

**UNITED STATES DISTRICT COURT DISTRICT
OF MINNESOTA**

Gamada Ahmed Hussein, Civil No. 16-00780
Plaintiff, (SRN/SER)

v. **ORDER OF REFERRAL**

Loretta E. Lynch, U.S. Attorney General;
and U.S. Department of Justice; and
James Comey, Director, Federal Bureau of
Investigation; and
Federal Bureau of Investigation; and John Does,
Defendants.

IT IS ORDERED that pursuant to Title 28,
United States Code, Section 636(b)(1), Defendants'
Motion to Dismiss [Doc. No. 20] is referred to the
Hon. Steven E. Rau for findings of fact and a
recommendation for the disposition of the motion. An
order will be issued ruling on this motion after the
objection period is complete.

Dated: October 5, 2016.

s/Susan Richard Nelson
SUSAN RICHARD NELSON
United States District Judge

**United States Court of Appeals
for the Eighth Circuit**

No. 17-2513

Gamada Ahmed Hussein,
Plaintiff - Appellant,

v.

Jefferson B. Sessions, III, U.S. Attorney General; U.S.
Department of Justice; Christopher Wray,¹ Director,
Federal Bureau of Investigation; John Does,
Defendants - Appellees.

Appeal from United States District Court for the
District of Minnesota - Minneapolis

Submitted: March 7, 2018
Filed: March 21, 2018 [Unpublished]

Before COLLOTON, BOWMAN, and BENTON,
Circuit Judges.

PERCURIAM.

Gamada Hussein appeals the district court's²

¹ Christopher Wray is substituted for his predecessor under
Federal Rule of Appellate Procedure 43(c).

² The Honorable Susan Richard Nelson, United States District
Judge for the District of Minnesota, adopting the report and
recommendations of the Honorable Steven E. Rau, United States
Magistrate Judge for the District of Minnesota.

dismissal of his civil rights action for failure to state a claim and lack of subject matter jurisdiction. Upon de novo review, we conclude that even assuming the district court had jurisdiction to consider Hussein's claim under the Privacy Act, the complaint failed to state a claim, and we affirm the dismissal of the remaining claims for the reasons stated by the district court. *See 8th Cir. R. 47B.*

United States Court of Appeals
for the Eighth Circuit
Thomas F Eagleton U S Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Michael E. Gans
Clerk of Court

VOICE (314) 244-2400
FAX (314) 244-2780
www.ca8.uscourts.gov

March 21, 2018

Mr. Gamada Ahmed Hussein
651-808-4809
1669 Philipp Way
Shakopee, MN 55379

RE: 17-2513 Gamada Hussein v. Jefferson B.
Sessions, III, et al

Dear Mr. Hussein:

The court today issued an opinion in this case. Judgment in accordance with the opinion was also entered today. The opinion will be released to the public at 10:00 a.m. today. Please hold the opinion in confidence until that time.

Please review Federal Rules of Appellate Procedure and the Eighth Circuit Rules on post-submission procedure to ensure that any contemplated filing is timely and in compliance with the rules. Note particularly that petitions for rehearing and petitions for rehearing en banc must be received in the clerk's office within 45 days of the date of the entry of judgment. Counsel-filed petitions

must be filed electronically in CM/ECF. Paper copies are not required. No grace period for mailing is allowed, and the date of the postmark is irrelevant, for pro-se-filed petitions. Any petition for rehearing or petition for rehearing en banc which is not received within the 45 day period for filing permitted by FRAP 40 may be denied as untimely.

Michael E. Gans
Clerk of Court

YML

Enclosure(s)

cc: Ms. Kate M. Fogarty
Mr. David W. Fuller

District Court/Agency Case Number(s):
0:16-cv-00780-SRN

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

No: 17-2513

Gamada Ahmed Hussein

Plaintiff - Appellant

v.

Jefferson B. Sessions, III, U.S. Attorney General; U.S.
Department of Justice; Christopher Wray, Director,
Federal Bureau of Investigation; John Does

Defendants - Appellees

Appeal from U.S. District Court for the District of
Minnesota - Minneapolis (0:16-cv-00780-SRN)

JUDGMENT

Before COLLOTON, BOWMAN and BENTON,
Circuit Judges.

This appeal from the United States District
Court was submitted on the record of the district
court and briefs of the parties.

After consideration, it is hereby ordered and
adjudged that the judgment of the district court in
this cause is affirmed in accordance with the opinion
of this Court.

March 21, 2018

Order Entered in Accordance with Opinion: Clerk,
U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

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

No: 17-2513

Gamada Ahmed Hussein

Appellant

v.

Jefferson B. Sessions, III,
U.S. Attorney General, et al.
Appellees

Appeal from U.S. District Court for the District of
Minnesota - Minneapolis (0:16-cv-00780-SRN)

ORDER

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

May 22, 2018

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

/s/ Michael E. Gans

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

Gamada Ahmed Hussein

Appellant

v.

Jefferson B. Sessions, III,
U.S. Attorney General, et al.
Appellees

Appeal from U.S. District Court for the District of
Minnesota - Minneapolis (0:16-cv-00780-SRN)

MANDATE

In accordance with the opinion and judgment
of 03/21/2018, and pursuant to the provisions of
Federal Rule of Appellate Procedure 41(a), the formal
mandate is hereby issued in the above-styled matter.

May 30, 2018

Clerk, U.S. Court of Appeals, Eighth Circuit

MINNESOTA ADULT LITERACY
CAMPAIGN SCHOLARSHIP FUND
and
RONALD M. HUBBS
SCHOLARSHIP FUND
of
The Saint Paul Foundation, Inc.

TEACHER RECOMMENDATION
FORM

(Please do not recommend more than
two students.)

Your Name: Donna Lindstrom Position: Teacher
Address: Hubbs Center

Student's Name: Gamada Ahmed Hussein
How long have you known the applicant? School year
2005 -2006

Will the student complete their GED by June 15th?
X Yes No Has completed GED

Signature: s/Donna Lindstrom Telephone: 651-290-
4736

Teacher input is very important to the Advisory
Committee's selection process. In your
recommendation of the above-named student,
please consider the following items: quality of
academic work contributions within a
community (geographic, school, faith, ethnic, or
other community); educational and
employment/career goals; student growth;
potential for success in post-secondary education;
and any special circumstances affecting this
student's pursuit of further education. Attach
additional sheets if necessary. Please return this
form to the applicant so that it can be included in

their application. **The postmark deadline for all application materials is June 15th.**

Incomplete and/or late applications will not be considered.

Gamada, a student in my GED writing class, has distinguished himself as a true scholar. He is intellectually curious, persistent in his pursuit of knowledge, focused on achieving his educational goals, and dedicated to becoming - as stated in his GOALS ESSAY – "... an esteemed, voluntary, productive, hardworking, and honest servant for society." On numerous occasions, in and out of the classroom, I witnessed Gamada's willingness to share his time, talents, resources, and knowledge with other learners at the Hubbs Center. I feel confident that Gamada will be an outstanding college student and will reach the challenging goals he has set before him. It is with honor and pleasure that I recommend Gamada Ahmed Hussein for this scholarship.

THE ONEIDA SCHOLARSHIP FUND
of THE WEST SEVENTH COMMUNITY
CENTER

GRANT RECOMMENDATION FORM

Student's Name: Gamada Hussein

In your recommendation of the above-named student, please consider that the following items will be evaluated by the Selection Committee: quality of academic/skilled work; contributions within the learning community; educational goals and post-education plans, and any special circumstances affecting this student's completion of their education. Attach additional sheets if necessary. Applications will not be considered complete until recommendation forms are submitted.

Gamada has been a student in my Advanced Listening & Speaking class (ESL – Level 5-6) since January 9th, 2006. During this time, he has been an outstanding student, more than once receiving the highest numerical grade (A+) on various tests and assignments, out of nearly 50 students in my teaching sections. I have found him to be a motivated, committed, and devoted student. He has already shown particular interest in the advanced areas of study that await him in his major program. I feel certain Gamada will be successful and a valuable addition to society. I am very happy to recommend Gamada for a grant.

How long have you known the applicant? Since January, 2006, when classes commenced on

January 9th.

Signature
s/James P. Murphy

Printed Name
James P. Murphy

Telephone
651-846-1554

Email
james.murphy@saintpaul.edu

Position
Instructor

Address
Saint Paul College 235 Marshall Ave. St. Paul, MN
55101

MINNESOTA ADULT LITERACY
CAMPAIGN SCHOLARSHIP FUND
and
RONALD M. HUBBS
SCHOLARSHIP FUND
of
The Saint Paul Foundation, Inc.

TEACHER RECOMMENDATION
FORM

(Please do not recommend more than
two students.)

Your Name: Mary Burmaster Position: ESL
Instructor

Address: St. Paul College, 235 Marshall Avenue, St.
Paul

Student's Name: Gamada Ahmed Hussein

How long have you known the applicant? 4 months

Will the student complete their GED by June 15th?

Yes No

Signature: s/Mary Burmaster E-mail:

mary.burmaster@saintpaul.edu

Teacher input is very important to the Advisory Committee's selection process. In your recommendation of the above-named student, please consider the following items: quality of academic work contributions within a community (geographic, school, faith, ethnic, or other community); educational and employment/career goals; student growth; potential for success in post-secondary education; and any special circumstances affecting this student's pursuit of further education. Attach

additional sheets if necessary. Please return this form to the applicant so that it can be included in their application. **The postmark deadline for all application materials is June 15th.** Incomplete and/or late applications will not be considered.

Gamada Hussein studied briefly with me while I taught ESL at the Ronald Hubbs Center, and he has been in my ESL Advanced Grammar class at Saint Paul College since January '06. I have found Gamada to be highly motivated and dedicated to his studies. He consistently produces "A" work in my class and generously helps other students to understand rules and concepts. Though I have not known Gamada for very long, I have no doubt that he will succeed in his major program of Medical Lab Technician at Saint Paul College. I recommend Gamada for the scholarship and am certain he will use the funds to better himself.



TECHNICAL COLLEGE 235 Marshall Avenue
Saint Paul, Minnesota 55102 Telephone (612) 221-
1300

February 2nd, 2007

Coss Family Foundation Scholarship Fund
Scholarship America--Maria Lokensgard
One Scholarship Way
P.O. Box 297
Saint Peter, MN 56082

Dear Sir:

I am writing this letter of recommendation in behalf of Gamada Hussein, a student at this college.

Gamada was a student in my Listening and Speaking course at this college during the Spring 2006 semester. COMM 0811, COMM 0814 were the course numbers. The course dealt with Listening and Speaking techniques for Advanced ESL students in college, as preparation for entry into a professional program.

Gamada is one the best and most conscientious and truly goal-directed students that I have ever taught. His writing skills, considering English being his second language, are outstanding and continuously improving. Based on my past experience, Gamada has very substantial writing skills and aptitude for writing in the English language.

He has also overcome very significant difficulties in his home country to make the trip to America and to fulfill his own and his parents' dreams for his future.

He is also a compassionate student who wants to make the world a better place for all people. We are very fortunate indeed to have Gamada Hussein as a student at Saint Paul College, and I wish him the best, and for favorable consideration for a scholarship from your organization.

Sincerely yours,

s/

James P. Murphy
Instructor, ESL

Minneapolis Community & Technical College
1501 Hennepin Avenue
Minneapolis, MN 55403
612-659-6000
612-659-6731 (tty)
www.minneapolis.edu

A Member of the Minnesota State College and
Universities System

Equal Opportunity Educator and Employer

June 11, 2009

Gamada Ahmed Hussein
565 North Aldine Street
Apt # 01
Saint Paul, MN 55104

Dear Gamada Ahmed Hussein,

Congratulations on your academic record for Spring semester 2009. You are one of the 1249 students who are on the Dean's Honor List. This represents 13% of our Spring semester enrollment. Full-time students with a 3.00 or above grade point average in a single semester are placed on the Dean's Honor List. Grades of P, N, AU, W and I are not included in the computation.

The Minneapolis Community and Technical College family is very proud of you and your achievements. We congratulate you for your perseverance and tireless efforts as you make sacrifices to achieve long-term benefits. So many of you have personal and work responsibilities that those in the larger

community say preclude your being an excellent student. You have risen above that stereotype. Congratulations. All of us at MCTC are proud of you.

We encourage your continued education and offer whatever support we can to help you achieve successful completion of your goals.

If your cumulative Grade Point Average (GPA) is above 3.3 and have completed 12 or more MCTC college level credits you are eligible for Phi Theta Kappa (PTK). Please contact Counseling & Advising for application. after September 16th, 2009.

Sincerely,

Irene H. Kovala, Ed.D.
Vice President
Academic and Student Affairs

October 11, 2009

Pentair Foundation/STEM application
College Advancement Office K1100
Minneapolis Community and Technical College
1501 Hennepin Avenue
Minneapolis MN 55403

Dear Committee Members:

Mr. Gamada Hussein, a student in my English 1111 course last spring, has requested that I submit this recommendation as part of his application for an academic scholarship. Mr. Hussein's performance in my class was exemplary, and I am pleased to provide a recommendation for him.

Mr. Hussein's talents warrant the highest recommendation. Although English is not Mr. Hussein's native language, he earned one of the few A's in a class of mostly native English speakers. Mr. Hussein is a hard worker and a diligent scholar: he does not accept simple answers to the problems he tackles, researching an issue until he is satisfied that he has viewed the issue from several angles. His critical thinking abilities are exceptionally good.

English 1111 requires students to write a research paper. In our class Mr. Hussein chose to concentrate on the obstacles to improving the educational system in Ethiopia. His paper was well written, well argued, and well researched. In order to tackle the history of the problem, he read several books and articles by scholars with opposing positions on the issue. His essay also discussed the religious, political; and cultural obstacles to providing state-sponsored education, laying the problem out clearly for an American audience unfamiliar with Ethiopian

history and culture. The essay went far beyond the required page length for the project, but his argument and audience necessitated his lengthy and detailed treatment. It was a thoughtful and well-reasoned essay and a wonderful model of a good research project.

I have no reservations about recommending Mr. Hussein for an academic scholarship. He's a hard worker and a diligent, conscientious student.

Please contact me if you need additional information. I can be reached on campus at 612-659-6475.

Sincerely,

Elizabeth McLemore
MCTC English faculty

Saint Paul Public Schools
HUBBS CENTER
Where Literacy Leads to Learning

1030 University Ave., St. Paul, MN 55104
651-290-4822

February 22, 2013

To Whom it may concern:

It is my pleasure to recommend Gamada Hussein. He worked with the Hubbs Center from September of 2010 to May of 2011, while he was a student at the University of Minnesota through the work-study program. Gamada assisted adult basic education students in the computer lab as they learned how to use computers as a distance learning/online learning tool. He worked with immigrants and refugees, as well as native speakers of English who had limited educational and computer background.

In this position, it is important to be patient, flexible, approachable, and easy to work with. Gamada possesses all of these skill sets, and is very enjoyable to work with. He is very dependable and takes his job seriously. He was also an asset to our program (and would be in many work settings) because of his language skills. He was able to speak with students both in English and with some in their native language if they needed clarification. I highly recommend Gamada!

If you have any questions, please feel free to contact me at Ruth.Rodriguez@spps.org or 651-744-7611.

Sincerely,

Ruth Rodriguez
Volunteer Coordinator

March 6, 2013

To Whom it may concern,

It is my pleasure to recommend Gamada Hussein for a position as a Clinical Laboratory Scientist. Gamada has successfully completed the rigorous curriculum and internship from the University of Minnesota Clinical Laboratory Science program and is ready for employment at your institution.

I am the University of Minnesota teaching specialist who observed Gamada's daily performance during the face to face laboratory experience: Gamada demonstrated not only good academic standard but other fine qualities for success in the profession such as strong attention to detail, good work ethic, integrity, a pleasant personality; and the perseverance to always achieve quality data.

It is a high achievement to complete the Clinical Laboratory Science program at the University of Minnesota. Each student is ready for employment in the profession as well as success in the career. Gamada is ready for this next step!

If you have further questions about Gamada's performance, feel free to contact me at trcka008@umn.edu.

Sincerely,

Phyllis Trcka M.Ed. MT(ASCP)
Faculty
Medical Laboratory Technician Program
South Central College
Mankato/Faribault

HUSSEIN, GAMADA A – 2014 Evaluation

Job Code: [4000415] MEDICAL TECHNOLOGIST

Dept: [04.67100] FNH LABORATORY

Core Values

- People - Become the employer of choice
- Service - Provide world class service.
- Quality/Safety - Achieve world class quality and safety.
- Finance - Practice financial stewardship for investment in our people, technologies and services
- Growth - Plan for responsible growth

<u>Section</u>	<u>Score</u>	<u>Possible</u>
I. System Requirements	Complete	(-10)
II. Department Competencies	Complete	(-10)
Confidentiality and non-disclosure agreement signed?		
Yes		

I. System Requirements (see attached transcript)

Annual Education Completed? **Yes**

Does the employee adhere to the Corporate Code of Conduct? **Completed? Yes**

Forms Catalog Completed? **Yes**

Master Documents Completed? **Yes**

Quality Records Completed? **Yes**

Comments:

All Requirements Met = 0 Points, 1 Requirement Not Met = -5 Points, 2 or more requirements not met = -10 points

II. Department Competencies (optional)

Essential Department Competencies Completed? (attach completed annual competency) **Yes**

Comments:

All Requirements Met = 0 Points, 1 Requirement Not

Met = -5 Points, 2 or more requirements not met =
-10 points

III. Essential Functions

Needs Immediate Improvement

- Does not deliver results needed
- Less than acceptable

Approaching Expectations

- Performance leaves some room for improvement
- Willing and trying to improve
- Performance at expected level for the learning curve of the position
- A typical rating for new employees

Achieves Expectations

- Performance meets and satisfies all expectations
- Solid contribution to the success of the department, group or company

Exceeds Expectations

- Performance often exceeds all expectations
- Results are meaningful, on-time and of good quality
- Appropriately takes initiative
- Strongly contributed to the success of the department, group or company

Always Exceeds Expectations

- Performance consistently exceeds all expectations
- Results are superior, on-time or ahead of schedule, and of exceptional quality
- Significantly contributed to the success of the department, group or company

1. Conducts analysis for body fluids to determine presence or normal and abnormal components

Evidenced by:

Review of Needs Approaching Achieves
test logs and Immediate Expectations Expectations
exception Improvement

Exceeds Always
Expectations Exceeds
Expectations

Comments: Performs Chemistry analyses according to policy/procedure

2. Performs blood group, type and compatibility testing

Evidenced by:

Review of Needs Approaching Achieves
bloodbank Immediate Expectations Expectations
worksheets Improvement

Exceeds Always
Expectations Exceeds
Expectations

Comments: Performs blood bank tests according to policy/procedure

3. Conducts cell analysis, numbers and morphology using automated and microscopic techniques

Evidenced by:

Review of Needs Approaching Achieves
exception Immediate Expectations Expectations
reports Improvement

Comments: Garnada is well versed in the setup of cultures and performance of kit tests. He has not been trained in this lab regarding id and sensitivity procedures at this point in time.

6. Performs venipunctures, arterial punctures, and fingersticks using proper aseptic technique.

Evidenced by:

Observation Needs Approaching Achieves
Immediate Expectations Expectations
Improvement

Exceeds Always
Expectations Exceeds
Expectations

Comments: Needs some additional hours experience in phlebotomy procedures.

IV. Essential Behaviors

1. **Ownership • Accepts responsibility for workplace resources and environment. Represents Freeman by doing more than their job.**

Needs Approaching Achieves Exceeds
Immediate Expectations Expectations Expectations
Improvement

Always
Exceeds
Expectations

Comment: Gamada is very conscientious of resources

and his time. In fact, he has presented to lab several times on his day off to gain additional training and experience.

2. Teamwork - Commits to helping, supporting, and teaching co-workers.

Needs Approaching Achieves Exceeds
Immediate Expectations Expectations Expectations
Improvement

Always
Exceeds
Expectations

Comment: Gamada is always willing to do whatever is necessary to assist his fellow coworkers,

3. Compassion - Treats others as they want to be treated.

Needs Approaching Achieves Exceeds
Immediate Expectations Expectations Expectations
Improvement

Always
Exceeds
Expectations

4. Professionalism - Displays honesty, dependability and positive attitude. Ensures the highest quality and safety.

Needs Approaching Achieves Exceeds
Immediate Expectations Expectations Expectations

Improvement

Always
Exceeds
Expectations

Comment: Gamada is very professional in his demeanor and attitude.

5. Communication • Greets, listens and responds with courtesy and respect.

Needs Approaching Achieves Exceeds
Immediate Expectations Expectations Expectations
Improvement

Always
Exceeds
Expectations

Comment: Garnada is very respectful and courteous. There have been some instances in which staff, unused to his accent, have difficulty in communicating with him. This may improve as they become more accustomed.

6. Attendance - Maintains regular and reliable attendance.

Needs Approaching Achieves Exceeds
Immediate Expectations Expectations Expectations
Improvement

Always
Exceeds
Expectations

Comment: Does not miss work and is on time.

List any corrective actions for the year

V. Previous Professional Goals (minimum of one)

Previous Professional Goals (minimum of one)

Did Not Meet Goals

Partially Met Goals

Met Goals

New Goals (minimum of one)

1. Implement 1.3 bright ideas prior to next evaluation

Employee/Manager Comments:

Gamada is a very skilled and dependable medical laboratory scientist. He exhibits a very sound work ethic, has excellent attendance and is constantly pursuing improvements to his own skill levels. His efforts are truly appreciated.

Employee Signature: HUSSEIN, GAMADA A –
4/5/2014 11:13 PM –102.168.21.27

Evaluator Signature: RIVERS, MICHAEL R –
4/5/2014 11:10 PM – 10.51.4.103

Director Signature: RIVERS, MICHAEL R –
4/5/2014 11:13 PM – 192.168.21.27

FW:
Thurman, Angela Jean
Sent: Wednesday, April 16, 2014 5:16 AM
To: Hussein, Gamada A

04/15/14

To Whom It May Concern

As the senior night shift medical technologist at Freeman Neosho laboratory, it is my responsibility for the training of new hire technologist in the learning of the Instrumentation, maintenance performed, performing of quality control, calibration of instruments, new reagents/new lot numbers. I also train in the proper use of the hospital IT system to access/order quality control, and how to review quality control. How to generate patient orders, patient stickers, and patient results.

For the first two weeks in July, 2013 I have been training Gamada Hussein in the above responsibilities. Gamada is a very capable technologist that is eager to learn. He has excelled in all tasks that have been given him and would prove a valuable asset in any laboratory field that he would enter.

Gamada continues to be a very capable technologist. He is committed to performing his duties to the best of his abilities and is dedicated to excellent performance.

Thank you,

Angela Jean Thurman MT (AMT)
113 W Hickory
Neosho, MO 64850
417-455-4330
fax 417-455-4331

Rohland Home Healthcare

08/26/2016

To Whom It May Concern,

It's my absolute pleasure to recommend Gamada Hussein as a candidate for a position with your organization. In his position as an Administrative Assistant, Gamada was employed from 2014-2015. I thoroughly enjoyed my time working with Gamada, and came to know him as a truly valuable asset to absolutely any team. He is honest, dependable and incredibly hard-working. Beyond that, his organizational skills are impressive and were greatly appreciated.

Along with his undeniable caring personality, Gamada has always been an absolute joy to work with. He is a true team player, and always manages to foster positive discussions and bring the best out of other employees.

Without a doubt, I confidently recommend Gamada Hussein to join your team. As a dedicated and knowledgeable employee and an all-around great person, I know that he will be a beneficial addition to your organization.

Please feel free to contact me at (507) 252-4619 should you like to discuss Gamada's qualifications and experience further. I'd be happy to expand on my recommendation.

Best wishes,

s/ _____
Omar Hassan

1500 1st Ave NE Ste 210 Rochester, MN 55906
P. (507) 252-4619 • F. (866) 597-0950 •
rohlanddhomehealthcare@yahoo.com

To whom it may concern

Dear Sirs or Madams:

It is with great enthusiasm that I provide my strongest recommendation for Gamada Hussein and his application for the acceptance into the advanced degree programs at the University of Minnesota. As an Adjunct Professor at UST, I have had the opportunity to meet and work with Gamada as a student. In those interactions, Gamada has consistently displayed the characteristics and attributes of those who are successful as students, as professionals, and as leaders. I believe Gamada would be a valued asset to the advanced degree programs at the U of M.

As a student, Gamada has demonstrated the ability to use both written and vocal skills to demonstrate his knowledge and intellect. Gamada is well spoken, writes well, and is cognizant of the priorities of being a successful graduate student. The papers that Gamada submitted as part of the course requirements received the highest grades and his class presentations were equally exceptional. In addition, Gamada brings a valued world view to the class. He presents the information both cogently with balance and without bias.

As a person, Gamada demonstrated that he gets along well with others. He is able to interact with his peers and with me. He was thoughtful and empathetic in his classroom demeanor. It is without hesitation that I recommend Gamada Hussein to the advanced degree programs at the University of Minnesota.

Sincerely,

Dr. James A. Mulder
Adjunct Professor
University of St Thomas
1021 West Larpenteur Ave. #306W
Roseville, MN 55113
(651-489-0677)
jandcmulder@yahoo.com

University of St. Thomas
College of Education, Leadership and Consulting
Graduate School of Professional Psychology
School of Education

Mail MOH 217
1000 LaSalle Avenue
Minneapolis, MN. 55403-2009
U.S.A.

Telephone: 1 (651) 962-4550
Facsimile: 1 (651) 962-4169

September 14. 2017

Regarding: Gamada Hussein

To Whom It Might Concern

This is a strong letter of recommendation for Gamada Hussein in his application to the PhD program. As Gamada's academic advisor and program director. I have come to a great appreciation of his intellectual and ethical abilities. In fact, he is one of the most talented, hardworking and brilliant students I have ever met in my teaching career. I had him in numerous courses counting toward the MA in International Leadership. As a MA student, Gamada took my courses in International Development, Biography and Leadership, The Intellectual and Ethical Foundations of Leadership, and the Leadership Integrative Seminar. In all of the above, he excelled as one of our top students in the International Leadership program.

Gamada is an extraordinary person whose commitment to the intellectual inquiry and the

advancement of the common good is indisputable. I admire his intellectual inquisitiveness as much as I do his dedication to promoting the common good, particularly in the Global South and his native Ethiopia. Gamada does not satisfy himself with being a brilliant student. he goes ahead to become an honors' student.

Because of his intellectual capabilities including his proficient academic inquisitiveness. his understanding of concepts and theories. In addition to the sharpness of his vision for the Global South in particular, I believe that Gamada has a multidisciplinary future. He will perform beyond expectation in any PhD program. I am quite certain that your prestigious University will be proud of such skilled. brilliant and hard-working visionary scholar and professional.

I therefore believe that Gamada will be an exceptional asset to your respected University.

Please feel free to contact me if you need additional information.

Sincerely,

Dr. Jean-Pierre Bongila
Associate Professor and Director
International Leadership Program
Department of Leadership, Policy and Administration
College of Applied Professional Studies
Mail MOH 217
1000 LaSalle Avenue, Minneapolis, MN 55403-2009
Tel. (651) 962-4799. Fax. (651) 962-8831

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

Gamada A. Hussein,
Plaintiff,
Case No. 16-cv-780 (SRN/SER)

v.

**REPORT AND
RECOMMENDATION**

Jeff Sessions,¹
U.S. Attorney General;
U.S. Department of Justice;
James Comey, *Director*,
Federal Bureau of Investigation;
Federal Bureau of Investigation; and
John Does,
Defendants.

Gamada A. Hussein, pro se, Saint Paul, Minnesota

D. Gerald Wilhelm, Esq., United States Attorney's
Office, Minneapolis, Minnesota, for Defendant.

STEVEN E. RAU, United States Magistrate Judge

This matter comes before the undersigned on Defendants Jeff Sessions, U.S. Department of Justice, James Comey, Federal Bureau of Investigation, and John Does' (collectively,

¹ On February 9, 2017, Jeff Sessions became the Attorney General of the United States, succeeding Loretta E. Lynch. See *Office of the Attorney General*, United States Dep't of J., <https://www.justice.gov/ag> (last visited Mar. 2, 2017). Jeff Sessions is therefore automatically substituted as a defendant in this matter. See Fed. R. Civ. P. 25(d).

"Defendants") Motion to Dismiss [Doc. No. 20]. This matter was referred to the undersigned pursuant to 28 U.S.C. § 636(b)(1)(B)-(C) and District of Minnesota Local Rule 72.1(a)(3)(A). *See* (Order of Referral) [Doc. No. 26]. For the reasons stated below, the Court recommends that Defendants' Motion to Dismiss be granted and that this case be dismissed.

I. BACKGROUND

Gamada A. Hussein ("Hussein) filed his complaint on March 28, 2016. (Civil Rights Compl.) [Doc. No. 1]. On May 25, 2016, Hussein filed his first amended complaint. (Am. Civil Rights Compl., "First Am. Compl.") [Doc. No. 11]. In particular, Hussein amended the complaint to remove as defendants the Department of Homeland Security, former Unites States Attorney General Eric Holder, and former Director of the Federal Bureau of Investigations Robert S. Mueller. (*Id.*) On September 20, 2016, Hussein filed his second amended complaint. (Am. Civil Rights Compl., "Operative Compl.") [Doc. No. 18]. In particular, based the parties oral agreement, Hussein removed claims against Defendants Loretta E. Lynch and James Comey in their individual capacities.² *Compare* (First Am. Compl. at 1), *with* (Operative Compl. at 1); *see also* (Mem. in Supp. of Mot. to Dismiss) [Doc. No. 21 at 1-2].

² At no time did Hussein seek leave of the Court to file his amended complaints. Nevertheless, because the parties agreed to the amendments made in Hussein's Operative Complaint, the Court addresses the factual allegations and claims in the Operative Complaint. *See In re Atlas Van Lines, Inc.*, 209 F.3d 1064, 1067 (8th. Cir. 2000) ("It is well-established that an amended complaint supercedes an original complaint and renders the original complaint without legal effect.").

Hussein's Operative Complaint alleges a myriad of wrongs instigated by the Defendants.

For example:

Defendants acting in concert and each of them individually have conspired and contributed to the unlawful acts against Plaintiff, which include intense surveillance, physical, mental and psychological torture, oppression, harassment, discrimination, abuse, threats against his life, attempted assassination, intimidation, invasion of privacy and defamation by the government agencies, both local and federal, since 2008 and still going on. The harm against Plaintiff was also carried out by many other government agencies, officials and personnel who were only acting on the orders of and misinformation from Defendants, including line FBI special agents.

(Operative Compl. ¶15).

Hussein asserts that these actions violate his constitutional rights guaranteed under the First, Fourth, Fifth, and Fourteenth Amendments. (*Id.* at 24-33). Hussein alleges eleven claims in total: (I) violations of the Fourth Amendment for taking his wallet at the Hennepin County Medical Center ("HCMC"); (II) violations under 5 U.S.C. § 552(a) for disseminating private records without Hussein's consent; (III) discrimination under 42 U.S.C. § 1981 for interfering with "existing contracts of

employment"; (IV) violations under 42 U.S.C. § 1983, the Fourth Amendment, and the Fourteenth Amendment for discriminatory actions based on Hussein's race and country of origin; (V) violation of the Fifth Amendment due to First Amendment deprivations of free speech; (VI) unspecified additional violations under 42 U.S.C. §§ 1983 and 1985 for exercising his First Amendment Rights; (VII) a civil cause of action for criminal mail-theft under 18 U.S.C. § 1708; (VIII) battery; (IX) invasion of privacy including intrusion upon seclusion (IX(a)) and false light (IX(b)); (X) defamation; and (XI) intentional infliction of emotional distress. (*Id.*). In general, the claims can be classified thus: claims I to VI are civil rights claims ("civil rights claims"), claim VII is a mail-theft claim ("mail-theft claim"), and claims VIII to XI are tort liability claims ("tort liability claims").

Hussein asks the Court to enjoin Defendants from taking any further discriminatory actions, for compensatory and punitive damages for the alleged wrongs, and for fees and costs associated with filing this lawsuit. (*Id.* at 34-35).

On October 4, 2016, Defendants filed their Motion to Dismiss, asserting that the Court lacks subject matter jurisdiction over the alleged claims pursuant to Federal Rules of Civil Procedure 12(b)(1) and because Hussein failed to allege claims for which relief can be granted under Federal Rules of Civil Procedure 12(b)(6). (Mot. to Dismiss at 1). In particular, Defendants assert that Hussein's civil rights claims should be dismissed because the United States has not waived sovereign immunity and the Court therefore lacks subject matter jurisdiction over the civil rights claims. (Mem. in Supp. of Mot. to Dismiss at 4). Defendants also assert that the mail-

theft claim should be dismissed because no civil remedies exist for violating the criminal statute, depriving the Court of subject matter jurisdiction over the mail-theft claim. (*Id.*) With respect to the tort liability claims, Defendants assert that Hussein failed to exhaust his administrative remedies under the Federal Tort Claim Act ("FTCA"), 28 U.S.C. § 1346(b), and thus the Court lacks subject matter jurisdiction over the tort liability claims. (*Id.* at 4, 9). Defendants also argue that Hussein's claims should be dismissed because his allegations fail to state claims upon which relief can be granted. *See, e.g., (id.* at 14) (stating that "nothing in the complaint except Hussein's unsupported belief suggests that any agent of the United States was involved").

The Court heard oral argument on Defendants' Motion to Dismiss on December 19, 2016. (Minute Entry Dated December 19, 2016) [Doc. No. 33]. The matter is fully briefed and ripe for consideration.

II. DISCUSSION

Defendants seek to have this case dismissed pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (Mot. to Dismiss at 1).

As a threshold matter, under a 12(b)(1) analysis for lack of subject jurisdiction, the complaint may be challenged on its face or on the truthfulness of stated facts. *See Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993). Defendants are making a facial attack to Hussein's Operative Complaint in regards to his civil rights and mail theft claims. *See* (Mem. in Supp. of Mot. to Dismiss at 5-9). Thus, for the purposes of addressing these claims, "all of the factual allegations concerning jurisdiction are

presumed to be true and the motion is successful if the plaintiff fails to allege an element necessary for subject matter jurisdiction." *Titus*, 4 F.3d at 593.

For Hussein's tort liability claims, however, Defendants are challenging the Operative Complaint on the factual basis that Hussein did not exhaust his administrative remedies. *See* (Mem. in Supp. of Mot. to Dismiss at 9-10). Thus, for analysis of these claims, the Court is tasked with reviewing matters outside the pleadings. *See Osborn v. United States*, 918 F.2d 724, 729 n. 6 (8th Cir.1990); *see also McClain v. Am. Economy Ins. Co.*, 424 F.3d 728, 734 (8th Cir. 2005). Furthermore, because the underlying question that the Court is tasked with adjudicating relates to the presence of subject matter jurisdiction, the Court may consider matters outside the pleadings without converting Defendants' Motion to Dismiss into a motion for summary judgment. *Osborne*, F.2d at 729 nn. 4, 6. Also – based on Hussein's status as a pro se litigant- the Court must construe his Operative Complaint liberally. *See, e.g., Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Spencer v. Haynes*, 774 F.3d 467,471 (8th Cir. 2014); *Stone v. Harry*, 364 F.3d 912, 914 (8th Cir. 2004); *Miller v. Norris*, 247 F.3d 736, 739 (8th Cir. 2001).

A. Civil Rights Claims

In claims I to VI, Hussein alleges various civil rights violations. (Operative Compl. at 24-30). These claims can be further categorized as claims arising under the Constitution of the United States and claims arising under various federal statutes. Defendants argue that to the extent these civil rights claims arise under the Constitution they should be dismissed for lack of subject matter jurisdiction

because Defendants have not waived sovereign immunity from suit. (Mem. in Supp. of Mot. to Dismiss at 4-6). Defendants also assert that to the extent the civil rights claims arise under federal statutes, they should be dismissed because the statutes do not apply to the Defendants. *See* (Mem. in Supp. to Dismiss at 6-8).

1. Legal Standard

It is well-established that as a sovereign nation, the United States enjoys sovereign immunity against suit. *See U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 615 (1992); *United States v. Mitchell*, 445 U.S. 535, 538 (1980). "Sovereign immunity is a jurisdictional doctrine, and the terms of the United States' consent to be sued in any court define that court's jurisdiction to entertain the suit." *Brown v. United States*, 151 F.3d 800, 803 (8th Cir. 1998) (internal quotation marks omitted). "[T]he Government's consent to be sued must be construed strictly in favor of the sovereign." *United States v. Nordic Village Inc.*, 503 U.S. 30, 34 (1992). Thus, the consent may not be enlarged beyond what the consenting language requires. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685 (1983).

2. Analysis

Hussein alleges violations of the First Amendment (claims V and VI), Fourth Amendment (claims I and IV), Fifth Amendment (claim IV), and Fourteenth Amendment (claim IV). Hussein also alleges violations under various civil rights statutes, including 42 U.S.C. § 1982 (claim IV), 42 U.S.C. § 1983 (claim IV), and 42 U.S.C. § 1985 (claim VI). The

Court below analyses these claims in both their constitutional and statutory capacities.

a. Constitutional Claims

Hussein alleges violations by the Federal Bureau of Investigations and the Department of Justice, both agencies of the United States, and James Comey and Jeff Sessions in their official capacities. (Operative Compl. at 1). "[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity" because "[i]t is **not** a suit against the official personally, for the real party in interest is the entity." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). For similar reasons, suits against agencies of the United States Government are considered suits against the United States itself. *Cf. Leoffler v. Frank*, 486 U.S. 549, 554 (1988) (determining whether Congress waived sovereign immunity for suits against the United States Postal Service). Thus, Hussein's claims, whether asserted against employees of the United States Government in their official capacities or agencies of the United States Government are directed at the United States as an entity which triggers sovereign immunity analysis. *See Leoffler*, 486 U.S. at 552-65; *Graham*, 473 U.S. at 167-68.

Hussein alleges violations of the First Amendment (claims V and VI), Fourth Amendment (claims I and IV), Fifth Amendment (Claim IV), and Fourteenth Amendment (Claim IV). As a threshold matter, by its very language, the Fourteenth Amendment applies only to state action. *See U.S. Cont. amend. XIV; Shelley v. Kraemer*, 334 U.S. 1, 7 (1948). Hussein's Operative Complaint names only federal defendants. *See generally* (Operative Compl.).

Thus, any claims arising under the Fourteenth Amendment must be dismissed for lack of subject matter jurisdiction. See *Corrigan v. Buckley*, 271 U.S. 323, 330, 331-32 (1926) (holding that the appeal must be dismissed for lack of subject matter jurisdiction, in part because claims arising under the Fourteenth Amendment require state action).

Regarding the remaining claims under the First, Fourth, and Fifth Amendments, it is well-settled that a claim can be brought against federal officials arising under the United States Constitution for violations of constitutionally protected rights. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971); *Buford v. Runyon*, 160 F.3d 1199, 1203 n. 6 (8th Cir. 1998). The federal government's waiver of sovereign immunity under *Bivens*, however, is limited to defendants in their individual capacities. See *Buford*, 160 F.3d at 1203. Thus, the waiver of sovereign immunity does not extend to claims against government officials in their official capacities. *Id.*; see also *Laswell v. Brown*, 683 F.2d 261, 268 (8th Cir. 1982). Stated differently, because Hussein brings suit against Defendants in their official capacities, sovereign immunity bars those claims. See *Buford*, 160 F.3d at 1203; see also *McCourt v. Rios*, No. 08-cv-6411 (PAM/RLE), 2010 WL 3269905, at *7 (D. Minn. July 16, 2010) (Erickson, Mag. J.), adopted by 2010 WL 3269914 (Aug. 16, 2010) (Magnuson, J.); *Hill v. Holinka*, No. 06-cv-4720 (PJS/JJG), 2008 WL 549928, at *2 (D. Minn. Feb. 27, 2008) (Graham, Mag. J., as adopted by Schiltz, J.) ("Other Eighth Circuit cases have held that, where a *Bivens* claim is brought against federal employees in their official capacity, the real party is the United States and so sovereign immunity attaches."). Thus, to the extent that

Hussein's claims arise under the Constitution of the United States, the Court recommends that his claims be dismissed for lack of subject matter jurisdiction.

b. Statutory Claims

Hussein also alleges claims arising under 5 U.S.C. § 552a (claim II), 42 U.S.C. §§ 1981, 1983, 1985 (claims III, IV, VI). (Operative Compl. at 24-30). 42 U.S.C. §§ 1981, 1983, 1985, however, are not applicable to the Defendants as pleaded by Hussein and thus fail to confer the Court with subject matter jurisdiction.

i. 5 U.S.C. § 552a

Hussein's claim under the Privacy of Information Act of 1974 pursuant to 5 U.S.C. § 552a fails in this instance because Hussein has not specifically alleged facts essential to show jurisdiction. Thus, Hussein's claim under 5 U.S.C. § 552(a) should be dismissed for lack of subject matter jurisdiction.

Under 5 U.S.C. § 552a, a civil remedy may lie when an agency "disclose[s] any record ... to any other person ... except ... with prior written consent of ... the individual to whom the record pertains." See 5 U.S.C. § 552a(b); see also 5 U.S.C. § 552a(g)(1)(D) (stating that a civil remedy exists for failure "to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual"). But this civil remedy is predicated on a two-year statute of limitations. See 5 U.S.C. § 552a(g)(5).

"[F]ailure to file a Privacy Act claim within the two-year period is jurisdictional." *Flowers v. Exec. Office of the President*, 142 F. Supp. 2d 38, 44-45

(D.C. Cir. 2001). It is Hussein's responsibility to "allege in his pleading the facts essential to show jurisdiction." *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); see also *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990). Importantly, jurisdiction may not "be inferred argumentatively from averments in [Hussein's] pleadings." See *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 547 (1986) (internal quotation omitted). Thus, jurisdiction "must affirmatively and distinctly appear" in the complaint. *Norton v. Larney*, 266 U.S. 511, 515-16 (1925).

Here, Hussein has not pleaded factual assertions with sufficient specificity to allow this Court to ascertain whether Hussein's Operative Complaint satisfies the limitations period. In particular, Hussein provides no factual assertions regarding what information was unlawfully disclosed, by whom this information was unlawfully disclosed, or when this information was unlawfully disclosed. Of import with respect to the jurisdictional question is the complete omission of any facts regarding when the alleged unlawful conduct occurred. See, e.g., (Operative Compl. at 2) (general statement of jurisdiction and venue). "Without these basic factual assertions, the court has no basis to determine whether [Hussein's] claims satisfy the applicable limitations period This omission is quite fatal, as the court cannot proceed if [Hussein] has not established the court's jurisdiction to hear [his] claims." *Flowers*, 142 F. Supp. 2d at 45.

Consequently, Hussein's Operative Complaint fails to establish subject matter jurisdiction for his claim arising under 5 U.S.C. § 552a, and should be dismissed.

ii. 42 U.S.C. §§ 1981, 1983

Hussein's claims under sections 1981 and 1983 also fail to confer subject matter jurisdiction. Namely, the statutes are directed to actions under color of state law. Hussein names federal defendants only; the Defendants are not acting under the color of state law. *See generally* (Operative Compl.). Thus, the Court recommends to the extent that Hussein's civil rights claims arise under 42 U.S.C. §§ 1981 and 1983, these claims be dismissed for lack of subject matter jurisdiction.

42 U.S.C. § 1981 states in relevant part

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981(a). But, "[t]he rights protected by this section are protected against impairment by nongovernmental discrimination and impairment **under color of State law.**" *Id.* § 1981(c) (emphasis added). The "color of State law" limitation, by its terms, means that 42 U.S.C. § 1981 does not provide a cause of action against the United States. *See, e.g., Dotson v. Friesa*, 398 F.3d 156, 162 (2nd Cir. 2005); *Conner v. Greef*, 99 F. App'x. 577, 580 (6th Cir. 2004);

Davis-Warren Auctioneers, JV v. F.D.J.C., 215 F.3d 1159, 1161 (10th Cir. 2000); *Davis v. U.S. Dep't of Justice*, 204 F.3d 723, 725-26 (7th Cir. 2000); *Lee v. Hughes*, 145 F.3d 1272, 1277 (11th Cir. 1998); *Geyer Signal, Inc. v. Minn. Dep't of Transp.*, No. 11-cv-321 (JRT/LIB), 2014 WL 1309092, at *21 (D. Minn. Mar. 31, 2014) (Tunheim, J.).

As stated above, Defendants are employees in their official capacities or agencies of the federal government; the real party in interest is the United States. See *Leoffler*, 486 U.S. at 554; *Graham*, 473 U.S. at 166. Consequently, Hussein's claims arising under 42 U.S.C. § 1981 should be dismissed for lack of subject matter jurisdiction.

42 U.S.C. § 1983 states in relevant part

Every person who, **under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia**, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

(emphasis added). It is well-settled that the plain meaning of the statute prevents suits against the United States. See *Davis v. United States*, 439 F.2d 1118, 1119 (8th Cir. 1971) (holding 42 U.S.C. § 1983 "by its plain language ... does not authorize redress against the United States"). Because Hussein's

allegations are against the United States, 42 U.S.C. § 1983 provides no jurisdictional basis for his lawsuit. Thus, to the extent Hussein alleges claims arising under 42 U.S.C. § 1983, those claims should be dismissed for lack of subject matter jurisdiction.

iii. 42 U.S.C. § 1985

There are three provisions to 42 U.S.C. § 1985. Hussein makes no specific recitation of which provision he believes Defendants violated. (Operative Compl. at 29-30). Nevertheless, the only provision that reasonably applies is § 1985(3); sections 1985(1) and 1985(2) address interfering with officers of the United States from performing their duties and obstructing justice through the intimidation of parties, witnesses, and jurors, respectively.

Section 1985(3) states in part

If two or more persons in any State or Territory conspire ... or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(c). But, "[s]ection 1985(3) does not confer liability on a federal agency because the United States is not a 'person' within the meaning of § 1985(3)." *Cobb v. U.S. Dep't of Energy*, 487 F.

Supp. 2d 1049, 1056 (D. Minn. 2007) (Davis, J.). Thus, like sections 1981 and 1983, "[t]he United States is not subject to suit under section 1985(3)." *Mousseaux v. United States*, 28 F.3d 786, 787 (8th Cir. 1994). Consequently, to the extent that Hussein asserts claims arising under 42 U.S.C. § 1985, those claims should be dismissed for lack of subject matter jurisdiction.

In sum – viewing all factual allegations in Hussein's Operative Complaint as true – the claims arising under the United States Constitution and the asserted federal statutes fail to confer subject matter jurisdiction. Consequently, the Court recommends that Hussein's civil rights claims (claims I to VI) be dismissed for lack of subject matter jurisdiction.

B. Mail-Theft Claim

In claim VII, Hussein alleges that Defendants stole his mail in violation of criminal statute 18 U.S.C. § 1708 and seeks damages in this civil action. (Operative Compl. at 30). Because the Court finds that there is no private cause of action under 18 U.S.C. § 1708, the Court recommends that claim VII be dismissed for lack of subject matter jurisdiction.

1. Legal Standard

"In determining whether to infer a private cause of action from a federal statute, our focal point is Congress' intent in enacting the statute." *Thompson v. Thompson*, 484 U.S. 174, 179 (1988). In general, the courts use a four-factor test to determine Congress's intent. *Id.* These factors are

- (1) whether the plaintiff is a member of the class for whose benefit the statute was enacted;
- (2) whether Congress intended,

explicitly or implicitly, to create such a remedy; (3) whether a private remedy is consistent with the underlying legislative scheme; and (4) whether a private right based on a federal statute would interfere with an area relegated to state law.

Wisdom v. First Midwest Bank, of Poplar Bluff, 167 F.3d 402, 407-08 (8th Cir. 1999). "Congressional intent is the **determining** factor and is not merely to be weighed against the other ... factors." *Id.* at 408 (emphasis added).

2. Analysis

Courts are reluctant to imply private causes of action from a federal statute. *See, e.g., Hofbauer v. Nw. Nat'l Bank of Rochester*, 700 F.2d 1197, 1200 (8th Cir. 1983) (citing Supreme Court cases). For example, "a bare criminal statute does not necessarily preclude an implied private right of action, [but] there should at least [be] a statutory basis for inferring that a civil cause of action of some sort lay in favor of someone." *Wisdom*, 167 F.3d at 408. Stated differently, there must be a "clear indication that Congress intended to create" a private cause of action. *See id.* There is not a clear indication that Congress intended 18 U.S.C. § 1708 to provide for a private cause of action. 18 U.S.C. § 1708 states

Whoever steals, takes, or abstracts, or by fraud or deception obtains, or attempts so to obtain, from or out of any mail, post office, or station thereof, letter box, mail receptacle, or any mail route or other

authorized depository for mail matter, or from a letter or mail carrier, any letter, postal card, package, bag, or mail, or abstracts or removes from any such letter, package, bag, or mail, any article or thing contained therein, or secretes, embezzles, or destroys any such letter, postal card, package, bag, or mail, or any article or thing contained therein; or

Whoever steals, takes, or abstracts, or by fraud or deception obtains any letter, postal card, package, bag, or mail, or any article or thing contained therein which has been left for collection upon or adjacent to a collection box or other authorized depository of mail matter; or

Whoever buys, receives, or conceals, or unlawfully has in his possession, any letter, postal card, package, bag, or mail, or any article or thing contained therein, which has been so stolen, taken, embezzled, or abstracted, as herein described, knowing the same to have been stolen, taken, embezzled, or abstracted-

Shall be fined under this title or imprisoned not more than five years, or both.

Nothing in the language of 18 U.S.C. § 1708 nor in the statute's legislative history suggests Congress intended to create a private cause of action. Thus, none can be implied. *Accord Wisdom* 167 F.3d at 408; *Hofbauer* 700 F.2d at 1200. Consequently, the Court

finds that there is no private cause of action under 18 U.S.C. § 1708.

Courts in other districts have also found that no private cause of action exists under 18 U.S.C. § 1708, further supporting this Court's views.³ See, e.g., *Stephenson v. Murray*, Nos. 2:14-cv-1755, 2:14-cv-2350, 2014 WL 7015119, at *3 (S.D. Ohio Dec. 11, 2014); *Zahl v. Kosovsky*, No. 08 Civ. 8308, 2011 WL 779784, at *10 (S.D.N.Y. Mar. 3, 2011); *Sciolino v. Marine Midland Bank-Western*, 463 F. Supp. 128, 130-31 (W.D.N.Y. 1979) (holding "[a] civil claim arising out of an alleged violation of penal statutes relating to the mails i.e., 18 U.S.C. §§ 1701, 1702, 1703, 1708 and 1709 is not" cognizable (citations omitted)). In fact, this Court could find no case that suggested that a private cause of action exists under 18 U.S.C. § 1708. Thus, Hussein's civil claims under 18 U.S.C. § 1708 must fail and the Court recommends that his mail- theft claim be dismissed for lack of subject matter jurisdiction. Cf. *Wisdom* 167 F.3d at 409.

C. Tort Liability Claims

As stated above, Hussein asserts torts claims under the FTCA for (VIII) battery; (IX) invasion of privacy including intrusion upon seclusion (IX(a))

³ It does not appear that other courts in this District or this Circuit have analyzed 18 U.S.C. § 1708 to determine if a private cause of action exists under the statute. In *Carpenter v. Garland County Prob. & Parole Staff*, No. 07-6072, 2008 WL 276352, at *4 (W.D. Ark. Jan. 30, 2008), however, it was held that no private cause of action existed under 18 U.S.C. § 1701. Sections 1701 and 1708 are criminal statutes relating to the mail. Compare 18 U.S.C. § 1701 (obstruction of mails generally), with 18 U.S.C. § 1708 (theft or receipt of stolen mail matter generally). Thus, the holding in *Carpenter*, while not conclusive, is informative

and false light (IX(b)); (X) defamation; and (XI) intentional infliction of emotional distress. Because Hussein has failed to exhaust his administrative remedies, the Court lacks subject matter jurisdiction over these claims.

1. Legal Standard

Under 28 U.S.C. § 1346(b) of the FTCA, the United States Government may be sued as a tortfeasor. As a result – under the FTCA – the United States Government provides a limited waiver of its sovereign immunity. *See Dolan v. US. Postal Serv.*, 546 U.S. 481, 484-85 (2006) ("The FTCA, in turn, waives sovereign immunity in two different sections of the United States Code."). This waiver of sovereign immunity has various limitations, however. In particular:

[a]n action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, **unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail.**

28 U.S.C. § 2675(a) (emphasis added). The FTCA "provides that an action shall not be instituted upon a claim against the United States for money damages

unless the claimant has first exhausted his administrative remedies." *McNeil v. United States*, 508 U.S. 106, 107 (1993). The Eighth Circuit has determined that section 2675(a) "is a jurisdictional prerequisite to filing an FTCA action in federal district court." *Mader v. United States*, 654 F.3d 794, 807 (8th Cir. 2011). Thus, where exhaustion has not occurred, FTCA claims must be dismissed "for want of subject-matter jurisdiction." *See id.*

2. Analysis

As a threshold matter, this Circuit has established that "[p]resentment of an administrative claim is jurisdictional and must be **pleaded** and proven by the FTCA claimant." *Bellecourt v. United States*, 994 F.2d 427, 430 (8th Cir. 1993) (emphasis added). In *Jones v. Bock*, 549 U.S. 199 (2007), however, the Supreme Court rejected a similar heightened pleading standard under the Prison Litigation Reform Act ("PLRA"). *See Jones* 549 U.S. at 213. So, "[i]t is unclear if the heightened pleading standard, which was imposed by some Courts, including our Court of Appeals, under the FTCA, has survived the Supreme Court's holding in *Jones v. Bock*." *Dasta v. Shearin*, No. 04-cv-4475 (MJD/RLE), 2007 WL 4952768 at *17 (D. Minn. Nov. 15, 2007) (Erickson, C. Mag. J.), *adopted by* 2008 WL 1889953 (Jan. 22, 2008) (Davis, J.). While still an open question, many courts have found that exhaustion under the FTCA must be pleaded. *See, e.g., Aneur v. Gates*, 950 F. Supp. 2d 905, 920 n. 6 (E.D. Va. 2013); *Colbert v. US. Postal Serv.*, 831 F. Supp. 2d 240, 243 (D.D.C. 2011); *Lubrano v. United States*, 751 F. Supp. 2d 453, 455 (E.D.N.Y. 2010); *see also Ellis v. United States*, No. 06-305, 2009 WL 440390 at *17 n.

17 (W.D. Pa. Feb. 23, 2009) (Baxter, Mag. J., as adopted by McLaughlin, J.) (finding that the PLRA exhaustion requirements and the FTCA exhaustion requirements are of a different character and thus exhaustion under the FTCA is required to be pleaded).

Here, Hussein has not pleaded that he exhausted his administrative remedies. Under this Court's current understanding of whether exhaustion must be pleaded, Hussein's tort claims (claims VIII to XI) fail. The Court lacks subject matter jurisdiction over the alleged tort claims because Hussein failed to exhaust administrative remedies. *See Hayes v. Fed. Bureau of Prisons*, No. 12-cv-0577 (PJS/FLN), 2014 WL 1017954, at *3 (D. Minn. Mar. 17, 2014) (Schiltz, J.) (stating that "a failure to exhaust administrative remedies" is a finding "that a court lacks jurisdiction over the FTCA claim-and a dismissal for lack of jurisdiction is properly without prejudice"); *see also County of Mille Lacs v. Benjamin*, 361 F.3d 460, 464 (8th Cir. 2004) ("A district court is generally barred from dismissing a case with prejudice if it concludes subject matter jurisdiction is absent."). Therefore, this Court must recommend that Hussein's tort claims be dismissed without prejudice.⁴

⁴ Defendants also assert that Hussein's tort claims for false light (claim IX(b)) and defamation (claim X) should be dismissed with prejudice grounded on futility in light of the United States' sovereign immunity with respect to those claims. *See* (Mem. in Supp. of Mot. to Dismiss at 13-14). Dismissal with prejudice is not appropriate, however. *See Roth v. United States*, 476 F. App'x 95 (8th Cir. 2012) (per curiam) (unpublished opinion) (affirming the judgement to dismiss for lack of subject matter jurisdiction grounded on the presence of sovereign immunity, but clarifying that the judgement is without prejudice) (citing *County of Mille Lacs*, 361 F.3d at 464; *Murray v. United States*,

Thus, the Court recommends that Hussein's tort liability claims (claims VIII to XI) be dismissed without prejudice for lack of subject matter jurisdiction due to failure to exhaust administrative remedies.

D. Failure to State a Claim

As described above, Hussein's claims fail for lack of subject matter jurisdiction. The Court also finds Hussein's Operative Complaint fails to state a claim for which relief can be granted. Even if the Court had subject matter jurisdiction for Hussein's claims, they could alternatively be dismissed pursuant to Rule 12(6)(6).

1. Legal Standard

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citations omitted). "[B]are assertion[s] ... will not suffice." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Thus, the pleaded factual allegations "must be enough to raise a right of relief above the speculative level." *Id.* at 555.

686 F.2d 1320, 1327, 1327 n. 14 (8th Cir. 1982) (affirming dismissal without prejudice where dismissal was granted on grounds of sovereign immunity)).

2. Analysis

a. 5 U.S.C. § 552a

As discussed above, Hussein pleaded insufficient facts to overcome a facial attack of his Operative Complaint for the purposes of conferring this Court with subject matter jurisdiction. Likewise, these failures implicate Hussein's failure to state a claim for which relief can be granted. In particular, Hussein provides no particularized facts about what protected information was disclosed, when the disclosure occurred, or which agency allegedly disclosed the information. Furthermore, Hussein provides no reasonable connection between the alleged disclosure and any of his alleged harms. See *Brown v. Dep't of Veteran Affairs*, No. 15-0172, 2015 WL 6149232, at *2 (W.D. Mo. Oct. 19, 2015) (stating that the "plaintiff does not allege what agency disclosed the records, when that disclosure occurred, facts demonstrating a causal connection for how the disclosure adversely affected him, or that the disclosure was willful" when granting a motion for a more definite statement with the provision that plaintiff's 5 U.S.C. § 552a claim would be dismissed under 12(b)(6) should corrective action not be taken).

In sum, Hussein's Operative Complaint fails to state a claim for relief under 5 U.S.C. § 552a.

b. Remaining Claims

Similarly, with respect to Hussein's remaining claims, Hussein's Operative Complaint is devoid of sufficient factual support to meet the pleading standards espoused in *Twombly* and *Iqbal*. Stated differently, nothing pleaded in Hussein's Operative

Complaint rises above mere speculation.

Hussein's Operative Complaint consists of conclusory allegations and bare assertions with little to no factual support. *See, e.g., (id. ¶ 28)* (stating that Hussein "believes" individuals received "surveillance video from outside sources" which led to Hussein's harassment); *(id. ¶ 34)* (asserting he "felt" that he was the target of a plot against his life when an unnamed coffee shop worker poured something in his coffee); *(id. ¶ 40)* (losing a job because he "believed" law enforcement agencies passed false information about him to the hiring manager); *(id. ¶ 42)* (alleging that he "believed" an FBI agent had told a recruiter that Hussein could not do the job).

In support of his claims that he was irradiated, for example, Hussein states that he "felt some fatigue and burning sensations but ... didn't seek medical attention at the time," nor does he identify the particular source of his radiation exposure. *(Id. ¶ 45)*; *see also (id. ¶ 48)* (alleging a second incident of being irradiated, based solely on his observation that he had symptoms "very similar to those" he experienced during his first alleged exposure to radiation). In both instances, Hussein fails to identify who allegedly exposed him to radiation. *(Id. ¶¶ 45, 48)*.

Furthermore, there is barely a scintilla of support tying these allegations to the Defendants. Hussein's Operative Complaint consists of 172 paragraphs, including both claims and factual assertions on which those claims are based. There are a number of places where Hussein mentions state police. *See, e.g., (id. ¶ 26)* (alleging a uniformed police officer and a plain clothes police officer "encircled" the room while Hussein was taking an

exam at the University of Minnesota); (*id.* ¶ 27) (alleging the police and undercover agents followed, intimidated, and harassed Hussein); (*id.* ¶ 31) (alleging harassment at the hands of police "[o]utside of the school in Rochester"); (*id.* ¶ 34) (stating that Roseville Police officers were outside the coffee shop when he exited); (*id.* ¶ 77) (alleging that when Hussein went to the hospital for treatment of nausea and a "burning sensation all over his body" police were already there). But – as described above – Hussein does not name state actors in this suit, including the state police officers that he alleges mistreated him.

Yet there is barely any mention of federal agents, in general, and nothing to support Hussein's myriad claims against Defendants more specifically. *See* (*id.* ¶ 39) (alleging that an FBI agent tried to distract him while he took a test); (*id.* ¶ 42) (alleging that he "believed" an FBI agent had told a recruiter that Hussein could not do the job); (*id.* ¶ 64) (alleging that during a visit to an FBI office, an FBI duty agent asked Hussein whether he had "borrowed some money from other people"); (*id.* ¶ 73) (alleging that people told Hussein about FBI agents choking him, but Hussein makes no claims that FBI agents actually choked him); (*id.* ¶ 89, 90) (alleging talking to FBI agents about perceived surveillance and harassment who instructed Hussein to "start locally"); (*id.* ¶ 92) (alleging FBI agents at the FBI Office in Brooklyn Center, Minnesota questioned him about when he last saw a physician); (*id.* ¶ 93) (detailing a discussion he had with FBI agents regarding being compensated for the wrongs Hussein alleges). None of these factual allegations alone or in combination provide the Court with a sufficient factual basis to suggest that the Defendants are

liable under any of Hussein's eleven enumerated claims.⁵

For example, the above cited paragraphs-which form the entire universe of interactions with federal government agents in Hussein's Operative Complaint-omit any relationship to Hussein's wallet, which forms the basis of his Fourth Amendment Claims. Likewise, there is nothing to suggest a relationship between the Defendants and any of Hussein's civil rights claims. Hussein provides no reasonable basis by which to infer that Defendants came in contact with Hussein's mail, which forms the basis of his mail-theft claim. In addition, there is nothing to suggest from the above that Defendants had any involvement in subjecting Hussein "to poisoning, radiation, injection of foreign substance into his body and flushing [sic] of intense light into his eyes" which forms the basis of his battery claim. (*Id.* ¶ 151). For similar reasons, therefore, there is nothing to create a reasonable inference that Defendants are liable for any of Hussein's tort liability claims.

⁵ This would be true regardless of whether Jeff Sessions and James Comey were sued in their individual or official capacities. All of Hussein's factual allegations are too attenuated to establish a connection between Defendants and the alleged harm, regardless of the capacity in which they were sued. See *Iqbal*, 556 U.S. at 678. That is, in Defendants' official capacities, there is nothing to suggest that "a policy or custom of the entity violated the plaintiffs' rights." See *Gorman v. Bartch*, 152 F.3d 907, 914 (1998). Likewise, there is nothing to suggest that Defendants acted with sufficient personal involvement in their respective individual capacities necessary to establish "personal liability for individual actions ... in the course of their duties." *Id.* Therefore, the presence of claims against Defendants in their individual capacities-that Hussein removed at an earlier stage in this litigation-would have no material impact on this Court's Report and Recommendation.

What Hussein's Operative Complaint does address, however, are his inter-personal run-ins with various members of the community and his co-workers, none of whom appear to be federal government employees nor are they named as defendants in this lawsuit. See, e.g., (*id.* ¶ 20) (stating he had to confirm his contact information with an employee at a Western Union office before money could be transferred); (*id.* ¶ 22) (discussing a party where he was asked lots of personal questions by party-goers); (*id.* ¶ 33) (alleging he "believed" his co-workers were whispering about him "after they received some information from outside sources"); (*id.* ¶ 35) (alleging that co-workers were following him and indicated to each other that Hussein was "still fully functional"); (*id.*) (stating that a coworker made lewd comments about Hussein's genitals); (*id.* 43) (discussing an exchange between an unidentified man and Hussein's work-place trainer, where Hussein was described as "hard to train"); (*id.* ¶ 51-53) (detailing various encounters with co-workers); (*id.* ¶ 58) (describing a run-in with a photographer at his bank); (*id.* ¶ 61) (alleging that co-workers talked about the fact that Hussein had been injected with salmonella); (*id.* ¶ 69) (alleging that co-workers told Hussein that they know he is going to die because of the poison that he had been given); (*id.* ¶ 72) (detailing an argument between Hussein and his co-workers about the appropriateness of "watching a religious song on YouTube"); (*id.* ¶ 79) (alleging one of his co-workers stated "burn in hell" and another being overheard saying "he is not even close to death"); (*id.* ¶ 85) (alleging co-works threatened to jail him and shoot him for his "terrorist acts").

In sum, there is nothing to suggest a "reasonable inference that the defendant is liable for

the misconduct alleged." *Iqbal*, 556 U.S. at 678. Consequently, even if the Court had subject matter jurisdiction, Hussein's Operative Complaint fails to state a claim upon which relief can be granted.

III. RECOMMENDATION

Based on all the files, records, and proceedings herein, **IT IS HEREBY RECOMMENDED** that:

1. Defendants Jeff Sessions, U.S. Department of Justice, James Comey, Federal Bureau of Investigation, and John Does' Motion to Dismiss [Doc. No. 20] be **GRANTED**; and
2. This case be dismissed **without PREJUDICE**.

Dated: March 03, 2017

s/Steven E. Rau
United States Magistrate Judge

Notice

Filing Objections: This Report and Recommendation is not an order or judgment of the District Court and is therefore, not appealable directly to the Eighth Circuit Court of Appeals.

Under D. Minn. LR 72.2(b)(1) "a party may file and serve specific written objections to a magistrate judge's proposed findings and recommendations within 14 days after being served a copy" of the Report and Recommendation. A party may respond to those objections within 14 days after being served a copy of the objections. LR 72.2(b)(2). All objections

and responses must comply with the word or line limits set forth in LR 72.2(c).

Under Advisement Date: This Report and Recommendation will be considered under advisement 14 days from the date of its filing. If timely objections are filed, this Report and Recommendation will be considered under advisement from the earlier of: (1) 14 days after objections are filed; or (2) from the date a timely response is filed.

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

Gamada A. Hussein,
Plaintiff,
Case No. 16-cv-780 (SRN/SER)

v.

**MEMORANDUM OPINION
AND ORDER**

Jeff Sessions,
U.S. Attorney General;
U.S. Department of Justice;
James Comey, Director,
Federal Bureau of Investigation;
Federal Bureau of Investigation; and
John Does,
Defendants.

Gamada Ahmed Hussein, Shakopee, Minnesota, pro
se.

D. Gerald Wilhelm and David W. Fuller, United
States Attorney's Office, Minneapolis, Minnesota, for
Defendants.

SUSAN RICHARD NELSON, United States District
Judge

I. INTRODUCTION

This matter comes before the Court on Plaintiff Gamada Ahmed Hussein's Objections [Doc. No. 37] to United States Magistrate Judge Steven E. Rau's Report and Recommendation ("R&R"), dated March 3, 2017 [Doc. No. 35]. The magistrate judge

recommended that Defendants' Motion to Dismiss [Doc. No. 20] for lack of subject matter jurisdiction and for failure to state a claim be granted, and that the Second Amended Complaint [Doc. No. 18] ("SAC") be dismissed without prejudice.

Pursuant to statute, this Court reviews *de nova* any portion of the magistrate judge's opinion to which specific objections are made, and "may accept, reject, or modify, in whole or in part, the findings or recommendations" contained in that opinion. 28 U.S.C. § 636(b)(1)(C); *see also* Fed. R. Civ. P. 72(b); D. Minn. LR 72.2(b)(3). For the reasons stated herein, the Court overrules Hussein's objections and adopts the R&R, albeit with minor modifications.

II. BACKGROUND

The allegations contained in Hussein's 172-paragraph SAC, although extensive, are highly speculative, conclusory, and not grounded in fact. Paragraph 15 of the SAC is representative of the nature of the claims in this action:

Defendants acting in concert and each of them individually have conspired and contributed to the unlawful acts against Plaintiff, which include intense surveillance, physical, mental and psychological torture, oppression, harassment, discrimination, abuse, threats against his life, attempted assassination, intimidation, invasion of privacy and defamation by the government agencies, both local and federal, since 2008 and still going on. The harm against Plaintiff was also carried out by many other government

agencies, officials and personnel who were only acting on the orders of and misinformation from Defendants, including line FBI special agents.

(SAC ¶ 15.)

All individual Defendants are sued in their official capacities. (*Id.* at 1.) In total, Hussein brings eleven claims, which may be divided for purposes of analysis into three main groupings. Counts I through VI allege various civil rights claims, including violations of the Fourth and Fourteenth Amendments; the Privacy Act, 5 U.S.C. § 552a;¹ and 42 U.S.C. §§ 1981, 1983, and 1985. (*See id.* ¶ 108-145.) Count VII alleges a civil cause of action for criminal mail-theft under 18 U.S.C. § 1708. (*See id.* ¶ 146-149.) Finally, Counts VIII through XI raise tort claims, including invasion of privacy, defamation, and intentional infliction of emotional distress. (*See id.* ¶ 150-172.) By way of remedy, Hussein asks the Court to declare that Defendants' alleged actions are in violation of the law; enjoin them from engaging in further such illegal activities; and award him compensatory and punitive damages, as well as fees and costs. (*See id.* at 34-35.)

Defendants moved to dismiss on October 4, 2016. As to the civil rights claims, Defendants argue that the United States has not waived sovereign immunity, and thus this Court lacks subject matter jurisdiction over those claims. (*See R&R* at 3-4.)

¹ Although the SAC refers to Hussein's second claim as "[v]iolation of [5] U.S.C. § 552(a)," it is clear from the text of the complaint that he meant to refer to 5 U.S.C. § 552a. The former is a sub-section of the Freedom of Information Act ("FOIA"), while the latter is the codification of the Privacy Act of 1974.

Defendants further contend that Hussein's mail fraud claim should be dismissed because no civil remedies exist for violating what is a criminal statute, rendering this Court also without jurisdiction over that claim. (*See id.* at 4.) Finally, Defendants argue that Hussein has failed to exhaust administrative remedies for his tort claims, and that, in the alternative, those claims should be dismissed under Federal Rule of Civil Procedure 12(b)(6).

III. DISCUSSION

A. STANDARD OF REVIEW

Upon issuance of an R&R, a party may "serve and file *specific* written objections to the proposed findings and recommendations." Fed. R. Civ. P. 72(b)(2) (emphasis added). "The objections should specify the portion of the magistrate judge's [R&R] to which objections are made and provide a basis for those objections." *Mayer v. Walvatne*, No. 07-cv-1958 (JRT/RLE), 2008 WL 4527774, at *2 (D. Minn. Sept. 28, 2008). Objections which are not specific but merely parrot arguments already presented to and considered by the magistrate judge are not entitled to *de novo* review. *Dunnigan v. Fed. Hom Loan Mortg. Corp.*, No. 15-cv-2626 (SRN/JSM), 2017 WL 825200, at *3 (D. Minn. Mar. 2, 2017) (citing *Mashak v. Minnesota*, No. 11-cv-473 (JRT/JSM), 2012 WL 928251, at *2 (D. Minn. Mar. 19, 2012)). Furthermore, when presenting arguments to a magistrate judge, parties must put forth "not only their 'best shot' but all of their shots." *Ridenour v. Boehringer Ingelheim Pharm., Inc.*, 679 F.3d 1062, 1067 (8th Cir. 2012) (quotations and citations omitted). Thus, a party cannot, in his objections to

an R&R, raise arguments that were not clearly presented to the magistrate judge. *Hammann v. 1-800 Ideas.com, Inc.*, 455 F. Supp. 2d 942, 947-48 (D. Minn. 2006).

B. Plaintiff's Civil Rights Claims

The Court will begin its review with Hussein's various civil rights claims, found in Counts I through VI of the SAC. For analytical convenience, the Court will follow the practice adopted in the R&R, and review the claims in two groups: those stating claims arising directly under the Constitution (Counts I, IV, and V), and those stating claims arising, in whole or in part, under federal statute (Counts II, III, IV, and VI).

1. Alleged Constitutional Violations

Hussein alleges that Defendants, acting in their official capacities, violated his Fourth Amendment right to be free of unreasonable searches and seizures when they took his wallet on May 17, 2010 at Hennepin County Medical Center in Minneapolis, and again at the Newton Public Library in Neosho, Missouri, and did not return it. (SAC ¶ 111.) He further claims discrimination and deprivation of equal protection, allegedly in violation of his rights under the Fourth and Fourteenth Amendments. (*Id.* ¶ 124-129.) Finally, Hussein alleges that Defendants have violated his right to freedom of speech, thus violating the First and Fifth Amendments. (*Id.* ¶ 133-138.)

Before the magistrate judge, Defendants argued that this Court lacks subject matter jurisdiction to consider Hussein's constitutional

claims for a very simple reason: the United States, as the real defendant in interest, has not waived sovereign immunity. (See R&R at 5.) The magistrate judge agreed, determining that, because Hussein alleged violations only by federal agencies and individual defendants acting in their official capacities, suit could only be maintained if Hussein could identify some express waiver of that immunity. Because Judge Rau concluded that no such waiver existed, he recommended that this Court dismiss Hussein's constitutional claims for lack of subject matter jurisdiction. (See *id.* at 6-8.)

The Court agrees with the majority of Judge Rau's analysis. As the magistrate judge noted, it is well established that suits against federal agencies, as well as against government officials acting in their official capacities, are really suits against the federal government itself. See *Loeffler v. Frank*, 486 U.S. 549, 554 (1988); *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). Because the federal government possesses sovereign immunity from suit, the Court's jurisdiction in any case in which the United States is the real defendant is limited to the extent that immunity has been waived by Congress. See *F.D.J.C. v. Meyer*, 510 U.S. 471, 475 (1994). Thus, the Court in the first instance must determine whether a statutory waiver of sovereign immunity exists before it can allow a claim against the federal government to proceed. See *United States v. Mitchell*, 463 U.S. 206, 212 (1983).

In this instance, the Court agrees with the magistrate judge that – insofar as Hussein seeks monetary damages – sovereign immunity has not been waived and his claim may not proceed in this Court. By suing directly pursuant to the Constitution, Hussein brings what is commonly known as a *Bivens*

action. See *Bivens v. Six Unknown Named Agents of Fed Bureau of Narcotics*, 403 U.S. 388 (1971). But it is well-settled that *Bivens* actions may be brought against individual defendants only in their personal, rather than official, capacities. See *Buford v. Runyon*, 160 F.3d 1199, 1203 n.6 (8th Cir. 1998). Likewise, the Supreme Court has expressly rejected attempts to extend *Bivens* to federal agencies. See *Meyer*, 510 U.S. at 486. Because Hussein points to no other express statutory grant of authority to sue the Federal Bureau of Investigation ("FBI") or the Department of Justice ("DOJ") for monetary damages, the Court concludes that no waiver of sovereign immunity exists.

While subject matter jurisdiction is thus lacking for Hussein's constitutional claims for monetary damages, the Court respectfully disagrees with the magistrate judge to the extent his sovereign immunity analysis also extends to the matter of injunctive relief. In *Raz v. Lee*, the Eighth Circuit determined that the United States cannot claim sovereign immunity from suit where the plaintiff seeks nonmonetary relief, because section 702 of the Administrative Procedure Act ("APA") "expressly waives sovereign immunity" in such cases.² 343 F.3d 936, 938 (8th Cir. 2003). On facts remarkably similar to those presented here, the Eighth Circuit held that a plaintiff could maintain suit against the director of the FBI in his official capacity where the plaintiff alleged various constitutional claims, but sought only an injunction prohibiting further violations of his rights. *Id.* at 937-38. This waiver extends not only to officials but also to government agencies. See 5 U.S.C.

² The Eighth Circuit further observed that the APA's waiver of sovereign immunity is not limited to actions brought under the APA. See *Raz*, 343 F.3d at 938 (citations omitted).

§ 702; *Schroeder v. Dep't of Veterans Affairs*, No. 3:08-cv-351 (MRK), 2009 WL 1531953, at *1 (D. Conn. 2009).

On the basis of the Eighth Circuit's holding in *Raz*, therefore, the Court concludes that it has subject matter jurisdiction over Hussein's direct constitutional claims, insofar as Hussein seeks injunctive relief.³ Nonetheless, the Court agrees with Judge Rau that Hussein's constitutional claims must be dismissed for the alternative reason that they fail to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). As the Supreme Court has observed, 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) (quotation and citation omitted). In order to meet this requirement, the plaintiff must plead facts such that the court can draw "a reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citation omitted). This "plausibility" standard requires showing more than a "sheer possibility that a defendant has acted unlawfully." *Id.* Bare assertions, without more, "will not suffice." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

Here, Hussein's SAC fails to plausibly connect Defendants to any of the actions he alleges violated his constitutional rights. As the magistrate judge observed, the SAC is composed primarily of

³ One exception to this holding is for Hussein's claim under the Fourteenth Amendment. As the magistrate judge properly recognized, the Fourteenth Amendment applies only to state action, and the SAC lists only federal defendants. *See Kills Crow v. United States*, 451 F.2d 323, 325 (8th Cir. 1971). Accordingly, that amendment is inapplicable in this case and Hussein's Fourteenth Amendment claim must be dismissed.

"conclusory allegations and bare assertions with little to no factual support." (R&R at 19.) In particular, despite alleging that Defendants are responsible for the wrongs he says have been perpetrated against him, Hussein provides absolutely no facts that-even if true-would allow a jury to conclude as much. To avoid needless repetition, the Court will not provide a detailed analysis of the SAC's factual deficiencies here-the R&R has done so accurately and comprehensively. (See R&R at 18-22.) It is enough simply to note that, despite its great length, the SAC fails to suggest a "reasonable inference that the defendant[s are] liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Absent such a connection, Hussein's complaint fails to state any constitutional claim upon which relief can be granted, and the pertinent counts must be dismissed.

2. Alleged Statutory Violations

In addition to his claims arising directly under the Constitution, Hussein seeks relief under three civil rights statutes (42 U.S.C. §§ 1981, 1983, and 1985), and the Privacy Act, which generally prohibits the unauthorized disclosure of personal records by a government agency. See 5 U.S.C. § 552a(b). As to the civil rights claims, the magistrate judge concluded that each should be dismissed because the statutes cited by Hussein do not apply to the United States or its officers. (See R&R at 10.) Because Hussein makes no specific (or, as best the Court can tell, unspecific) objection to this conclusion, the Court will review it for clear error. See *Dunnigan*, 2017 WL 825200, at *3. The Court finds none here. It is well-settled that §§ 1981 and 1983 are limited to actions taken "under color of state law," which by its terms

excludes actions of the United States or its officers made pursuant to federal authority. *See, e.g., Dotson v. Friesa*, 398 F.3d 156, 162 (2d Cir. 2005); *Davis v. United States*, 439 F.2d 1118, 1119 (8th Cir. 1971). Likewise, the Eighth Circuit has concluded that the United States – the real defendant in interest here – is not subject to suit under § 1985. *See Mousseaux v. United States*, 28 F.3d 786, 787 (8th Cir. 1994). Accordingly, the Court agrees that these claims must be dismissed.

Turning to the Privacy Act claim, the Court agrees with Judge Rau that Hussein's claim is barred because the SAC is devoid of allegations from which the Court can determine whether the applicable statute of limitations has been met. The Act requires that any suit must be brought "within two years from the date on which the cause of action arises" or, where the agency has "willfully misrepresented" material information, "within two years after discovery by the individual of the misrepresentation." 5 U.S.C. § 552a(g)(5). While the Court observes that statutes of limitation are not typically jurisdictional, *Logan v. United States*, 978 F.2d 1263 (mem.), 1992 WL 320977, at *1 (8th Cir. 1992), unique considerations arise when the limitations period acts as a waiver of sovereign immunity. In such circumstances, courts have recognized that the government is often consenting to suit for a limited period of time only, at the expiry of which its immunity "snaps back" into place. *See, e.g., Lehman v. Nakshian*, 453 U.S. 156, 160 (1981) (noting that the "terms of [the United States] consent to be sued in any court define that court's jurisdiction to entertain the suit") (quotation and citation omitted). Where sovereign immunity intrudes upon the limitations period analysis, failure to properly plead

compliance with that limitations period can give rise to a Rule 12(b)(1) motion. See Fed. R. Civ. P. 8(a)(1) (requiring that a complaint contain "a short and plain statement of the grounds for the court's jurisdiction").

In the context of the Privacy Act, courts have generally determined that the relevant limitations period is jurisdictional in nature.⁴ See *Diliberti v. United States*, 817 F.2d 1259, 1262 (7th Cir. 1987) (holding that plaintiffs "failure to file suit within the time period specified in § 552a(g)(5) deprives the federal courts of subject matter jurisdiction over the action"); *Flowers v. Exec. Office of the President*, 142 F. Supp. 2d 38, 44-45 (D.D.C. 2001). As such, Hussein must assert facts sufficient to allow the Court to determine from the face of the complaint whether the limitations period has been complied with before it can exercise jurisdiction over the claim. As the magistrate judge properly recognized, Hussein has failed to meet this requirement—there is simply no information from which the Court can make a clear determination of when his Privacy Act claim arose. Accordingly, the Court can only conclude that

⁴ There is some debate as to whether the limitations period set forth in 5 U.S.C. § 552a(g)(5) acts as a jurisdictional bar, and at least one circuit has concluded it is not. See *Rouse v. US Dep't of State*, 567 F.3d 408, 416 (9th Cir. 2009). The practical effect of this circuit split is limited in this case, however, because the Court concludes that even if § 552a(g)(5) is not jurisdictional Hussein's claim would fail under Rule 12(b)(6). As the magistrate judge correctly noted, Hussein's Privacy Act allegations "provide[] no particularized facts about what protected information was disclosed, when the disclosure occurred, or which agency allegedly disclosed the information. Furthermore, Hussein provides no reasonable connection between the alleged disclosure and any alleged harms." (R&R at 18.)

Hussein has failed to properly allege that this Court has subject matter jurisdiction over that claim, and it must be dismissed.

C. Plaintiff's Mail Fraud Claim

Magistrate Judge Rau recommended that Plaintiffs civil mail fraud claim, brought pursuant to 18 U.S.C. § 1708, be dismissed because there is no private cause of action under that statute. (R&R at 12.) In Count VII of the SAC, Hussein alleges that Defendants stole his mail, and seeks damages resulting from that theft. The magistrate judge correctly recognized that a federal criminal statute does not automatically give rise to a private civil claim, and observed that courts are reluctant to imply private causes of action absent "clear indication" of Congressional intent. (See R&R at 13 (quoting *Wisdom v. First Midwest Bank*, 167 F.3d 402, 407-08 (8th Cir. 1999)).) In keeping with decisions from several other courts, Judge Rau concluded that no private cause of action exists under 18 U.S.C. § 1708. (See *id.* at 14 (citing cases).)

In reviewing Hussein's Objections, the Court notes that at no point does he question the magistrate judge's legal analysis on this point. Rather, he argues in effect that his mail fraud claim should be understood as arising under the Federal Tort Claim Act ("FTCA"), 28 U.S.C. § 2671 *et seq.* (See Pl.'s Obj. [Doc. No. 37] at 6-7.) This is not how the claim is pleaded in the SAC, however, and it is axiomatic that a complaint cannot be amended by the briefs filed in opposition to a dispositive motion.⁵ See

⁵ In any event, for the reasons discussed *infra* in Part III.D, Hussein's mail fraud claim would be dismissed even under the FTCA, because he has failed to plead exhaustion of

Morgan Distrib. Co. v. Unidynamic Corp., 868 F.2d 992, 995 (8th Cir. 1989); *Shoots v. iQor Holdings US Inc.*, No. 15-cv-563 (SRN/SER), 2016 WL 6090723, at *4 (D. Minn. Oct. 18, 2016). Because Hussein makes no direct objection to the magistrate judge's legal conclusions, the Court reviews for clear error only. *See Dunnigan*, 2017 WL 825200, at *3.

Upon that review, the Court agrees with the magistrate judge that § 1708 does not give rise to a private right of action, and that Hussein's claim must accordingly fail on that basis. The Court respectfully differs from the magistrate judge in one particular, however. While Judge Rau concluded that the lack of a cause of action divested this Court of its subject matter jurisdiction (making dismissal proper under Rule 12(b)(1)), "[d]eterminations that a federal statute does not provide a private right of action are typically subject to dismissal under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim." *Fair v. Verizon Commc'ns Inc.*, 621 F. App'x 52, 53 (2d Cir. 2015); *see also Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) (discussing practical differences between dismissal under Rules 12(b)(1) and 12(b)(6)). Accordingly, the Court will modify the R&R so as to dismiss Count VII for failure to state a claim upon which relief can be granted.

D. Plaintiff's Tort Claims

In addition to his various other claims, Hussein asserts various tort claims against the Defendants, including battery, invasion of privacy, false light, defamation, and intentional infliction of emotional distress. In each case, Hussein's claims

administrative remedies.

arise under the FTCA, which allows suits against the United States by those who were injured by the negligent acts or omissions of any government employee acting within the scope of their duties. See 28 U.S.C. § 1346(b); *Hinsley v. Standing Rock Child Protective Servs.*, 516 F.3d 668, 671-72 (8th Cir. 2008). The magistrate judge recommended that Hussein's tort claims be dismissed for lack of subject matter jurisdiction, however, because he fails to plead exhaustion of administrative remedies, which is a prerequisite to suit under the FTCA. See 28 U.S.C. § 2675(a); *McNeil v. United States*, 508 U.S. 106, 107 (1993).

The Court agrees. At no point in the SAC does Hussein indicate that he has presented his claims to the appropriate federal agencies, and that those claims have been denied in writing. See 28 U.S.C. § 2675(a). Without such allegations, the complaint is not in conformity with § 2675(a), and "conformity with § 2675(a) is a jurisdictional term of the FTCA's limited waiver of sovereign immunity." *Mader v. United States*, 654 F.3d 794, 808 (8th Cir. 2011). Although the Court notes that Hussein has attached various exhibits to his Objections, which he claims show exhaustion of administrative remedies, it is clear that these documents are unrelated to any tort claims. (See, e.g. Pl.'s Obj, Ex. 2 (response from Department of Homeland Security relating to FOIA request).) In any event, to the extent these documents were not presented to the magistrate judge, they need not be considered here. See *Nunn v. Hammer*, No. 16-cv-2693 (SRN/HB), 2016 WL 5477072, at *3 (D. Minn. Sept. 28, 2016).

Because Hussein has thus failed to allege exhaustion of administrative remedies, his FTCA claims must be dismissed for lack of subject matter

jurisdiction.

IV. ORDER

Based on the foregoing, and all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Plaintiff's Objections [Doc. No. 37] to the Magistrate Judge's March 3, 2017 Report and Recommendation are **OVERRULED**;
2. The Court **ADOPTS** the Report and Recommendation [Doc. No. 35] as modified;
3. Defendants' Motion to Dismiss [Doc. No. 20] is **GRANTED**; and
4. Plaintiff's Second Amended Complaint [Doc. No. 18] is **DISMISSED** without prejudice.

Dated: May 10, 2017

s/ Susan Richard Nelson
SUSAN RICHARD NELSON
United States District Judge