York Labor Law ("NYLL"), premised on Plaintiff's belief that the NYLL precludes certain wage claims against the New York City Transit Authority, Plaintiff's former employer. (R&R (Dkt. No. 142) at 6) Judge Gorenstein explains that Plaintiff's claim is flawed in multiple respects: (1) NYLL Section 190 is a definitional statute, and does not address enforcement; (2) NYLL §§ 196(1)(a) and (c) grant enforcement authority to the New York State Commissioner of Labor; and (3) the New York Attorney General "is not a required party to an action challenging the constitutionality of a New York law for which the [Attorney General] has no particularized enforcement power."2 (Id. at 6-7 (citing case law)) Judge Gorenstein also2 Plaintiff also cites 28 U.S.C. § 2403(b), which provides as follows: "In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene . . . for argument on the question of constitutionality....." (See Pltf. Opp. (Dkt. No. 138) at 4 (citing 28 U.S.C. § 2403(b)))) As Judge Gorenstein points out, however, it is the Attorney General's decision whether to intervene pursuant to this

statute. points out that the Amended Complaint contains no "factual allegations against the NY AG whatsoever[.]" (Id. at 8) For all of these reasons, Judge Gorenstein recommends that Plaintiff's claims against the Attorney General should be dismissed for failure to state a claim. (Id. at 6-9) **B.Claims Against CUNY** The State Defendants contend that Plaintiff's claims against CUNY must be dismissed because (1) he fails to state a claim against CUNY; (2) they are barred by the Eleventh Amendment and the New York Education Law; and (3) Plaintiff lacks standing to sue CUNY. (State Def. Br. (Dkt. No. 137) at 6, 12-15) The Amended Complaint's sole reference to CUNY is as follows: CUNY was made a party because Mr. Camire works there, presumably committing his specialty of Medical Malpractice/Defamation (for 'friends only?) on innocent CUNY Students, also Petitioner believes the subject building should be used and owned jointly by tenants (under Article 11) and CUNY/Baruch as faculty/graduate/married housing (there are two other dorms, for NYU and SVA, on the block). (Am. Cmplt. (Dkt. No. 38) ¶ 33)) Judge Gorenstein concludes that this Court does not have subject matter jurisdiction – because Plaintiff lacks standing to assert his claims against CUNY – and does not reach the State Defendants' remaining arguments for dismissal. (R&R (Dkt. No. 142) at 10) (See R&R (Dkt. No. 142) at 7-8; id. at 8 (citing Wallach v. Lieberman, 366 F.2d 254, 257 (2d Cir. 1966); Am. Trucking Ass'n, Inc., 795 F.3d 351, 359 (2d Cir. 2015))) Given these circumstances, Judge Gorenstein concludes that this statute does not make the Attorney General a necessary or required party. (Id. at 7-8) Judge Gorenstein further notes that the Attorney General's motion to dismiss demonstrates that she does not wish to be part of this action. (Id. at8; see also id. at 7 n.5 (citing N.Y. C.P.L.R. § 1012(b), which reads: "When the

constitutionality of a statute of the state, or a rule and regulation adopted pursuant thereto is involved in an action to which the state is not a party, the attorney-general, shall be notified and permitted to intervene in support of its constitutionality." Construing Plaintiff's allegations against CUNY liberally, Judge Gorenstein finds that Plaintiff appears to assert "that a CUNY employee committed torts against 'innocent CUNY students.'" (id. at 9 (quoting Am. Cmplt. (Dkt. No. 38) ¶ 33)) Because Plaintiff has not alleged a harm against himself, he lacks standing to assert his claims against CUNY, and these claims must be dismissed for lack of subject matter jurisdiction. (Id. at 9-10 (citing Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 474 (1982)); see also Valley Forge Christian Coll., 454 U.S. at 474 ("'plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties'" (citation omitted)))3

C.Plaintiff's Request for Leave to Amend In his opposition to the State Defendants' motion to dismiss, Plaintiff seeks leave to file a second amended complaint. Plaintiff contends that he was not able to address – in the Amended Complaint – the issues raised in the State Defendants' motion to dismiss, because the motion was filed after the Amended Complaint. (Pltf. Opp. (Dkt. No. 138) at 8-11, 13-16) As Judge Gorenstein notes, Plaintiff "has already filed an amended complaint," and Federal Rule of Civil Procedure 15(a)(1) "does not permit him to amend his complaint as of right" at this point. (R&R (Dkt. No. 142) at 10) Rather, "he may only do so 'with consent of the opposing parties or with leave of the court.'" (Id. (quoting Scott v. Chipotle Mexican Grill, Inc., 300 F.R.D. 193, 197 (S.D.N.Y. 2014) (citation omitted))) Plaintiff asserts that he was "denied" his "as of right

amendment," "due to the untimeliness of the [State Defendants'] [motions to dismiss]." (Pltf. Opp. (Dkt. No. 138) at 14) 3 Judge Gorenstein also notes that Defendant Camire "has already been dismissed from this action," and that the allegations against Camire relate to his work at Bellevue Hospital and not at CUNY. (R&R (Dkt. No 142) at 9-10; see also Am. Cmplt. (Dkt. No. 38) ¶¶ 9-31; see also Dkt. Nos. 107, 109) In rejecting Plaintiff's argument, Judge Gorenstein notes that (1) "the [Attorney General] was added as a party to this action only when [Plaintiff] filed the [Amended Complaint], and thus obviously could not have made arguments for dismissal of claims before the [Amended Complaint] was filed"; and (2) Plaintiff "chose to amend his complaint as of right prior to the filing of responsive pleadings by [CUNY]." (R&R (Dkt. No. 142) at 10) As a result, Plaintiff's request to amend is governed by Federal Rule of Civil Procedure Rule 15(a)(2), which requires either consent or leave of court. (Id. at 11 (citing Fed. R. Civ. P. 15(a)(2))) Plaintiff seeks to amend the Amended Complaint to add two new defendants: counsel for the New York City Transit Authority and an investigator for the MTA Inspector General. (Pltf. Opp. (Dkt. No. 138) at 9-10) Judge Gorenstein notes that "[t]here are no allegations that either of these individuals is employed by, or otherwise associated with, either the [Attorney General] or CUNY, . . . and thus [Plaintiff] should not be granted leave to cure his claims against the [Attorney General] or CUNY by adding these defendants." (R&R (Dkt. No. 142) at 11-12) Plaintiff also seeks to add allegations stating that the Attorney General has enforced laws against wage theft. (Pltf. Opp. (Dkt. No. 138) at 14-15) Judge Gorenstein construes Plaintiff's request as a response to the State Defendants' argument that the Attorney General is not a necessary or proper party, because she lacks

particularized enforcement power over NYLL Section 190, which Plaintiff asserts is unconstitutional. (R&R (Dkt. No. 142) at 11-12) Judge Gorenstein finds that Plaintiff's proposed amendment would not assist him in demonstrating that the Attorney General is a proper or necessary party, because (1) "there is no allegation the [Attorney General] intends to bring any enforcement action against Plaintiff" (id. at 12 (citing HealthNow N.Y., Inc. v. New York, 448 F. App'x 79, 81 (2d Cir. 2011))); (2) "the fact that the [Attorney General] has previously brought wage-law-enforcement actions against non-parties under her general authority to enforce the laws of New York does not make her a proper party to this lawsuit" (id. (citing 1st Westco Corp. v. School Dist., 6 F.3d 108, 113 (3d Cir. 1993))); and (3) "[t]o the extent [that Plaintiff] may be asserting that his claims against the [Attorney General] are predicated on her failure to prosecute other defendants in this action, any such claims would be meritless." (Id. at 13 (citing VSF Coal., Inc. v. Scoppetta, 13 A.D.3d 517, 518 (2d Dept. 2004))). As such, Judge Gorenstein concludes that Plaintiff's request to amend as against the Attorney General should be denied based on futility. (Id. at 13 (citing Carr v. New York, 15 Civ. 9012 (LGS), 2016 WL 3636675, at *5 (S.D.N.Y. June 29, 2016))) Judge Gorenstein also recommends that this Court not grant Plaintiff leave to amend as against CUNY, because he has still not proffered factual allegations stating a claim against CUNY. (Id. at 13-14 (citing Lucente v. Int'l Bus. Machines Corp., 310 F.3d 243, 258 (2d Cir. 2002))) Finally, Judge Gorenstein notes "that this is the fourth federal lawsuit [Plaintiff] has filed against state government entities related to his employment with the NYCTA," and that "[e]ach of these lawsuits has been dismissed." (Id. at 14) The pattern of "unsuccessful prior lawsuits further support[s] the

conclusion that leave to amend should not be granted." (Id. (citing Hobbs v. Livingston, 20-cv-0515 (CM), 2020 WL 882431, at *3 (S.D.N.Y. Feb. 21, 2020)))

III.PLAINTIFF'S OBJECTIONS TO THE R&R On September 7, 2020, Plaintiff filed objections to Judge Gorenstein's R&R. (Obj. (Dkt. No. 143)) Plaintiff's objections are limited to Judge Gorenstein's recommendation that he be denied leave to amend. (Id. at 3-17) Plaintiff suggests he should be given leave to amend because (1) dismissal would be final; (2) he is complaining of a civil rights violation; and (3) he is a pro se plaintiff whose pleadings are entitled to a liberal reading. (Id.) Plaintiff also contends that – although his prior lawsuits were dismissed – they nonetheless had merit. (Id. at 7-12) In their September 17, 2020 response to Plaintiff's objections, the State Defendants contend that the objections should be overruled and that the R&R should be adopted in its entirety. (Def. Resp. (Dkt. No. 144))

DISCUSSIONI.LEGAL STANDARDS A.Review of Report and Recommendation A district court's review of a magistrate judge's report and recommendation "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C). Where a timely objection has been made to a magistrate judge's recommendation, the district court judge "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." Id. However, "[o]bjections that are merely perfunctory responses argued in an attempt to engage the district court in a rehashing of the same arguments set forth in the original papers will not suffice to invoke de novo review." Phillips v. Reed Grp., Ltd., 955 F. Supp. 2d 201, 211 (S.D.N.Y. 2013) (citation, quotation marks, and alteration omitted). "[T]o the extent . . . that

the [objecting] party makes only conclusory or general arguments, or simply reiterates the original arguments, the Court will review the [R & R] strictly for clear error." DiPilato v. 7-Eleven, Inc., 662 F. Supp. 2d 333, 339 (S.D.N.Y. 2009) (citation and quotation marks omitted). Although "[t]he objections of parties appearing pro se are generally accorded leniency and should be construed to raise the strongest arguments that they suggest . . .[,] even a pro se party's objections to a[n] [R&R] must be specific and clearly aimed at particular findings in the magistrate's proposal, such that no party be allowed a second bite at the apple by simply relitigating a prior argument." Id. at 340 (citations and quotation marks omitted). For portions of the R&R to which no objection is made, a court's review is limited to a consideration of whether there is any "clear error on the face of the record" that precludes acceptance of the recommendations. Wingate v. Bloomberg, No. 11-CV-188 (JPO), 2011 WL 5106009, at *1 (S.D.N.Y. Oct. 27, 2011) (citation and quotation marks omitted). **B.Rule 12(b)(1) and Rule 12(b)(6) Motions to Dismiss** "A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000) (citing Fed. R. Civ. P. 12(b)(1)). "The Constitution limits the jurisdiction of Article III courts to matters that present actual cases or controversies. This limitation means that when a plaintiff brings suit in federal court, [he] must have standing to pursue the asserted claims." Altman v. Bedford Cent. Sch. Dist., 245 F.3d 49, 69 (2d Cir. 2001) (internal citation omitted). To establish standing, a "plaintiff must show . . . he 'suffered an injury-in-fact'. . . ." Carver v. City of N.Y., 621 F.3d 221, 225 (2d Cir. 2010) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560

(1992)). "If [a] plaintiff[] lacks Article III standing, a court has no subject matter jurisdiction to hear" the plaintiff's claim. Cent. States Se. & Sw. Areas Health and Welfare Fund v. Merck–Medco Managed Care, L.L.C., 433 F.3d 181, 198 (2d Cir. 2005). To survive a Rule 12(b)(6) motion to dismiss for failure to state a claim, a complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citation omitted). For a claim to have facial plausibility, the plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," so as to establish "more than a sheer possibility that a defendant has acted unlawfully." Iqbal, 556 U.S. at 678. Although a pro se plaintiff's complaint "'must be held to less stringent standards than formal pleadings drafted by lawyers,'" Erickson v. Pardus, 551 U.S. 89, 94 (2007) (citation omitted), even a pro se complaint "must contain factual allegations sufficient to raise a 'right to relief above the speculative level.'" Dawkins v. Gonyea, 646 F. Supp. 2d 594, 603 (S.D.N.Y. 2009) (citation omitted). **C.Motion to Amend** District courts "ha[ve] broad discretion in determining whether to grant leave to amend," Gurary v. Winehouse, 235 F.3d 793, 801 (2d Cir. 2000), and "leave to amend should be freely granted when 'justice so requires.'" Pangburn v. Culbertson, 200 F.3d 65, 70 (2d Cir. 1999) (quoting Fed. R. Civ. P. 15(a)); see also Rachman Bag Co. v. Liberty Mut. Ins. Co., 46 F.3d 230, 234 (2d Cir. 1995) ("The Supreme Court has emphasized that amendment should normally be permitted, and has stated that refusal to grant leave without justification is 'inconsistent with the spirit of the Federal Rules.'" (quoting Foman v. Davis, 371 U.S. 178, 182 (1962))). A court may properly deny leave to amend, however, in

cases of "'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.'" Ruotolo v. City of New York, 514 F.3d184, 191 (2d Cir. 2008) (quoting Foman, 371 U.S. at 182). "'Where it appears that granting leave to amend is unlikely to be productive, . . . it is not an abuse of discretion to deny leave to amend.'" Lucente, 310 F.3d at 258 (quoting Ruffolo v. Oppenheimer & Co., 987 F.2d 129, 131 (2d Cir.1993) (per curiam)). "[A] party opposing a motion to amend . . . bears the burden of establishing that an amendment would be futile." Bonsey v. Kates, No. 13 Civ. 2708 (RWS), 2013 WL 4494678, at *8 (S.D.N.Y. Aug. 21, 2013). "Ordinarily, leave to amend may be denied on the basis of futility if the proposed claim would not withstand a Rule 12(b)(6) motion to dismiss." Summit Health, Inc. v. APS Healthcare Bethesda, Inc., 993 F. Supp. 2d 379, 403 (S.D.N.Y. 2014), aff'd sub nom. APEX Employee Wellness Servs., Inc. v. APS Healthcare Bethesda, Inc., 725 F. App'x 4 (2d Cir. 2018). **D.*Pro Se* Pleadings** A pro se plaintiff's complaint must be construed liberally and interpreted as raising the strongest arguments it suggests. Hill v. Curcione, 657 F.3d 116, 123 (2d Cir. 2011) (courts "review[ing] . . . the sufficiency of a pro se complaint . . . are constrained to conduct [their] examination with special solicitude, interpreting the complaint to raise the strongest claims that it suggests." (citation, quotation marks, and alterations omitted)); see also Tracy v. Freshwater, 623 F.3d 90, 101 (2d Cir. 2010) ("a court is ordinarily obligated to afford a special solicitude to pro se litigants"). The Second Circuit has cautioned that district courts "'should not dismiss [a pro se complaint] without granting leave to amend at least once when a liberal reading of the

complaint gives any indication that a valid claim might be stated.'" Cuoco v. Moritsugu, 222 F.3d 99, 112 (2d Cir. 2000) (quoting Gomez v. USAA Fed. Sav. Bank, 171 F.3d 794, 795 (2d Cir. 1999) **II.ANALYSIS A.Claims Against the Attorney General** Plaintiff does not object to Judge Gorenstein's recommendation that his claims against the Attorney General be dismissed for failure to state a claim. (Obj. (Dkt. No. 143); see also R&R (Dkt. No. 142) at 9). Accordingly, this recommendation is reviewed for clear error. See Wingate, 2011 WL 5106009, at *1. As discussed above, the Amended Complaint makes no more than a passing reference to the Attorney General, asserting that she is a "required party in order to challenge New York State Labor Law 190 as unconstitutional under the Equal Protection Clause of the 14th Amendment, Due Process Clause(s) and the Taking Clause of the Fifth Amendment." (Am. Cmplt. (Dkt. No. 38) ¶ 33) There is no error – let alone clear error – in Judge Gorenstein's finding that this passing and conclusory reference is insufficient to state a claim against the Attorney General. (R&R (Dkt. No. 142) at 6-9) As Judge Gorenstein notes, NYLL § 190 is a definitional statute enforced via NYLL § 196, which "provides that enforcement authority" is granted to the New York State Commissioner of Labor and not to the Attorney General. (Id. at 6 (citing NYLL §§ 196(a) and (c))) Neither case law nor statute requires the Attorney General to be a "party to an action challenging the constitutionality of a New York law for which the [Attorney General] has no particularized enforcement power." (Id. at 6-8 (citing Am. Trucking Ass'n, Inc. v. N.Y. State Thruway Auth., 795 F.3d 351, 359 (2d Cir. 2015) ("State (and federal) statutes are frequently challenged as unconstitutional without the state (or federal) government as a named party.")); see also 28 U.S.C. § 2403(b); N.Y. C.P.L.R. § 102(b)) And as Judge Gorenstein

points out, "[t]he [Attorney General's] motion to dismiss demonstrates that she does not wish to be a part of this action." (R&R (Dkt. No. 142) at 8 (citing Wallach v. Lieberman, 366 F.2d 254, 257 (2d Cir. 1966))) Because the Amended Complaint pleads no viable claim against the Attorney General, this Court will adopt Judge Gorenstein's recommendation that Plaintiff's claims against the Attorney General be dismissed. **B.Claims Against CUNY** Plaintiff does not object to Judge Gorenstein's recommendation that his claims against CUNY be dismissed for lack of subject matter jurisdiction. (Obj. (Dkt. No. 143); see also R&R (Dkt. No. 142) at 10) Accordingly, Judge Gorenstein's recommendation will be reviewed for clear error. See Wingate, 2011 WL 5106009, at *1. As discussed above, the Amended Complaint makes only one reference to CUNY, and that reference is in the context of an individual who is allegedly a CUNY employee. (Am. Cmplt. (Dkt. No. 38) ¶ 33) Plaintiff alleges that "Mr. Camire," the alleged CUNY employee, is "committing his specialty of Medical Malpractice/ Defamation (for 'friends only?) on innocent CUNY students." (Id.) At best, Plaintiff alleges harm to CUNY students and not to himself. Because Plaintiff has not alleged that CUNY caused him injury, he has not demonstrated standing. As a result, this Court lacks subject matter jurisdiction over his claims against CUNY. See Carver, 621 F.3d at 225; see also Valley Forge Christian Coll., 454 U.S. at 474 ("[T]his Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." (citation and quotation marks omitted)). Accordingly, Plaintiff's claims against CUNY will be dismissed pursuant to Rule 12(b)(1) **C.Plaintiff's Request for Leave to Amend** In his opposition, Plaintiff seeks leave to file a second amended

~~complaint. (Pltf. Opp. (Dkt.~~ No. 138) at 8-11, 13-16) Judge Gorenstein recommends that this request be denied. R&R (Dkt. No. 142) at 10-15) Plaintiff objects to this recommendation. (See Obj. (Dkt. No 143)) In his objections, Plaintiff reiterates arguments he made to Judge Gorenstein about why he should be permitted to add two new defendants to this case.4 (Compare Obj. (Dkt. No. 143) with Pltf. Opp. (Dkt. No. 138)) Accordingly, this Court reviews the R&R for clear error. See DiPilato, 662 F. Supp. 2d. at 339-40. The Second Circuit has cautioned that district courts "should not dismiss [a pro se complaint] without granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated." Cuoco, 222 F.3d at 112 (citation and quotation marks omitted). "'Where it appears that granting leave to amend is unlikely to be productive, however, it is not an abuse of discretion to deny leave to amend.'" Lucente, 310 F.3d at 258 (quoting Ruffolo, 987 F.2d at 131); see also Ruotolo, 514 F.3d at 191. Futility of an amendment is an appropriate basis for denying leave, and an amendment "is futile if the proposed claim could not withstand a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6)." Lucente, 310 F.3d at 258. As Judge Gorenstein finds, there is no reason to believe that permitting further amendment would yield a viable claim against either of the State Defendants. (R&R (Dkt. No. 142) at 10-15) "Even under the most liberal reading of the facts, [Plaintiff's] allegations cannot be cured by amendment." Carr, 2016 WL 3636675, at *5. And, as Judge Gorenstein notes, 4 As discussed above, Plaintiff asserts that his previously dismissed cases had merit. (Obj. (Dkt. No. 143) at 7-10) He also suggests that the Court could sua sponte substitute the New York State Department of Labor "as a more rational party than the AG." (Id. at 13) Neither

argument justifies permitting further amendment. Plaintiff's well-established pattern of filing meritless lawsuits suggests that granting him leave to amend would be futile. (See R&R (Dkt. No. 142) at 14) Finally, in connection with Plaintiff's claims against other defendants in the instant case, this Court has denied leave to file a second amended complaint, observing that "[Plaintiff's] papers evince a pattern of repeating arguments that have already been rejected by this Court." (Order (Dkt. No. 129) at 18) Here, Plaintiff has offered nothing to suggest that he is capable of pleading valid claims against the State Defendants. See Lucente, 310 F.3d at 258. Accordingly, the R&R's recommendation to deny leave to amend will be adopted. **CONCLUSION** For the reasons stated above, the R&R is adopted in its entirety. The motion to dismiss filed by the New York Attorney General and CUNY is granted. Plaintiff's request for leave to file a second amended complaint is denied. The Clerk of Court is directed to terminate the motion (Dkt. No. 136). This Court certifies that under 28 U.S.C. § 1915(a)(3) any appeal from this Order would not be taken in good faith, and therefore in forma pauperis status is denied for purposes of an appeal. A copy of this order will be mailed by Chambers to the pro se Plaintiff. Dated: New York, New York November 6, 2020

APPENDIX E R&RII 03/25/22

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK----------
---------- X BRIAN BURKE,: REPORT AND
Plaintiff,: RECOMMENDATION: 18 Civ. 4496 (PGG)
(GWG) -v.- : VERIZON COMMUNICATIONS, INC., et
al.,:: Defendants.: ----------
--------XGABRIEL W. GORENSTEIN, UNITED STATES

MAGISTRATE JUDGE Pro se plaintiff Brian Burke brought this lawsuit asserting various state and federal claims against over a dozen defendants. See Complaint and Affirmation, filed May 21, 2018 (Docket# 1). Before the Court is a motion filed by defendants Housing and Services, Inc. ("HSI"), Kenmore Housing Development Fund Corporation ("KHDFC"), Kenmore Housing Corporation ("KHC"), and Kenmore Associates, L.P. (together, "defendants" or "the Kenmore defendants"), seeking dismissal of the complaint pursuant to Fed. R. Civ. P. 12(c), or in the alternative, summary judgment pursuant to Fed. R. Civ. P. 56.1 For the following reasons, defendants' motion for summary judgment should be granted and the case should be dismissed. I. BACKGROUNDA. Procedural History Burke filed the original complaint in this action on May 21, 2018, asserting claims against over a dozen defendants. See Complaint and Affirmation. Burke filed an amended complaint on July 18, 2018. See Amended Complaint and Affirmation, filed July 18, 2018 (Docket # 38) ("FAC"). The amended complaint is difficult to understand as it is replete with disjointed and meandering discussions of numerous topics. The claims seem to arise from Burke's termination from employment with the New York City Transit Authority ("NYCTA"), id. at 4; id. ¶ 33, as well as alleged attempts to evict Burke from his apartment at 145 East 23rd Street, New York, NY 10010, id. ¶ 34. Burke's apartment is part of a housing complex owned and operated by the Kenmore defendants. See FAC at 5, 11; 143-47 East 23rd Street Management Agreement, dated June 28, 1996, annexed as Ex. L to Klauber Aff. The Kenmore defendants filed an answer to the amended complaint on August 7, 2018. See Answer, filed Aug. 7, 2018 (Docket # 49). The other defendants have already filed motions1 See Notice of Motion for Summary

Judgment, filed Sept. 14, 2021 (Docket # 177); Affirmation of Andrew L. Klauber, filed Sept. 14, 2021 (Docket # 179) ("Klauber Aff."); Memorandum of Law in Support of the Defendants' Motion for Summary Judgment, filed Sept. 14, 2021 (Docket # 180); Defendants' Rule 56.1 Statement, filed Sept. 14, 2021 (Docket # 182); Plaintiff's Affirmation in Opposition to Motion for Summary Judgment and Cross Motion to Strike with Prejudice, Affirmation, Memorandum of Law and Exhibits, filed Oct. 29, 2021 (Docket # 184) ("Pl. Opp."); Plaintiff's Affirmation in Opposition to Defendants' Rule 56.1 Statement and Exhibits/Attachments, annexed as Ex. A to Pl. Opp. ("Pl. Rule 56.1 Statement"); Reply Memorandum in Support of Defendants' Motion for Summary Judgment, filed Nov. 12, 2021 (Docket # 188). to dismiss and had those motions granted. See Order of March 29, 2019 (Docket # 107); Order of November 6, 2020 (Docket # 153). Accordingly, the Kenmore defendants are the only remaining named defendants. B. Allegations in the Amended Complaint and Other Evidence The amended complaint is sworn under penalty of perjury, see FAC at 2, and we thus we view it as constituting admissible evidence in opposition to the defendants' summary judgment motion to the extent it meets the requirements of admissible evidence. See generally Fed. R. Civ. P. 56(c)(4). Nonetheless, it is difficult to tell what claims it makes against the Kenmore defendants.2 Burke describes the Kenmore defendants, as well as former defendant Verizon, as "the putative owners" of 145 East 23rd Street, New York, NY 10010, where Burke claims to have resided since 1989. See FAC at 5, ¶ 1. Burke maintains that the transfer of the property to Verizon during his residence "was/is null and void for violating federal statute requiring an auction, and lack of correct notarization of alleged signature of deed," id. at 5, and that the transfer of deed lacked

consideration, id. In the amended complaint, Burke largely ascribes the Kenmore defendants' actions to Verizon, apparently referring to HSI as "Verizon's Shell Company." See id. ¶¶ 6-7.3 2 We ignore conclusory allegations against the "defendants" generally where Burke does not specify which defendant is involved. See generally Atuahene v. City of Hartford, 10 F. App'x 33, 34 (2d Cir. 2001) ("lumping all the defendants together in each claim and providing no factual basis to distinguish their conduct" fails to satisfy minimum "fair notice" standard of Fed. R. Civ. P. 8). 3 Although it is not ultimately relevant to the disposition of the motion, the Kenmore defendants have supplied evidence as to their relation to one another. KHC is a wholly owned subsidiary of KHDFC. See Deposition of Molly Mattimore, dated May 14, 2021, annexed as Ex. P to Klauber Aff. ("Mattimore Dep."), at 90. KHC is the general partner of Kenmore Associates and has a 0.1% interest in the partnership. See id. at 91-92. Kenmore Associates is the owner of Burke alleges that Verizon "hired [HSI] to act as their 'Managing Agent,'" FAC ¶ 6 (footnote omitted), and that HSI "has continuously engaged in said willful, intentional (with scienter) unlawful, harmful, dangerous, fraudulent, etc., misconduct," id. Burke claims that HSI employee Francesca Rossi "ordered/instructed Bellevue Hospital Mobile Crisis Unit to perform witting, intentional Defamation/Defamation per se/Medical Malpractice" and attempted to remove Burke from his apartment. FAC ¶ 8. Burke alleges that Rossi contacted Bellevue in an attempt to "establish . . . 'probable cause' to kidnap/remove [Burke] in order to" evict him and end his employment with the NYCTA. Id. ¶ 9; see also id. ¶ 34 ("[T]he record shows, or will, that the Verizon Defendants . . . went to Plaintiff's employer, conveying their false, conjured

Defamation, in order to harm/terminate/bankrupt, in order to evict."). Burke's amended complaint then details a series of complaints about a report Bellevue social worker Ryan Camire prepared following his assessment of Burke, which Burke labels defamatory and compares to medical malpractice. See FAC ¶¶ 10-31. Burke alleges that Camire's report contained inaccuracies about him for example, that Burke had previously been hospitalized for psychosis and that defendants communicated this inaccurate health information to Burke's then-employer, the NYCTA. See FAC ¶¶ 15, 20, 33-34. Burke has produced some relevant medical records, including Camire's report from his wellness check of Burke. See Bellevue Hospital Center Medical Records, annexed as Ex. G to Pl. Opp. the property at 143-47 East 23rd Street. See id. at 90-92; Limited Partner Interest Purchase Agreement, annexed as Ex. M to Klauber Aff. On June 28, 1996, Kenmore Associates entered into an agreement with HSI, a New York State non-profit, whereby HSI would manage the property at 143-47 East 23rd Street. See 143-47 East 23rd Street Management Agreement. Verizon was once a limited partner in Kenmore Associates, holding a 99.9% interest, but in 2016 HSI assumed Verizon's limited partnership role and 99.9% interest. See Mattimore Dep. at 91, 93. However, Burke provides no evidence of any communication between defendants and the NYCTA. The only evidence in the record bearing on the communication of Burke's health information to his employer is Camire's report, which expressly indicates that he considered and rejected the idea of informing NYCTA about Burke's mental condition. See id. at *7. Burke offers an affidavit from his sister stating that she never told Bellevue Hospital, the Kenmore defendants, or their employees that Burke had been hospitalized for psychosis, see Affidavit of Kelly A.

Burke, dated Sept. 9, 2021, annexed as Ex. C to Pl. Opp., and an affidavit from Burke's brother-in-law stating his belief that Burke is a "moral, sane, fair, intelligent person," see Affidavit of Dann M. Church, dated Sept. 9, 2021, annexed as Ex. B to Pl. Opp. Burke has also produced what he describes as an "Admitted Expert Report," which is a letter from his psychologist stating that Burke "has beliefs that against the doctors orders Ms. Rossi may have released information to his employer." See Letter from Kari Sherman, dated April 5, 2021, annexed as Ex. C to Affirmation of Service, filed July 19, 2021 (Docket # 169). Burke also makes allegations regarding a "smoke alarm" that malfunctioned on July 24, 2016, and that he did not want reinstalled. See FAC ¶ 32. Burke alleges that the Kenmore defendants "swatted"4 him "and gave NYPD/FDNY a false 911 call to gain unwarranted access." Id. Burke has provided two e-mails from the defendants regarding their attempts to test or replace the smoke detectors in Burke's apartment. One of these e-mails indicates that, in 2019, Burke informally requested a "reasonable accommodation" that such work not be done in his apartment, see E-mail from Francesca Rossi, dated Jan. 31, 2019, annexed as Ex. D to Pl. Opp., 4 Burke utilizes the term "swatting" to refer to "the practice of making a false police report to lure law enforcement to a particular location." See Order of March 29, 2019 at 16 n.7. while the other e-mail contains a reference by one of the defendants' employees to their practice of calling the police to facilitate maintenance workers' access to apartments, see E-mail from Almir Lalicic, dated June 6, 2018, annexed as Ex. E to Pl. Opp. This conduct, Burke claims, constitutes "a pattern of unconstitutional denial of Due Process, or Equal Protection." Id. Burke has also introduced a transcript from an administrative hearing

regarding citations issued to Kenmore Associates for performing electrical and plumbing work without a permit, see Hearing Transcript at 3, dated May 31, 2018, annexed as Ex. F to Pl. Opp., although it is not clear which of his claims this evidence is intended to support. The defendants have supplied some evidence that describes their interactions with plaintiff, none of which is contradicted by plaintiff in admissible form. On February 3, 2014 at11:15 a.m., Burke sent an e-mail to over one-hundred individuals, including employees of Verizon and HSI, as well as numerous local, state, and federal officials and elected representatives. See E-mail entitled "Re: Licensing requirements," dated Feb. 3, 2014, annexed as Ex. Y to Klauber Aff.5 The e-mail expressed Burke's frustration with attempts by HSI maintenance workers to perform work in his apartment. Id. On February 7, 2014, HSI social worker Francesca Rossi contacted the New York City Health Department, described Burke's e-mail, and requested that the mobile crisis unit assess him. See Redacted Hospital Records of Bellevue Hospital Center, annexed as Ex. AA to Klauber Aff., at 2; Mattimore Dep. at 77-79. 5 Although the version of Burke's email in the record does not list each of that e-mail's recipients, a reply e-mail from the Deputy Executive Director of HSI features the full list of e- mail recipients, see E-mail entitled "Response to email," dated Feb. 3, 2014, annexed as Ex. Z to Klauber Aff., and Burke concedes that the e-mail appears accurate, see Pl. Rule 56.1 Statement¶¶ 22-23; Defendants' Rule 56.1 Statement ¶¶ 22-23. As to the "smoke alarm" allegations relating to the events of July 14, 2016, the Kenmore defendants supply evidence that an HSI employee and a technician employed by former-defendant Johnson Controls attempted to enter Burke's apartment for the purpose of replacing asmoke detector. See HSI Incident Report, dated July 14, 2016, annexed as

Ex. CC to Klaube Aff., at 1. Upon Burke's refusal, the HSI employee contacted the New York City Police Department. See id. When police arrived, Burke permitted the work to be completed. See id. Burke does not specify the legal basis for his claims against the Kenmore defendants specifically. The complaint does, however, list a number of claims against all defendants as follows: 42 U.S. Code § 1983, Federal R.I.C.O. and New York Penal Code Article 460, et seq., Defamation, Defamation per se, (intentional/negligent) Medical Malpractice, Fraud, Theft, Tortious Interference With Prospective Economic Advantage, Assault, Federal, NY State, NYC False Claims Act(s), New York City/State Human Rights Law(s), Retaliatory Termination and Retaliatory Attempted Eviction, NY State Civil Service Law, HIPAA, Americans With Disabilities Act, ongoing NYCTA/TWU Local 100 Employment Contract Violations, and/or Conspiracy to Commit same. FAC at 3We understand Burke's § 1983, Racketeer Influenced and Corrupt Organizations Act ("RICO"), False Claims Act, and HIPAA claims to be premised on defendants' request for a wellness check on Burke and their alleged communication of his health information to the NYCTA.6 We also understand his Americans with Disabilities Act claim to be premised on 6 The amended complaint mentions § 1983 and RICO when discussing the wellness check defendants initiated. See FAC ¶ 13. Burke describes a portion of his post-wellness check medical records referring to him as delusional as a "False Claim," see id. at 31 n.18, and alleges that defendants "violat[ed] the patient's confidentiality by discussing [his medical history] with the MTA," see id. ¶ 15. defendants' attempts to install and/or maintain a smoke detector in Burke's apartment.7In response to the summary judgment motion, Burke filed two sworn affirmations, apparently

intending that one serve as his legal brief in opposition to the defendants' motion, see Pl. Opp., with the other serving as his statement under Local Civil Rule 56.1, see Pl. Rule 56.1Statement. Many of the paragraphs of Burke's opposition address matters unrelated to the merits of the defendants' motion, such as Burke's complaints about defendants' discovery production. See Pl. Opp. at 2-6. II. SUMMARY JUDGMENT STANDARD Because we find that the Kenmore defendants should be granted summary judgment, we do not reach their arguments seeking to dismiss for failure to state a claim. Rule 56(a) of the Federal Rules of Civil Procedure provides that a court shall grant summary judgment when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In determining whether a genuine issue of material fact exists, "[t]he evidence of the non-movant is to be believed" and the court must draw "all justifiable inferences" in favor of the nonmoving party. Id. at 255 (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970)); accord Morales v. Quintel Ent., Inc., 249 F.3d 115, 121 (2d Cir. 2001) ("[A]ll reasonable inferences must be drawn against the party whose motion is under consideration."). 7 Burke references his request for a "reasonable accommodation under ADA" to remove smoke detectors from his apartment. See id. at 37 n.21, 38. Once the moving party has shown that there is no genuine issue as to any material fact and that it is entitled to a judgment as a matter of law, "the nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial,'" Matsushita Elec. Indus. Co., Ltd.

v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)), and "may not rely on conclusory allegations or unsubstantiated speculation," Scotto v. Almenas, 143 F.3d105, 114 (2d Cir. 1998) (citing cases). In other words, the nonmovant must offer "concrete evidence from which a reasonable juror could return a verdict in his favor." Anderson, 477 U.S. at 256. Where "the nonmoving party bears the burden of proof at trial, summary judgment is warranted if the nonmovant fails to make a showing sufficient to establish the existence of an element essential to its case." Nebraska v. Wyoming, 507 U.S. 584, 590 (1993) (punctuation omitted). Thus, "[a] defendant moving for summary judgment must prevail if the plaintiff fails to come forward with enough evidence to create a genuine factual issue to be tried with respect to an element essential to its case." Allen v. Cuomo, 100 F.3d 253, 258 (2d Cir. 1996) (citing Anderson, 477 U.S. at 247-48). "Where it is clear that no rational finder of fact 'could find in favor of the nonmoving party because the evidence to support its case is so slight,' summary judgment should be granted." FDIC v. Great Am. Ins. Co., 607 F.3d 288, 292 (2d Cir. 2010) (quoting Gallo v. Prudential Residential Servs., Ltd. P'ship, 22 F.3d 1219, 1224 (2d Cir. 1994)). Plaintiff is proceeding pro se and thus we must liberally construe his filings to raise the strongest arguments they suggest. See Triestman v. Federal Bureau of Prisons, 470 F.3d 471, 474-75 (2d Cir. 2006). Nonetheless, "proceeding pro se does not otherwise relieve a litigant of the usual requirements of summary judgment, and a pro se party's bald assertions unsupported by evidence are insufficient to overcome a motion for summary judgment." Parker v. Fantasia, 425 F. Supp. 3d 171, 183 (S.D.N.Y. 2019) (citation omitted and punctuation altered). III. DISCUSSION In light of the difficulty in discerning plaintiff's causes of action against

the Kenmore defendants, and not finding that there exist any other causes of action that supply a claim against the defendants, we address only those causes of action listed by Burke that seem to relate to the allegations pertaining to the Kenmore defendants.8 A. Burke's Federal Law Claims1. 42 U.S.C. § 1983To prevail on a claim under 42 U.S.C. § 1983, a plaintiff must show that: (1) a right secured by the Constitution or laws of the United States was violated, and (2) the right was violated by a person acting under the color of state law, or a "state actor." See West v. Atkins, 487 U.S. 42, 48-49 (1988). The Kenmore defendants are not alleged to be governmental entities. This is not necessarily a bar to a § 1983 action, however, inasmuch as there are three bases for finding a private entity has acted under color of state law, described by the Second Circuit as follows: (1) when the entity acts pursuant to the coercive power of the state or is controlled by the state ("the compulsion test"); (2) when the state provides significant encouragement to the entity, the entity is a willful participant in joint activity with the state, or the entity's functions are entwined with state policies ("the joint action test" or "close nexus test"); or (3) when the entity has been delegated a public function by the state ("the public function test"). Sybalski v. Indep. Grp. Home Living Program, Inc., 546 F.3d 255, 257 (2d Cir. 2008) 8 Burke argues that the Court should deny the defendants' motion because it was filed late. See Pl. Opp. at 4-9. But Judge Gardephe has already ruled that the motion was timely filed. See Order of November 10, 2021 (Docket # 187). 10 (punctuation omitted). Although Burke alleges that defendants were acting under color of state law, see FAC at 6, Burke has failed to provide any competent evidence that would justify treating defendants' conduct as state action for purposes of § 1983. Burke has offered no admissible evidence based on

personal knowledge indicating that there are sufficient entanglements between defendants and any government body such that they may be treated as one and the same. Finally, there is no evidence that defendants are engaged in a public function. "It is well established that the provision of low-cost supportive housing is not a 'public function' within the meaning of section1983, because 'the provision of housing, for the poor or for anyone else, has never been the exclusive preserve [of] the state.'" George v. Pathways to Hous., Inc., 2012 WL 2512964, at *4 (S.D.N.Y. June 29, 2012) (quoting Young v. Halle Hous. Assocs., L.P., 152 F. Supp. 2d 355, 365 (S.D.N.Y. 2001)). Burke has therefore "fail[ed] to make a showing sufficient to establish the existence of an element essential to [his] case," Nebraska, 507 U.S. at 590, and the absence of such a showing is fatal to Burke's § 1983 claims, see Sklodowska-Grezak v. Stein, 236 F. Supp. 3d 805, 809 (S.D.N.Y. 2017). Defendants' motion for summary judgment as to Burke's § 1983 claims therefore should be granted. 2. RICO Claim Burke also brings a claim against defendants for violations of 18 U.S.C. § 1964(c) of the federal RICO act. See FAC ¶¶ 12-13. To maintain a civil claim for relief under RICO, a plaintiff must show "(1) a substantive RICO violation under § 1962; (2) injury to the plaintiff's business or property, and (3) that such injury was by reason of the substantive RICO violation." UFCW Local 1776 v. Eli Lilly & Co., 11620 F.3d 121, 131 (2d Cir. 2010). While Burke does not allege a violation of a particular subsection of § 1962, we need only note that each subsection includes as an element that the defendant commit "at least two acts of racketeering activity" within a ten-year period. 18 U.S.C. § 1961(5); see 18 U.S.C. §§ 1962(a)-(d). While Burke makes complaints regarding the ownership of his residence, the repairs to his smoke alarm, invasion of privacy that he

experienced in his home, and alleged defamatory statements, there are no allegations that could be viewed as constituting any of listed predicate acts in 18 U.S.C. § 1961(1). We note further that while Burke's complaint suggests that there were financial improprieties associated with the transfer of the Kenmore's ownership from Verizon to defendants, see FAC ¶¶ 3-6, Burke provides no admissible evidence of this, let alone evidence tending to show that the elements of any RICO predicates were satisfied by prior changes in the ownership of the Kenmore. Burke highlights the transcript of an administrative hearing in which defendants were cited for performing electrical work without a permit, see Hearing Transcript at 3, but the code violations at issue there are not predicate offenses listed within 18 U.S.C. § 1961(1), nor are they equivalents of the listed offenses. Accordingly, summary judgment must be granted to defendants as to any RICO claims. 3. Federal False Claims Act The False Claims Act, 31 U.S.C. §§ 3729 et seq., imposes civil liability upon "any person" who, among other acts, "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" to an officer, employee, or agent of the United States Government. 31 U.S.C. § 3729(a), (b). An FCA claim may be brought by either the federal government or by a private person, or "relator," who sues on behalf of the United States in a qui12 tam action. See id. § 3730(a), (b)(1). However, the False Claims act does not permit a pro se litigant to bring qui tam claims. See United States ex rel. Mergent Servs. v. Flaherty, 540 F.3d 89, 93 (2d Cir. 2008) ("Because relators lack a personal interest in False Claims Act qui tam actions, we conclude that they are not entitled to proceed pro se."); Klein v. City of New York, 2012 WL 546786, at *5 (S.D.N.Y. Feb. 21, 2012) ("[A] pro se plaintiff[ ] lacks standing as a relator in a qui tam

action pursuant to the FCA."). Accordingly, summary judgment should be granted to defendants on any False Claims Act claim. 4. HIPAA Burke also brings claims under "HIPAA," which we understand to refer to the Health Insurance Portability and Accountability Act, Pub. L. No. 104-191, 110 Stat. 1936 (1996). See FAC at 3. Construing Burke's complaint liberally, we interpret his complaint to allege that defendants violated a provision of HIPAA by improperly disclosing his protected health information to NYCTA without Burke's authorization. See id. ¶ 15. Burke does not provide any evidence that this occurred, however. While Burke cites to a letter from his psychologist stating that Burke "has beliefs" that defendants shared his personal health information, a letter relaying Burke's subjective beliefs is a far cry from "concrete evidence from which a reasonable juror could return a verdict in his favor." Anderson, 477 U.S. at 256; see also Fed. R. Evid. 602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."). In any event, the Second Circuit has held that "HIPAA confers no private cause of action, express or implied." Meadows v. United Servs., Inc., 963 F.3d 240, 244 (2d Cir. 2020). HIPAA13 instead delegates enforcement authority to the Secretary of Health and Human Services. See id. (citing 42 U.S.C. §§ 1320d-3, 1320d-5). Accordingly, summary judgment should be granted to defendants as to Burke's HIPAA claims. 5. Americans With Disabilities Act The ADA "consists of three parts: Title I, 42 U.S.C. §§ 12111-17, which prohibits discrimination in employment; Title II, 42 U.S.C. §§ 12131-65, which prohibits discrimination by public entities; and Title III, 42 U.S.C. §§ 12181-89, which prohibits discrimination in access to public accommodations." DeJesus v. Rudolph, 2019 WL

5209599, at *2 (S.D.N.Y. Oct. 11, 2019) (citing PGA Tour, Inc. v. Martin, 532 U.S. 661, 675 (2001)). Although Burke does not explain under which Title of the ADA he brings his claim, we will assume that he invokes Title III, as there is no evidence that defendants are his employer and there is no evidence that they are public entities.9 To prove a violation of Title III, a plaintiff must show "that (1) he or she is disabled within the meaning of the ADA; (2) that the defendants own, lease, or operate a place of public accommodation; and (3) that the defendants discriminated against the plaintiff within the meaning of the ADA." Roberts v. Royal Atl. Corp., 542 F.3d 363, 368 (2d Cir. 2008). Even if Burke qualifies as an individual with a disability, his ADA claims must be dismissed because he has not shown that the Kenmore is a place of public accommodation under 9 If Burke's allegations related to the provision of a governmental benefit, his claim might be viewed as having been brought under Title II. See Louis v. New York City Hous. Auth., 152 F. Supp. 3d 143, 149 (S.D.N.Y. 2016) (considering a Title II claim in connection with the plaintiff's receipt of Section 8 housing assistance pursuant to the United States Housing Act of 1937, as amended, 42 U.S.C. § 1437 et seq.)). However, Burke has provided no evidence that he is part of such a program, and defendants provide evidence that his Section 8 benefits were terminated in 2004. See Letter from the Department of Housing Preservation and Development, dated May 14, 2004, annexed as Ex. S to Klauber Aff. 14Title III of the ADA. The ADA defines "public accommodation" to include most "inn[s], hotel[s], motel[s], or other place[s] of lodging," 42 U.S.C. § 12181(7)(A), but the term "public accommodation" does not include residential facilities or apartment buildings," Mazzocchi v. Windsor Owners Corp., 2012 WL 3288240, at *7 (S.D.N.Y. Aug. 6, 2012);

see also Kitchen v. Phipps Houses Grp. of Cos., 2009 WL 290470, at *2 n.3 (S.D.N.Y. Feb. 5, 2009) (holding that Title III claims could not be maintained against residential facilities); aff'd, 380 F. App'x 99 (2d Cir. 2010); Reid v. Zackenbaum, 2005 WL 1993394, at *4 (E.D.N.Y. Aug. 17, 2005) (holding that a "residential facility, such as an apartment, is not a public accommodation under the ADA."). The fact that defendants contract with government entities to provide low-income housing does not render the Kenmore a public accommodation. See Rappo v. 94-11 59th Ave. Corp., 2011 WL 5873025, at *2 (E.D.N.Y. Nov. 21, 2011) (private residential complex was not a public accommodation, even though the complex was used for publicly subsidized housing). Accordingly, defendants should be granted summary judgment as to Burke's ADA claims.10 B. State Law Claims Burke's remaining claims consist of various claims under state law, such as defamation, 10 Burke's papers make scattered references to his desire for additional discovery or complaints about discovery provided by defendants. See Pl. Opp. at 3, 12. While a need for discovery may be a basis for opposing a summary judgment motion, see Fed. R. Civ. P. 56(d), this rule "applies to summary judgment motions made before discovery is concluded," Wilder v. World of Boxing LLC, 310 F. Supp. 3d 426, 443 n.6 (S.D.N.Y. 2018), aff'd, 777 F. App'x 531 (2d Cir. 2019) (punctuation omitted); accord McNerney v. Archer Daniels Midland Co., 164 F.R.D. 584, 588 (W.D.N.Y. 1995) ("Applications to extend the discovery deadline must be made prior to expiration of the deadline .....Rule 56(f) is not intended to circumvent discovery orders."). Here, discovery expired on May 21, 2021, long before summary judgment motions were filed, and plaintiff made no timely effort to challenge any purported discovery failures. See Order, filed July 2, 2021 (Docket # 165). Thus, summary

judgment cannot be denied based on plaintiff's purported need for discovery. 15assault, and medical malpractice. While we agree with defendants that these claims likely fail for the reasons stated in the briefs, the Court should decline to exercise supplemental jurisdiction over these claims. This Court has jurisdiction over Burke's federal claims pursuant to 28 U.S.C. § 1331. However, the Court's authority to hear Burke's state law claims is premised only on its supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a).11 Section 1367(a) provides that in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Section 1367(c) further provides that a district court may "decline to exercise supplemental jurisdiction over a claim under subsection (a) if . . . the district court has dismissed all claims over which it has original jurisdiction." The Supreme Court has noted that in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine judicial economy, convenience, fairness, and comity will point toward declining to exercise jurisdiction over the remaining state-law claims. Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 n.7 (1988); accord Delaney v. Bank of Am. Corp., 766 F.3d 163, 170 (2d Cir. 2014) ("In general, where the federal claims are dismissed before trial, the state claims should be dismissed as well."); Karmel v. Claiborne, Inc., 2002 WL11 There is no apparent other basis for jurisdiction over Burke's state law claims. The diversity of citizenship requirement of 28 U.S.C. § 1332 is not met here because Burke states that he "has resided in New York County,

New York for over thirty years," see FAC at 4, and many of the original defendants in this action were governmental entities located in New York, such as the City University of New York. Moreover, the Kenmore defendants have offered records from the Secretary of State indicating that they are each New York corporations headquartered in New York. See Secretary of State Records, annexed as Ex. I to Klauber Aff. 161561126, at *3 (S.D.N.Y. July 15, 2002) ("[W]hen federal claims are dismissed early in the Litigation for example, before trial on a summary judgment motion dismissal of state law claim[s] . . . is appropriate.") (quoting Cobbs v. CBS Broadcasting, Inc., 1999 WL 244099, at *8 (S.D.N.Y. Apr. 26, 1999)). Given that no trial has taken place in this case, the Court should decline to exercise jurisdiction over Burke's remaining state law claims. IV. CONCLUSION For the foregoing reasons, defendants' motion for summary judgment (Docket # 177) should be granted and the case should be dismissed. The Clerk is requested to mail a copy of this Report and Recommendation to plaintiff. PROCEDURE FOR FILING OBJECTIONS TO THIS REPORT AND RECOMMENDATION Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties have fourteen (14) days (including weekends and holidays) from service of this Report and Recommendation to file any objections. See also Fed. R. Civ. P. 6(a), 6(b), 6(d). A party may respond to any objections within 14 days after being served. Any objections and responses shall be filed with the Clerk of the Court. Any request for an extension of time to file objections or responses must be directed to Judge Gardephe. If a party fails to file timely objections, that party will not be permitted to raise any objections to this Report and Recommendation on appeal. See 28 U.S.C. §

636(b)(1); Fed. R. Civ. P. 72; Fed. R. Civ. P. 6(a), 6(b), 6(d); Thomas v. Arn, 474 U.S. 140 (1985); Wagner & Wagner, LLP v. Atkinson, Haskins, Nellis, Brittingham, Gladd& Carwile, P.C., 596 F.3d 84, 92 (2d Cir. 2010). Dated: March 25, 2022 New York, New York *w* United States Magistrate Judge

APPENDIX F R&R 08/07/20

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK ---------- ---------- X BRIAN BURKE: REPORT AND Plaintiff: RECOMMENDATION: 18 Civ. 4496 (PGG) (GWG) -v.-: VERIZON COMMUNICATIONS, INC et al.: Defendants.: ---------- -X**GABRIEL W. GORENSTEIN, UNITED STATES MAGISTRATE JUDGE** Pro se plaintiff Brian Burke brought this lawsuit asserting various state and federal claims against over a dozen defendants. Before the Court is the motion of the Attorney General of the State of New York ("NY AG") and of the City University of New York's ("CUNY") (collectively, the "state defendants") to dismiss the amended complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).1 For the following reasons, the state defendants' motion should be granted. I. BACKGROUND Burke filed the original complaint in this action on May 21, 2018, which asserted claims1 See Notice of Motion to Dismiss, filed May 21, 2020 (Docket # 136) ("Mot."); Memorandum of Law in Support of the State Defendants' Motion to Dismiss the Amended Complaint, filed May 21, 2020 (Docket # 137) ("Def. Mem."); Plaintiff's Opposition to New York Attorney General's Motion to Dismiss, Affirmation, Memorandum of Law and Exhibits, filed June 5, 2020 (Docket # 138) ("Pl. Mem."); Reply Memorandum of Law in Further

Support of the State Defendants' Motion to Dismiss the Amended Complaint, filed June 15, 2020 (Docket # 140) ("Def. Reply"). against over a dozen defendants, including CUNY. See Complaint and Affirmation, filed May 21, 2018 (Docket # 1). An amended complaint was filed on July 18, 2018, which added, inter alia, the NY AG as a named defendant. See Amended Complaint and Affirmation, filed July 18, 2018 (Docket # 38) ("FAC"). The allegations of the FAC are difficult to comprehend, but Burke at one point asserts he is making claims under 42 U.S. Code § 1983, Federal R.I.C.O. and New York Penal Code Article 460, et seq., Defamation, Defamation per se, (intentional/ negligent) Medical Malpractice, Fraud, Theft, Tortious Interference With Prospective Economic Advantage, Assault, Federal, NY State, NYC False Claims Act(s), New York City/State Human Rights Law(s), Retaliatory Termination and Retaliatory Attempted Eviction, NY State Civil Service Law, HIPAA, Americans With Disabilities Act, ongoing NYCTA/TWU Local 100 Employment Contract Violations, and/or Conspiracy to Commit same. FAC at 3. These claims appear to be predicated on the termination of Burke's employment as a train operator/station agent for the New York City Transit Authority ("NYCTA"), id. at 4; id. ¶ 33, as well as alleged attempts to evict Burke from his apartment, id. ¶ 34.2 On August 7, 2018, defendants Housing and Services, Inc.; Kenmore Housing Development Fund Corporation; Kenmore Housing Corp.; and Kenmore Associates, L.P. filed answers to the FAC. (Docket # 49). On March 29, 2019, the Court granted motions to dismiss the FAC as against defendants Verizon Communications, Inc.; the NYCTA; the New York City Health & Hospitals Corporation (Bellevue); Ryan Camire L.S.C.W.; the Transport Workers Union Local 100; Derick Echevarria; the City of New York; the New

York City Police Department; and the New York City Fire Department. See Order, filed Mar. 29, 2019 (Docket 2 Because, as explained below, the 46-page FAC is essentially devoid of allegations against the state defendants, we have not provided a detailed summary of its allegations, which relate almost entirely to other defendants. A summary may be found in Burke v. Verizon Commc'ns, Inc., 2020 WL 1330670, at *1-3 (S.D.N.Y. Mar. 22, 2020). 2# 107). Burke made a motion for leave to file a second amended complaint, as well as reconsideration of the March 29, 2019, Order. (Docket # 109). Both of Burke's requests were denied by the Court on March 22, 2020. (Docket # 129). On April 14, 2020, Burke appealed the Court's denial of his motion for reconsideration to the Second Circuit. (Docket # 130). On May 1, 2020, counsel for the state defendants filed a letter with the Court seeking to file motions to dismiss and indicating that when the NY AG's office "was initially served with the amended complaint, it was construed as simply a notification of the constitutional challenge." (Docket # 132 at *2).3 However, "[u]pon receiving the Second Circuit notification" counsel "reviewed the docket" and "reached out to CUNY. Unfortunately, due to an administrative error, when CUNY was served, the appropriate individuals were not notified, and they mistakenly neglected to inform [the NY AG's] office or request representation." Id. The Court set a briefing schedule on the state defendants' motion to dismiss. (Docket # 133). Subsequently, the state defendants— the only remaining defendants to have not either filed an answer to the complaint or had the complaint dismissed as against them — filed their motion to dismiss on May 21, 2020, see Mot., and it was fully briefed as of June 15, 2020, see Def. Reply.4II. LAW GOVERNING MOTIONS TO DISMISS A. Rule 12(b)(6) A defendant may move to

dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) where the plaintiff "fail[s] to state a claim upon which relief can be granted." To survive such a3 ECF-assigned page numbers are denoted by an asterisk (*).4 A subsequent filing, Docket # 141, appears to be a duplicate copy of Burke's opposition brief, see Pl. Mem. 3motion, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal quotation marks omitted) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). As the Supreme Court noted in Iqbal, A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Id. (citation omitted). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," a complaint is insufficient under Federal Rule of Civil Procedure 8(a) because it has merely "alleged—but it has not shown—that the pleader is entitled to relief." Id. at 679 (brackets and internal quotation marks omitted) (quoting Fed. R. Civ. P. 8(a)(2)). Pro se plaintiff filings are liberally construed, and "a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." Erickson v. Pardus, 551 U.S. 89, 94 (2007) (per curiam) (citations and internal quotation marks omitted); accord Littlejohn v. City of N.Y., 795 F.3d 297, 322 (2d Cir. 2015); see also Hill v. Curcione, 657 F.3d 116, 122 (2d Cir. 2011) (review of pro se complaint for sufficiency requires "special solicitude, interpreting the complaint to raise the strongest claims that it suggests") (citation,

alteration, and internal quotation marks omitted). However, even the pleadings of these plaintiffs "must contain factual allegations sufficient to raise a right to relief above the speculative level." Dawkins v. Gonyea, 646 F. Supp. 2d 594, 603 (S.D.N.Y. 2009) (internal quotation marks omitted) (quoting Twombly, 550 U.S. at 555); accord Ford v. Rodriguez, 20164WL 6776345, at *2 (S.D.N.Y. Nov. 16, 2016). B. Rule 12(b)(1) "A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000) (citing Fed. R. Civ. P. 12(b)(1)). Under Article III of the Constitution, federal courts have jurisdiction only over "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. Thus, "[i]f plaintiffs lack Article III standing, a court has no subject matter jurisdiction to hear their claim." Cent. States Se. & Sw. Areas Health and Welfare Fund v. Merck–Medco Managed Care, L.L.C., 433 F.3d 181, 198 (2d Cir. 2005); accord Altman v. Bedford Cent. Sch. Dist., 245 F.3d 49, 69 (2d Cir.) ("The Constitution limits the jurisdiction of Article III courts to matters that present actual cases or controversies. This limitation means that when a plaintiff brings suit in federal court, she must have standing to pursue the asserted claims.") (internal citation omitted), cert. denied, 534 U.S. 827 (2001). To meet the Article III standing requirement, a plaintiff must show [1] that he "suffered an injury-in-fact — an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical"; [2] that there was a "causal connection between the injury and the conduct complained of"; and [3] that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Lujan v. Defenders of

Wildlife, 504 U.S. 555, [561] (1992) (citations and internal quotation marks omitted). "[E]ach element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." Id. at 561. Carver v. City of N.Y., 621 F.3d 221, 225 (2d Cir. 2010). III. DISCUSSION We first address the NY AG's arguments for dismissal, see Def. Mem. at 6; Def. Reply at51-5, and then address CUNY's arguments, see Def. Mem. at 7-10; Def. Reply at 5-6. We conclude by considering Burke's request for leave to amend. See Pl. Mem. at 8-11, 13-16. A. Dismissal of the NY AG There is a single reference to the NY AG in the FAC. It alleges "[t]he NYS Attorney General was added as a required party in order to challenge New York State Labor Law 190 [("Section 190")] as unconstitutional under the Equal Protection Clause of the 14th Amendment, Due Process Clause(s) and the Taking Clause of the Fifth Amendment." FAC ¶ 33. Specifically, Burke purports to challenge the constitutionality of Section 190's definition of employer as excluding government agencies — presumably because Burke believes this definition precludes certain wage claims against his former employer: the NYCTA. Id. ("The Labor Law 190 was quoted in NYCTA's successful second Motion to Dismiss in 15-cv-1481 as reason to deny damages, thus standing."). But Section 190 is merely a definitional statute. The enforcement provision is found in N.Y. Lab. Law § 196, and that statute provides that enforcement authority is not even with the NY AG but rather is with the Commissioner of Labor. See N.Y. Lab. Law §§ 196(a), 196(c) (Commissioner "shall investigate and attempt to adjust equitably controversies between employers and employees relating to this article" and "may institute proceedings on account of any criminal

violation of any provision of this article."). Indeed, Burke essentially concedes this point elsewhere in the FAC, alleging that "The Labor Law . . . was quoted by [a] Senior Labor Standards Investigator . . . as the reason the NYS Department of Labor cannot intervene or assist in recovering the ongoing wage theft/fraud." FAC ¶ 33. Additionally, caselaw is clear that the NY AG is not a required party to an action6 challenging the constitutionality of a New York law for which the NY AG has no particularized enforcement power. See Am. Trucking Ass'n, Inc. v. N.Y. State Thruway Auth., 795 F.3d 351, 359 (2d Cir. 2015) ("State (and federal) statutes are frequently challenged as unconstitutional without the state (or federal) government as a named party."); Mendez v. Heller, 530 F.2d 457, 460 (2d Cir. 1976) ("The Attorney General has no connection with the enforcement of [N.Y. Dom. Rel. Law §] 230(5), and therefore cannot be a party to this suit."); HealthNow N.Y., Inc. v. New York, 739 F. Supp. 2d 286, 297 (W.D.N.Y. 2010) (dismissing claims where plaintiff "failed to sufficiently allege that the Attorney General has a particular enforcement duty or has threatened an enforcement action of the allegedly unconstitutional statute."), aff'd, 448 F. App'x 79 (2d Cir. 2011) ("HealthNow"); Ulrich v. Mane, 383 F. Supp. 2d 405, 410 (E.D.N.Y. 2005) ("While the Attorney General is charged with defending the constitutionality of state law, this fact alone does not provide a basis for bringing an action against him."); Fed. Nat'l Mortg. Ass'nv. Lefkowitz, 383 F. Supp. 1294, 1296 (S.D.N.Y. 1974) ("'In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party.'") (quoting Ex parte

Young, 209 U.S. 123, 157 (1908)). We note that a federal statute, 28 U.S.C. § 2403(b),5 provides that in a federal action "to which a State or any agency, officer, or employee thereof is not a party, wherein the5 A similar state statute provides that "[w]hen the constitutionality of a statute of the state, or a rule and regulation adopted pursuant thereto is involved in an action to which the state is not a party, the attorney-general, shall be notified and permitted to intervene in support of its constitutionality." N.Y. C.P.L.R. § 1012(b). constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene . . . for argument on the question of constitutionality." 28 U.S.C. § 2403(b). Burke references this statute in his opposition memorandum. See Pl. Mem. at 4. However, "the legislative history of the statute makes clear that it is the Attorney General who should decide whether, under all of the circumstances, he should intervene." Wallach v. Lieberman, 366 F.2d254, 257 (2d Cir. 1966); accord Filler v. Port Wash. Union Free Sch. Dist., 436 F. Supp. 1231, 1234-35 (E.D.N.Y. 1977).6 The NY AG's motion to dismiss demonstrates that she does not wish to be a part of this action. Not only is the NY AG not a necessary party to this action, the FAC is devoid of any factual allegations against the NY AG whatsoever, and thus fails to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). Even giving Burke the "special solicitude" owed to pro se plaintiffs and "interpreting the complaint to raise the strongest claims that it suggests," Hill, 657 F.3d at 122 (citation, alteration, and internal quotation marks omitted), the FAC simply does not "contain factual allegations sufficient to raise a right to relief above the speculative level," Dawkins, 646 F. Supp. 2d at 603 (citation and

internal quotation marks omitted); accord Gomez v. Cty. of Westchester, 649 F. App'x 93, 96 (2d Cir. 2016) (affirming dismissal of pro se plaintiff's complaint where "he failed to provide any factual allegations to plausibly support" his claim); Mattos v. N.Y. State Dep't of Taxation & Fin., 2017 WL 2303509, at *3 (E.D.N.Y. May6 Although Wallach involved 28 U.S.C. § 2403(a) rather than 28 U.S.C. § 2403(b), Section 2403(a) is the statute's "provision for the federal government" that is "analogous" to Section 2403(b) and thus the case law interpreting it is instructive here. Am. Trucking Ass'n, Inc., 795 F.3d 351 at 359 (citing 28 U.S.C. §§ 2403(a), 2043(b)). 825, 2017) (dismissing complaint as against NY AG where it "contain[ed] no allegations as to the Attorney General's Office"); Perez-Avalos v. Schult, 2010 WL 4806988, at *5 (N.D.N.Y. Oct. 14, 2010) (pro se plaintiff's complaint should be dismissed where it was "utterly bereft of factual allegations which would allow for the Court to deduce the plausibility of a cognizable cause of action."), adopted by 2010 WL 4791677 (N.D.N.Y. Nov. 18, 2010). Accordingly, the FAC should be dismissed as against the NY AG for failure to state a claim. B. Dismissal of CUNY There is a single reference to CUNY in the FAC. It alleges CUNY was made a party because Mr. Camire works there, presumably committing his specialty of Medical Malpractice/Defamation (for 'friends only?) on innocent CUNY Students, also Petitioner believes the subject building should be used and owned jointly by tenants (under Article 11) and CUNY/Baruch as faculty/ graduate/married housing (there are two other dorms, for NYU and SVA, on the block). FAC ¶ 33. Construing this allegation liberally, at best it alleges that a CUNY employee committed torts against "innocent CUNY Students." Id. Burke lacks standing to bring suit for harms allegedly incurred by non-parties, and thus the

Court lacks subject matter jurisdiction over such claims. See Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 474 (1982) ("[T]his Court has held that 'the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'") (quoting Warth v. Seldin, 422 U.S. 490, 499 (1975)); Golden Hill Paugussett Tribe of Indians v. Weicker, 39 F.3d 51, 58 (2d Cir. 1994) (Article III standing requires that plaintiff "assert[ ] its own legal rights, and not those of a third party"). And the FAC's other allegations against Camire — who has already been dismissed from this action —relate to his prior employment at Bellevue Hospital, which is not alleged to be a hospital9operated by CUNY. See FAC ¶¶ 9-31. Thus, these allegations are irrelevant to any purported claim made against CUNY. Accordingly, the FAC should be dismissed as against CUNY pursuant to Federal Rule of Civil Procedure 12(b)(1). Because the Court lacks subject matter jurisdiction over the claims against CUNY, we need not address CUNY's alternative arguments made for dismissal. See Def. Mem. at 7-9. C. Leave to Amend In his opposition memorandum, Burke seeks leave to file a second amended complaint. Pl. Mem. at 8-11, 13-16. Because he has already filed an amended complaint, Fed. R. Civ. P. 15(a)(1) does not permit him to amend his complaint as of right. Instead he may only do so "with consent of the opposing parties or with leave of the court." Scott v. Chipotle Mexican Grill, Inc., 300 F.R.D. 193, 197 (S.D.N.Y. 2014) (internal citation omitted). Burke takes issue with the fact that the state defendants had not yet filed their motion to dismiss at the time he filed the FAC. See Pl. Mem. at 14 ("[T]his party has been denied, due tothe untimeliness of the instant MTD, an as of right amendment."). Thus, Burke contends he was not given an

opportunity to address the deficiencies raised by the instant motion when he amended the complaint "as of right" and filed the FAC. This argument fails for two reasons. First, the NY AG was added as a party to this action only when Burke filed the FAC, and thus obviously could not have made arguments for dismissal of claims before the FAC was filed. Second, with regard to CUNY, a defendant may make a motion to dismiss at any time prior to a responsive "pleading if a responsive pleading is allowed." Fed. R. Civ. P. 12(b). Burke chose to amend his complaint as of right prior to the filing of responsive pleadings by all defendants. Indeed, prior to the filing of the FAC, three defendants had filed a motion to dismiss, see Docket10## 22, 23, and six defendants had answered the original complaint, see Docket ## 25, 26, 28. But four defendants, including CUNY, had not yet filed responsive pleadings. Rule 15 makes clear that a plaintiff is only entitled to amend "as of right" once, and Burke has already done so here. See Pl. Mem. at 13-14 ("FRCP allows (one) 'as of right' Amended Complaint, which admittedly Plaintiff has availed himself of."). Accordingly, Burke's request to amend must be assessed under the discretionary standard of Rule 15(a)(2). Federal Rule of Civil Procedure Rule 15(a)(2) provides that a court "should freely give leave [to amend] when justice so requires." The policy behind this rule is that "[l]iberal amendment promotes judicial economy by making it possible to dispose of all contentions between parties in one lawsuit." Bilt-Rite Steel Buck Corp. v. Duncan's Welding & Corr. Equip., Inc., 1990 WL 129970, at *1 (E.D.N.Y. Aug. 24, 1990) (citing JennAir Prods. v. Penn Ventilator, Inc., 283 F. Supp. 591, 594 (E.D. Pa. 1968)). The decision to grant or deny leave to amend under Rule 15(a)(2) is within the trial court's discretion. See Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 330

(1971). A court may deny leave to amend for "good reason," which normally involves an analysis of the four factors articulated in Foman v. Davis, 371 U.S. 178, 182 (1962): undue delay, bad faith, futility of amendment, or undue prejudice to the opposing party. See McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 200 (2d Cir. 2007) (citing Foman, 371 U.S. at 178, 182). Burke apparently seeks to file a second amended complaint that adds two new individual defendants: "Daniel Chiu, esq., Counsel for NYCT" and Seamus Weir, an "Investigator for MTA Inspector General." Pl. Mem. at 9. There are no allegations that either of these individuals is employed by, or otherwise associated with, either the NY AG or CUNY, however, and thus11Burke should not be granted leave to cure his claims against the NY AG or CUNY by adding these defendants. Burke also requests leave to amend the FAC and add the following language: Given that the New York State Attorney General, by precedent, for centuries, has enforced the various (NYS) laws against Wage Theft (at least for Private Employees) and furthermore that LL §190, as it currently, unconstitutionally, stands, prevents the same conduct on behalf of Public Employees, the NYS AG is a Required Party, and please see attached Press Release https://ag.ny.gov/press- release/2020/attorney-general-james-delivers-restitution-wage-theft-victims. And see Warden v. Pataki. Id. at 14-15. We construe this proposed additional allegation to be responsive to the state defendants' arguments that the NY AG is not a proper or necessary party to this lawsuit because she lacks particularized enforcement power over Section 190, which Burke alleges is unconstitutional. However, the fact that the NY AG has on occasion utilized her general law enforcement powers to prosecute violations of wage laws does not make her a proper party to a constitutional

challenge to Section 190. First, there is no allegation that the NY AG intends to bring a wage law enforcement action against Burke or otherwise utilize Section 190 against Burke. See HealthNow, 448 F. App'x at 81 (affirming dismissal of claims against NY AG where plaintiff did not allege "it would engage in any actions that would reasonably prompt the use of [enforcement authority by the NY AG], notwithstanding the Attorney General's insistence he has no plans to employ that authority against it."). Second, the fact that the NY AG has previously brought wage-law- enforcement actions against non-parties under her general authority to enforce the laws of New York does not make her a proper party to this lawsuit. See 1st Westco Corp. v. School Dist., 6F.3d 108, 113 (3d Cir. 1993) ("General authority to enforce the laws of the state is not sufficient to make government officials the proper parties to litigation challenging the law."); Warden v. 12Pataki, 35 F. Supp. 2d 354, 359 (S.D.N.Y.) ("a state official's duty to execute the laws is not enough by itself to make that official a proper party in a suit challenging a state statute"), aff'd, 201 F.3d 430 (2d Cir. 1999). To the extent Burke may be asserting that his claims against the NY AG are predicated on her failure to prosecute other defendants in this action, any such claims would be meritless. See, e.g., VSF Coal., Inc. v. Scoppetta, 13 A.D.3d 517, 518 (2004) ("The Attorney–General has the discretion regarding whether to commence suit, and a court has no authority to interfere with such discretion"). Indeed, the discretionary nature of actions brought by the actual enforcement authority, the Commissioner of Labor, is explicitly codified into the statute. See N.Y. Lab. Law§ 196(2) ("Nothing in this section shall be construed as requiring the commissioner in every instance to investigate and attempt to adjust controversies, or to take assignments of wage claims, or to institute criminal

prosecutions for any violation under this article . . . but he or she shall be deemed vested with discretion in such matters.").7 Accordingly, the request to amend the FAC as against the NY AG should be denied based on its futility. See also Carr v. NewYork, 2016 WL 3636675, at *5 (S.D.N.Y. June 29, 2016) (dismissing complaint and denyingleave to amend where "[e]ven under the most liberal reading of the facts, [the] allegations cannot be cured by amendment"). Finally, with respect to CUNY, Burke does not articulate how he could amend the FAC other than summarily stating that "[g]iven the undisputed wrongdoings by Mr. Camire, there is certainly Relief (Injunctive Relief?) available that will, at least partially, Remedy the Wrong." 7 For this reason, the March 9, 2020, complaint to the NY AG's office, which was attached to Burke's opposition memorandum, adds nothing to his arguments. See Pl. Mem. at*22-24. 13Pl. Mem. at 15-16 (footnote omitted). Because Burke offers no allegations stating a claim against CUNY, Burke should not be given leave to amend as against CUNY. See Lucente v. Int'l Bus. Machines Corp., 310 F.3d 243, 258 (2d Cir. 2002) ("'Where it appears that granting leave to amend is unlikely to be productive . . . it is not an abuse of discretion to deny leave to amend.'") (quoting Ruffolo v. Oppenheimer & Co., 987 F.2d 129, 131 (2d Cir. 1993) (percuriam)); Glass v. U.S. Presidents since 1960, 2017 WL 4621006, at *4 (E.D.N.Y. Oct. 12, 2017) (finding that the plaintiff's amended complaint rose "to the level of irrational," and declining to give the plaintiff an opportunity to further amend her complaint "given that the deficiencies therein [were] not such that could be cured by amendment"). We also note that this is the fourth federal lawsuit Burke has filed against state government entities related to his employment with the NYCTA. Each of these lawsuits has been dismissed.8

These unsuccessful prior lawsuits further support the conclusion that leave to amend should not be granted. See Hobbs v. Livingston, 2020 WL 882431, at *3 (S.D.N.Y. Feb. 21, 2020) ("Because the defects in Plaintiff's complaint cannot be cured with an amendment, and in light of his extensive litigation history, the Court declines to grant Plaintiff leave to amend his complaint."); Iwachiw v. N.Y.C. Bd. of Educ., 2007 WL 433401, at *6 n.5 (E.D.N.Y. Feb. 5, 2007) ("Plaintiff's extremely litigious nature also weighs further in favor of denying plaintiff a8 See Burke v. N.Y.C. Transit Auth. et al., No. 1:15-cv-01481 (E.D.N.Y. May 18, 2018) (Docket # 48) (dismissing claims in second amended complaint against inter alia, the NYCTA); Burke v. N.Y.C. Transit Auth. et al., No. 1:15-cv-01481 (E.D.N.Y. Sept. 23, 2016) (Docket # 28) (dismissing claims in first amended complaint against inter alia, the NYCTA); Burke v. Metro. Transp. Auth., 2009 WL 4279538, at *4 (S.D.N.Y. Dec. 1, 2009) (dismissing claims against, inter alia, the NYCTA, Metropolitan Transportation Authority, New York Public Employment Relations Board, and the NY AG); Burke v. Solomon Acosta & Fascore/Great W., 2008 WL 11399425, at *3 (S.D.N.Y. Aug. 27, 2008) (dismissing claims against, inter alia, the "MTA/NYC Transit Authority"). 14 fourth opportunity to file a complaint in this action."), aff'd, 318 F. App'x 8 (2d Cir. 2009). IV. CONCLUSION For the foregoing reasons, the Attorney General of the State of New York and the City University of New York's motion to dismiss the First Amended Complaint (Docket # 136) should be granted. Burke's request to amend his complaint should be denied. The Clerk is requested to mail a copy of this Report and Recommendation to Brian Burke at the address on the docket sheet. **PROCEDURE FOR FILING OBJECTIONS TO THIS REPORT AND RECOMMENDATION** Pursuant to 28 U.S.C. § 636(b)(1)

and Rule 72(b) of the Federal Rules of Civil Procedure, the parties have fourteen (14) days (including weekends and holidays) from service of this Report and Recommendation to file any objections. See also Fed. R. Civ. P. 6(a), (b), (d). A party may respond to any objections within 14 days after being served. Any objections and responses shall be filed with the Clerk of the Court. Any request for an extension of time to file objections or responses must be directed to Judge Gardephe. If a party fails to file timely objections, that party will not be permitted to raise any objections to this Report andRecommendation on appeal. See Thomas v. Arn, 474 U.S. 140 (1985); Wagner & Wagner, LLPv. Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, P.C., 596 F.3d 84, 92 (2d Cir. 2010). Burke may file his response by email by sending it in pdf form toTemporary_Pro_Se_Filing@nysd.uscourts.gov. In the alternative, the response may be mailed to Pro Se Docketing, 500 Pearl Street, New York, NY 10007. Dated: August 17, 2020 New York, New York /S