IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ARMONI MASUD JOHNSON, : Civil No. 1:23-CV-534 : Plaintiff, : : (Chief Judge Brann)

v . : : (Magistrate Judge Carlson) DEPUTY MIRARCHI, et al., :

: Defendants. :

REPORT AND RECOMMENDATION I. Statement of Facts and of the Case This is a prisoner civil rights case filed by the pro se plaintiff, Armoni Johnson, a state inmate incarcerated in the Pennsylvania Department of Corrections ("DOC") at the State Correctional Institution at Coal Township. Johnson brings his claims pursuant to 42 U.S.C. § 1983, alleging that the defendants—DOC correctional staff at SCI Coal Township—v iolated his First Amendment rights when he was unable to make copies in the law library using a cash slip, which he asserts was retaliatory and designed to hinder his access to the courts. He also asserts a claim of civil conspiracy. (Doc. 1-2). On this score, Johnson's complaint a sserts that he had ongoing civil litigation in both the Commonwealth Court of Pennsylvania and the Middle District of

2 Pennsylvania in August of 2022. (Doc. 1-2, ¶ 1). Johnson claims that sometime in September of 2022, he was told by the law librarian at the institution that he was not permitted to make copies using a cash slip, but rather must purchase a card that would be used to make copies in accordance with DOC policies. (Id., ¶ 2). The complaint asserts that the law librarian was directed by Defendants Mirarchi and McGinley to stop allowing inmates to use cash slips, and that this order was given in retaliation for Johnson's lawsuits that he had filed in both state and federal court. (Id., ¶¶ 2-3). Johnson claims that because of his inability to make copies, he was forced to request extensions of time from the courts, and that "non-frivolous meritorious issues" in one of his laws uits was dismissed. (Id., ¶¶ 24, 30).

Johnson filed a grievance relating to this issue, which was denied by Defendant Mirarchi on initial review, and the appeal to the facility manager was denied by Defendant McGinley. (Id., ¶ 3; Doc. 1-2, Exs. 2, 9). In this grievance, Johnson challenged the DOC's policy as unconstitutional but, notably, did not name any of the individual defendants in his grievance. (Id., Ex. 2, at 12). Rather, his complaint in his grievance simply stated in a conclusory fashion that because of the policy, he was unable to make copies for two months, and he requested one million dollars as relief. (Id.) Johnson

filed this lawsuit in the Northumberland County Court of Common Pleas against Mirarchi, McGinley, and two individuals identified as law librarians—

3 Bahner and Rosini. (Doc. 1-2). The defendants subsequently removed the complaint to this court and filed a motion to dismiss the complaint. (Docs. 1, 3). These defendants argue that Johnson has failed to state a claim against them, and further, that he has failed to exhaust his administrative remedies under the Prison Litigation Reform Act ("PLRA"). This motion has been briefed and is ripe for resolution. (Docs. 7, 14, 18). After consideration, we conclude that Johnson has failed to exhaust his administrative remedies, and further, has failed to state a constitutional claim against the defendants for violating his First Amendment rights and for civil conspiracy. Accordingly, for the following reasons, we will recommend that the motion to dismiss be granted. II. Discussion

A. Motion to Dismiss – Standard of Review A motion to dismiss tests the legal sufficiency of a complaint. It is proper for the court to dismiss a complaint in accordance with Rule 12(b)(6) of the Federal Rules of Civil Procedure only if the complaint fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). With respect to this benchmark standard for the legal sufficiency of a complaint, the United States Court of Appeals for the Third Circuit has aptly noted the evolving standards governing pleading practice in federal court, stating that:

Standards of pleading have been in the forefront of jurisprudence in recent years. Beginning with the Supreme Court's opinion in Bell

4 Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), continuing with our opinion in Phillips [v. County of Allegheny, 515 F.3d 224, 230 (3d Cir. 2008)], and culminating recently with the Supreme Court's decision in Ashcroft v. Iqbal, BU.S.B, 129 S. Ct. 1937 (2009), pleading standards have seemingly shifted from simple notice pleading to a more heightened form of pleading, requiring a plaintiff to plead more than the possibility of relief to survive a motion to dismiss. Fowler v. UPMC Shadyside, 578 F.3d 203, 209-10 (3d Cir. 2009).

In considering whether a complaint fails to state a claim upon which relief may be granted, the court must accept as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom are to be construed in the light most favorable to the plaintiff. Jordan v. Fox, Rothschild, O'Br ien & Frankel, Inc., 20 F.3d 1250, 1261 (3d Cir. 1994). However, a court "need not credit a complaint's bald assertions or legal conclusions when deciding a motion to dismiss." Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997). Additionally, a court need not "assume that a . . . plaintiff can prove facts that the . . . plaintiff has not alleged." Associated Gen. Contractors of Cal. v. California State Council of Carpenters, 459 U.S. 519, 526 (1983). As the Supreme Court held in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), in order to state a valid cause of action, a plaintiff must provide some factual grounds for relief which "r equires more than labels and conclusions, and a formulaic recitation of the elements of a cause of actions will not do." Id., at 555. "Factual a llegations must be enough to raise a right to relief above the speculative level." Id.

5 In keeping with the principles of Twombly, the Supreme Court has underscored that a trial court must assess whether a complaint states facts upon which relief can be granted when ruling on a motion to dismiss. In Ashcroft v. Iqbal, 556 U.S. 662 (2009), the Supreme Court held that, when considering a motion to dismiss, a court should "begin by identify ing pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." Id., at 679. According to the Supreme Court, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id., at 678. Rather, in conducting a review of the adequacy of a complaint, the Supreme Court has advised trial courts that they must:

[B]egin by identifying pleadings that because they are no more than conclusions are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief. Id., at 679.

Thus, following Twombly and Iqbal, a well-pleaded complaint must contain more than mere legal labels and conclusions; it must recite factual allegations sufficient to raise the plaintiff's claime d right to relief beyond the level of mere speculation. As the United States Court of Appeals for the Third Circuit has stated:

[A]fter Iqbal, when presented with a motion to dismiss for failure to state a claim, district courts should conduct a two-part analysis. First, the factual and legal elements of a claim should be separated. The

6 District Court must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions. Second, a District Court must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a "plausible claim for relief." In other words, a complaint must do more than allege the plaintiff's entitlement to relief. A complaint has to "show" such an entitlement with its facts. Fowler, 578 F.3d at 210-11.

As the Court of Appeals has observed: The Supreme Court in Twombly set forth the "plausibility" standard for overcoming a motion to dismiss and refined this approach in Iqbal. The plausibility standard requires the complaint to allege "enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570, 127 S. Ct. 1955. A complaint satisfies the plausibility standard when the factual pleadings "allow[ ] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 129 S. Ct. at 1949 (citing Twombly, 550 U.S. at 556, 127 S. Ct. 1955). This standard requires showing "more than a sheer possibility that a defendant has acted unlawfully." Id. A complaint which pleads facts "merely consistent with" a defendant's liability, [ ] "stops short of the line between possibility and plausibility of 'entitlement of relief.' " Burtch v. Milberg Factors, Inc., 662 F.3d 212, 220-21 (3d Cir. 2011), cert. denied, 132 S. Ct. 1861 (2012).

In practice, consideration of the legal sufficiency of a complaint entails a three-step analysis:

First, the court must "tak[e] note of the elements a plaintiff must plead to state a claim." Iqbal, 129 S. Ct . at 1947. Second, the court should identify allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth." Id., at 1950. Finally, "where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief."

7 Santiago v. Warminster Twp., 629 F.3d 121, 130 (3d Cir. 2010) (quoting Iqbal, 129 S. Ct. at 1950).

In considering a motion to dismiss, the court generally relies on the complaint, attached exhibits, and matters of public record. Sands v. McCormick, 502 F.3d 263, 268 (3d Cir. 2007). The court may also consider "undisputedly authentic document[s] that a defendant attached as an exhibit to a motion to dismiss if the plaintiff's claims are based on the [atta ched] documents." Pension Benefit Guar. Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir. 1993). Moreover, "documents whose contents are alleged in the complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered." Pryor v. Nat'l Collegiate Athletic Ass'n, 288 F.3d 548, 560 (3d Cir. 2002); see also U.S. Express Lines, Ltd. v. Higgins, 281 F.3d 382, 388 (3d Cir. 2002) (holding that "[a]lthough a district court may not consider matters extraneous to the pleadings, a document integral to or explicitly relied upon in the complaint may be considered without converting the motion to dismiss in one for summary judgment"). However, the court may not rely on other parts of the record in determining a motion to dismiss, or when determining whether a proposed amended complaint is futile because it fails to state a claim upon which relief may be granted. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994).

8 B. The Defendants' Motion Should be Granted. As we have explained, Johnson asserts claims under 42 U.S.C. § 1983 for violation of his rights under the First Amendment, as well as a civil conspiracy claim. However, for the following reasons, we conclude that Johnson has failed to exhaust his administrative remedies under the PLRA. Further, even if he had properly exhausted his claims, he has failed to state a claim against the defendants for violations of his constitutional rights.

1. Johnson Failed to Exhaust his Administrative Remedies under

the PLRA. Under the PLRA, a prisoner must pursue all avenues of relief available within a prison's grievance system before bringing a federal civil rights action concerning prison conditions. 42 U.S.C. § 1997e(a); Booth v. Churner, 206 F.3d 289, 291 (3d Cir. 2000). This "exhaustion requirement applie s to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." Porter v. Nussle, 534 U.S. 516, 532 (2002). The exhaustion requirement is mandatory. Williams v. Beard, 482 F.3d 637, 639 (3d Cir. 2007); see also Booth v. Churner, 532 U.S. 731, 741 (2001) (holding that the exhaustion requirement of the PLRA applies to grievance procedures "regardless of the relief offered through

administrative procedures"); Nyhuis v. Reno, 204 F.3d 65, 67 (3d Cir. 2000) (same). Moreover, "it is beyond the power of [any] court ... to excuse compliance with the exhaustion requirement." Nyhuis, 204

9 F.3d at 73 (quoting Beeson v. Fishkill Corr. Facility, 28 F. Supp. 2d 884, 894-95 (S.D.N.Y. 1998)).

To exhaust administrative remedies, an inmate must comply with all applicable grievance procedures and rules. Spruill v. Gillis, 372 F.3d 218, 231 (3d Cir. 2004). The PLRA requires not only technical exhaustion of administrative remedies, but also substantial compliance with procedural requirements. Id. at 227- 32; see also Nyhuis, 204 F.3d at 77-78. A procedural default by the prisoner bars the prisoner from bringing a claim in federal court unless equitable considerations warrant review of the claim. Spruill, 372 F.3d at 227-32; see also Camp v. Brennan, 219 F.3d 279 (3d Cir. 2000).

An inmate's failure to comply with the exhaustion requirement prescribed by the PLRA is an affirmative defense, Jones v. Bock, 549 U.S. 199, 216 (2007), and the burden of proving a failure to exhaust rests with the defendants. Brown v. Croak, 312 F.3d 109, 111 (3d Cir. 2002). The Pennsylvania Department of Corrections Inmate Grievance Policy provides for a three-step process that provides inmates with a means of seeking review of problems that may arise during the course of confinement. Pursuant to DC-ADM 804, after an attempt to resolve problems informally, an inmate may submit a written grievance to the institution's Grievance Coordinator for initial review. This must occur within 15 days after the events upon which the claims are based. "The text of the grievance must be legible,

10 understandable, and presented in a courteous manner. The inmate must include a statement of the facts relevant to the claim. The statement of facts shall include the date, approximate time and location of the event(s) that gave rise to the grievance. The inmate shall identify individuals directly involved in the event(s)." DC-ADM 804, § 1(A)(11).

Within 15 days of an adverse decision by the Grievance Coordinator, an inmate may appeal to the Facility Manager of the institution. Thereafter, within 15 days of an adverse decision by the Facility Manager, the inmate may file a final appeal to the Secretary's Office of Inmate Grievances and Appeals. An appeal to final review cannot be completed unless an inmate complies with all established procedures. Thus, an inmate must exhaust all three levels of review and comply with all procedural requirements of the grievance review process in order to fully exhaust an issue. See Booth, 206 F.3d at 293 n.2 (outlining Pennsylvania's grievance review process); Ingram v. SCI Camp Hill, 448 F. App'x 275, 279 (3d Cir. 2011) (same). Here, our review of the grievance paperwork attached to the plaintiff's complaint reveals leads us to conclude that his claims are unexhausted. At the outset, we note that there is no indication that Johnson ever appealed his grievance to final review. Rather, all that is attached are the initial review response and the facility manager's response to Johnson's appeal. (D oc. 1-2, Exs. 2, 9). As we have explained, an inmate must exhaust all three levels of review. Accordingly, to the

11 extent that Johnson failed to appeal his grievance to final review, this grievance has not been properly exhausted. Further, as the defendants point out, Johnson did not name any of the defendants in his grievance. While the PLRA does not impose a "name all defendants" requi rement, Johnson did not name any person in his grievance. Instead, his grievance complains of the allegedly unconstitutional policy of prohibiting the use of cash slips to make copies.

Indeed, on this score, the initial review response indicates that Johnson's grievance stated in relevant part:

Complaint: I'm attacking the uncons titutional policy of the facility refusing to let inmates make copies with the cash slips. I have incurred injury from such policy and was retaliated against for having lawsuits pending. This is a irreparable issue. I don't want to talk about it. Rather I was denied to make copies for over 2 months and arbitrarily denied, thus access to court violation also. Relief, I seek 1 million dollars, yall will be hearing from me in court. (Doc. 1-2, Ex. 2, at 12). This complaint does nothing to put the institution on notice that any of the defendants, or an individual in particular at all, violated his rights. Johnson instead appears to attack the validity of the policy itself while vaguely asserting that the policy is retaliation for his filing of lawsuits. In our view, this grievance which does not name any of the defendants and was not appealed to final review is, thus, unexhausted. See e.g., Brown v. Wetzel, 2022 WL 4647330, at *8 (M.D. Pa. Sept. 30, 2022) (Kane, J.) (finding a grievance unexhausted where the grievance did not name three of the named defendants); McNesby v. Heenan, 2017

12 WL 4418421, at *4-5 (M.D. Pa. Oct. 5, 2017) (hold that the inmate procedurally defaulted his claim when he failed to explain why he did not name the defendant in his grievance). However, as we will explain, even if Johnson' s grievance was properly exhausted, we conclude that his claims fail as a matter of law.

2. Johnson's Constitutional Claims Fail. Johnson asserts civil rights claims pursuant to § 1983, alleging that the defendants violated the First Amendment when they retaliated against him for filing lawsuits, and that his access to the courts was hindered when he was unable to make copies for two months. He also asserts a civil conspiracy claim against these defendants. However, Johnson has failed to show the personal involvement of the named defendants, a prerequisite to a § 1983 claim. Moreover, Johnson's constitutional claims as currently pleaded fail as a matter of law. At the outset, the defendants argue that Johnson has not adequately pleaded the personal involvement of each of the defendants as required for liability under § 1983. Indeed, in considering claims brought against supervisory officials such as Mirarchi and McGinley arising out of alleged constitutional violations, the courts recognize that prison supervisors may be exposed to liability only in certain, narrowly defined circumstances.

13 At the outset, it is clear that a claim of a constitutional deprivation cannot be premised merely on the fact that the named defendants were prison supervisors when the incidents set forth in the

complaint occurred. Quite the contrary, to state a constitutional tort claim the plaintiff must show that the supervisory defendants actively deprived him of a right secured by the Constitution. Morse v. Lower Merion School Dist., 132 F.3d 902 (3d Cir. 1997); see also Maine v. Thiboutot, 448 U.S. 1 (1980). Constitutional tort liability is personal in nature and can only follow personal involvement in the alleged wrongful conduct shown through specific allegations of personal direction or of actual knowledge and acquiescence in the challenged practice. Robinson v. City of Pittsburgh, 120 F.3d 1286 (3d Cir. 1997). In particular, with respect to prison supervisors, it is well established that: "A[n individual government] defendant in a civil rights action must have personal involvement in the alleged wrongdoing; liability cannot be predicated solely on the operation of respondeat superior. Personal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence." Evancho v. Fisher, 423 F.3d 347, 353 (3d Cir. 2005) (quoting Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988)).

As the Supreme Court has observed: Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of respondeat superior.... See Monell v. New York City Dept. of Social Servs., 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) (finding no vicarious

14 liability for a municipal "person" under 42 U.S.C. § 1983); see also Dunlop v. Munroe, 7 Cranch 242, 269, 3 L.Ed. 329 (1812) (a federal official's liability "will only result fro m his own neglect in not properly superintending the discharge" of hi s subordinates' duties); Robertson v. Sichel, 127 U.S. 507, 515-516, 8 S.Ct. 1286, 3 L.Ed. 203 (1888) ("A public officer or agent is not responsible for the misfeasances or position wrongs, or for the nonfeasances, or negligences, or omissions of duty, of the subagents or servants or other persons properly employed by or under him, in the discharge of his official duties"). Because vicarious liability is inapplicable to Bivens and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution. Iqbal, 556 U.S. at 676.

Applying these benchmarks, courts have frequently held that, in the absence of evidence of supervisory knowledge and approval of subordinates' actions, a plaintiff may not maintain an action against supervisors based upon the misdeeds of their subordinates. O'Connell v. Sobina, No. 06-238, 2008 WL 144199, * 21 (W.D. Pa. Jan. 11, 2008); Neuburger v. Thompson, 305 F. Supp. 2d 521, 535 (W.D. Pa. 2004). Rather, "[p]ersonal involvement mu st be alleged and is only present where the supervisor directed the actions of supervisees or actually knew of the actions and acquiesced in them." Jetter v. Beard, 183 F. App'x 178, 181 (3d Cir. 2006) (emphasis added).

To the extent that an inmate's supervisory liability claims rest on the premise that prison supervisors did not after-the-fact act favorably upon past grievances, this claim also fails. An inmate cannot sustain a constitutional tort claim against prison supervisors based solely upon assertions that officials failed to adequately

15 investigate or respond to his past grievances. Inmates do not have a constitutional right to a prison grievance system. Speight v. Sims, 283 F. App'x 880 (3d Cir. 2008) (citing Massey v. Helman, 259 F.3d 641, 647 (7th Cir. 2001) ("[T]he existence of a prison grievance procedure confers no liberty interest on a prisoner")). Consequently, dissatisfaction with a response to an inmate's grievances does not support a constitutional claim. See Alexander v. Gennarini, 144 F. App'x 924 (3d Cir. 2005) (involvement in post-incident grievance process not a basis for § 1983 liability); Pryor-El v. Kelly, 892 F. Supp. 261, 275 (D. D.C. 1995) (holding that prison officials' failure to comply w ith grievance procedure is not actionable because prison grievance procedure does not confer any substantive constitutional rights upon prison inmates); see also Cole v. Sobina, No. 04-99J, 2007 WL 4460617, at *5 (W.D. Pa. Dec. 19, 2007) ("[M]ere concurrence in a prison administrative appeal process does not implicate a constitutional concern").

As the Third Circuit observed when disposing of a similar claim by another inmate:

Several named defendants, such as the Secretaries of the Department of Corrections or Superintendents, were named only for their supervisory roles in the prison system. The District Court properly dismissed these defendants and any additional defendants who were sued based on their failure to take corrective action when grievances or investigations were referred to them. See Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988) (defendant in a civil rights action must have personal involvement in the alleged wrongs; liability cannot be predicated solely on the operation of respondeat superior); see also Antonelli v. Sheahan, 81 F.3d 1422, 1430 (7th Cir. 1996) (state's inmate grievance procedures

16 do not give rise to a liberty interest protected by the Due Process Clause). Pressley v. Beard, 266 F. App'x 216, 218 (3d Cir. 2008). Indeed, as to such claims, the Court of Appeals has held that summary dismissal is appropriate "because there is no apparent obligation for prison officials to investigate prison grievances." Paluch v. Sec'y Pennsylvania Dept. Corr., 442 F. App'x 690, 695 (3d Cir. 2011) (citing Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 382 (2d Cir. 1973)).

In the instant case, it is clear at the outset that Johnson has not adequately pleaded the personal involvement of Defendants Bahner and Rosini. Despite identifying these individuals as law librarians in the caption of his complaint, Johnson's complaint does not allege any specific actions by either of these individuals. Rather, the complaint contains one sentence alleging that: "plaintiff was told by law librarian around or about the end of August-2022 that they were ordered by defendant[s] [Mirarchi and McGinley] to stop allowing inmates to make copies by the use of cash slips . . . ." (Doc. 1-2, ¶ 2). This single allegation, in our view, is insufficient to establish the personal involvement of either Defendant Bahner or Defendant Rosini in the alleged constitutional violations.

With respect to Defendants Mirarchi and McGinley, the complaint, in a vague fashion, alleges that these two supervisory defendants directed a law librarian to prohibit inmates from using cash slips to make copies of materials. It also asserts

17 that these defendants denied Johnson's gr ievances. As for his claim regarding the denial of his grievances, it is clear that these supervisory defendants cannot be held liable for their participation in the grievance process. See Speight, 283 F. App'x 880; Alexander, 144 F. App'x 924. With respect to Johnson's allegation that these individuals directed a law librarian to prohibit the use of cash slips, we conclude that this allegation would be sufficient to state the requisite personal involvement of these defendants to the extent it alleges that Mirarchi and McGinley personally directed a subordinate to commit the alleged constitutional violation. However, even if Johnson has pleaded the requisite personal involvement of these defendants, we conclude that his First Amendment claims fail as a matter of law. Regarding his retaliation claim, Johnson avers that he was retaliated against by all of the defendants when they denied him the ability to make copies, which he asserts was retaliatory for the lawsuits he had filed in both state and federal court. In order to state a claim of retaliation under the First Amendment, a plaintiff must show: "(1) that [he] engaged in a protected activ ity, (2) that defendants' retaliatory action was sufficient to deter a person of ordinary firmness from exercising his or her rights, and (3) that there was a causal connection between the protected activity and the retaliatory action." Lauren W. ex rel. Jean W. v. DeFlaminis, 480 F.3d 259, 267 (3d Cir. 2007) (citing Thomas v. Independence Twp., 463 F.3d 285, 296 (3d Cir. 2006)). Stated differently, the plaintiff must demonstrate that the protected speech was "a

18 'substantial factor' in the alleged retalia tory action." McAndrew v. Bucks County Bd. Of Comm'rs, 183 F.Supp.3d 713, 731 (E.D. Pa. 2016) (citing Gorum v. Sessoms, 561 F.3d 179, 184 (3d Cir. 2009)). If a plaintiff makes such a showing, the burden then shifts to the defendant to show that, even if the protected speech had not taken place, it would have taken the same action. Id.

With respect to the third element, there are three ways in which a plaintiff can establish causation for a First Amendment retaliation claim, showing: "(1) an 'unusually suggestive temporal proximi ty' between the speech and the alleged retaliatory conduct; (2) a 'pattern of antagoni sm coupled with timing'; or (3) that the 'record as a whole' permits the trier of fact to infer causation." McAndrew, 183 F.Supp.3d at 737 (quoting DeFlaminis, 480 F.3d at 267). Additionally, an unusually suggestive temporal proximity, by itself, can be enough to infer causation. LeBoon v. Lancaster Jewish Community Center Ass'n, 503 F.3d 217, 232 (3d Cir. 2007) (citing Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 273-74, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001)). However,

While " 'suggestive temporal proximity ' is relevant to establishing a causal link between protected conduct and retaliatory action ... in First Amendment retaliation cases," Ambrose v. Twp. of Robinson, Pa., 303 F.3d 488, 494 (3d Cir. 2002) (citations omitted) (emphasis added), it is not dispositive of the issue. See DeFlaminis, 480 F.3d at 267. Rather, a plaintiff may also establish the requisite causal connection by showing "a pattern of antagonism coupled with timing to establish a causal link." Id. (citing Krouse v. American Sterilizer Co., 126 F.3d 494, 503–04 (3d Cir. 1997); Woodson v. Scott Paper Co., 109 F.3d 913, 920–21 (3d Cir. 1997)). The plaintiff may establish that causal link by offering evidence

19 which "gleaned from the record as a whole" could lead a reasonable fact-finder to infer causation. Id. (citing Farrell v. Planters Lifesavers Co., 206 F.3d 271, 281 (3d Cir. 2000)). Finally, Plaintiff is not required to show "but for causation;" rather , she is required to show that the "exercise of free speech rights play ed 'some substantial role' in the employer's decision." Marrero v. Camd en Cty. Bd. of Social Services, 164 F.Supp.2d 455, 469 (D.N.J. 2001) (citing Suppan, 203 F.3d at 236). Malone v. Economy Borough Municipal Authority, 669 F.Supp.2d 582, 603 (W.D. Pa. 2009). In the instant case, the defendants do not dispute that Johnson's lawsuits constitute protected activity for purposes of the First Amendment. However, they assert that Johnson has not shown that his inability to make copies constituted an adverse action, or that any adverse action was causally connected to his protected activity. We conclude that even if the inability to make copies constitutes an adverse action in this case, Johnson has not pleaded facts from which we can infer a causal connection between his protected activity and the adverse action. At the outset, although the inability to make copies standing alone appears to amount to only a de minimis action that would not be actionable under the First Amendment, see Miskovitch v. Hostoffer, 721 F.Supp.2d 389, 396 (W.D. Pa. 2010), Johnson has alleged that his inability to make copies resulted in missing filing deadlines in his civil actions. Accordingly, at the motion to dismiss stage, we conclude that Johnson has sufficiently alleged an adverse action. However, there are

20 no facts alleged in the complaint from which we can conclude that the adverse action was causally connected to his protected activity. On this score, Johnson's complaint indi cates his civil lawsuits were filed in 2018 and 2021 in the Middle District of Pennsylvania, and in 2022 in the Commonwealth Court of Pennsylvania. (Doc. 1-2, at 10). Specifically, Johnson's 2021 federal lawsuit involved Superintendent McGinley. (Id.) However, it is undisputed from policy attached to the plaintiff's complaint that the policy regarding copies was implemented in 2017, prior to the filing of any of the plaintiff's lawsuits. (See Doc. 1-2, Ex. 3, at 14). The policy indicates that as of October 2, 2017, inmates would be required to purchase a venda-card in order to make copies. (Id.) By amendment dated January 1, 2018, this policy was updated to allow for copies using cash slips only if the copies exceeded the forty-five-dollar venda-card maximum. (Id.) Thus, the policy which Johnson himself attached to the complaint completely contradicts his contention that he was prohibited from using cash slips in retaliation for filing his lawsuits. Instead, it is clear that this policy was implicated prior to the filing of any of Johnson's lawsuits, and t hus, its implementation cannot be said to have been retaliatory in relation to his lawsuits. Moreover, while Johnson contends that he had been able to use cash slips to make copies after the policy went into effect, as we have noted, the policy allowed for the use of cash slips in certain

21 circumstances. (Id.) This policy further supports the defendants' contention that the same action would have been taken regardless of Johnson's protected activity. See Starnes v. Butler County Court of Common Pleas, 50 th

Judicial District, 971 F.3d 416, 430 (3d Cir. 2020) (noting that a defendant has the opportunity to rebut a prima facie case of retaliation by showing it would have taken the same action regardless of any

retaliatory motive). Indeed, the defendants assert that regardless of the plaintiff's pending lawsuits, he would have be en denied the use of cash slips to make copies in accordance with the DOC's policy. See Burgos v. Canino, 641 F.Supp.2d 443, 456 (E.D. Pa. 2009) (finding no retaliatory causation where the defendant's actions were taken in accordance with prison policy). In sum, Johnson has not fully and properly exhausted his constitutional claims at the institutional level. Moreover, and more fundamentally, Johnson's First Amendment claim fails as a matter of law because has not alleged enough at this stage to show a causal connection between his protected activity and the defendants' alleged adverse actions. Further, the defendants have shown that the same action would have been taken regardless of Johnson's protected activity. Accordingly, we conclude that this First Amendment retaliation claim fails as a matter of law. We reach a similar conclusion with respect to the plaintiff's access-to-courts claim. A prisoner's ability to bring a claim to the court's attention is a decidedly important interest. Indeed, even the Supreme Court has articulated that "prisoners

22 have a constitutional right of access to the courts." Bounds v. Smith, 430 U.S. 817, 821 (1977). This right of access to the courts enumerated by the Supreme Court, however, is not inherently coupled with "an abstract, freestanding right to a law library or legal assistance." Lewis v. Casey, 518 U.S. 343, 14 (1996). Rather, "meaningful access" to the courts is th e controlling determination for whether a prisoner's right to access the courts has been satisfied. Bounds, 439 U.S. at 823. While there is no constitutional mandate that provides said freestanding right to accessing a law library, Bounds does instruct that the right of access to the courts requires that prisoners receive "ade quate law libraries ..." Id. at 828.

Asserting an actionable claim for denial of access to the courts requires a prisoner to allege that (1) they "lost a ch ance to pursue a 'nonfrivolous' or 'arguable' underlying claim" and (2) they have no av ailable remedy for the lost claim other than the present denial of access action. Rivera v. Monko, 37 F.4th 909, 915 (3rd Cir. 2022) (citing Monroe v. Beard, 536 F.3d 198, 205 (3rd Cir. 2008)). Most significant is the nonfrivolous nature of the claim allegedly lost. The lost claim must be "more than hope" in orde r to be deemed nonfrivolous. Christopher v. Harbury, 536 U.S. 403, 416 (2002). On this score, Johnson appears to assert that he was denied access to the courts because his inability to make copies resulted in the dismissal of his case in the Commonwealth Court and in his inability to file a motion in his federal case

23 docketed at 3:18-CV-1714. However, the complaint fails to assert facts from which we could conclude that Johnson's claims in these cases were meritorious. Indeed, Johnson fails to describe any of the claims in these civil cases, as well as what motions or claims he was unable to assert and how they were meritorious. Accordingly, at this stage, Johnson has not alleged enough to state a claim for denial of access to the courts. 1 Finally, Johnson asserts a conspiracy claim against the defendants. To the extent that Johnson asserts this claim under § 1983, this claim fails as a matter of law because we have concluded that Johnson has not shown an underlying constitutional violation. See Tarapchak v. Lackawanna Cnty., 173 F.Supp.3d 57, 87 (M.D. Pa. 2016) (dismissing a § 1983 conspiracy claim due to the plaintiff's failure to establish an underlying constitutional violation); White v.

Brown, 408 F. App'x 595, 599 (3d Cir. 2010) (affirming the district court's grant of summary judgment on the plaintiff's conspiracy claims for a failure to establish the underlying constitutional violation).

1 We note that Johnson's brief in opposition a ttempts to assert new claims and to set forth a host of issues in a myriad of state court cases that he claims were a result of being denied access to the courts. (Doc. 14). However, "it is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss." Com. of Pa. ex rel. Zimmerman v. PepsiCo, Inc., 836 F.2d 173, 181 (3d Cir. 1988) (quoting Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1107 (7th Cir.1984), cert. denied, 470 U.S. 1054 (1984)). Accordingly, these assertions are not a basis for permitting this claim to proceed forward.

24 Further, to the extent Johnson is asserting this claim under § 1985(3), this claim fails as a matter of law. At the outset, we note that the reach of § 1985(3) has been carefully defined by the courts. As the Third Circuit has observed, "in Griffin v. Breckenridge, 403 U.S. 88 (1971) ..., the Supreme Court clarified that the reach of section 1985(3) is limited to private conspiracies predicated on 'racial, or perhaps otherwise class based, invidiously discriminatory animus.' Id. at 102." Lake v. Arnold, 112 F.3d 682, 685 (3d Cir. 1997). Thus:

Section 1985(3) permits an action to be brought by one injured by a conspiracy formed "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." 42 U.S.C. § 1985(3). In a line of cases ..., the Supreme Court has made clear what a plaintiff must allege to state a claim under § 1985(3): "(1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is injured in his person or property or deprived of any right or privilege of a citizen of the United States." United Bhd. of Carpenters & Joiners v. Scott, 463 U.S. 825, 828–29 (1983) (citing Griffin, 403 U.S. at 102–03). Farber v. City of Paterson, 440 F.3d 131, 134 (3d. Cir. 2006); See Lake v. Arnold, 112 F.3d 682, 685 (3d Cir. 1997). "[B]ecause § 1985(3) requires the 'intent to deprive of equal protection, or equal privileges and immunities,' a claimant must allege 'some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action' in order to state a claim." Farber, 440 F.3d at 135 (citations omitted) (emphasis in original).

25 In the instant case, Johnson has not alleged some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' actions, as he is required to do under this statute. Farber, 440 F.3d at 135. Moreover, and more fundamentally, presently Johnson's complain t is devoid of any well-pleaded facts whatsoever which would support an inference of some conspiratorial agreement to violate his rights. Instead, this claim simply proceeds based upon the label of conspiracy unadorned by any factual averments. This, too, is a fatal flaw since:

[T]o maintain a civil conspiracy claim, "[b]are conclusory allegations of 'conspiracy' or 'concerted acti

on' will not suffice to allege a conspiracy. The plaintiff must expressly allege an agreement or make averments of communication, consultation, cooperation, or command from which such an agreement can be inferred." Flanagan v. Shively, 783 F. Supp. 922, 928 (M.D. Pa. 1992). The plaintiff's allegations "must be supported by facts bearing out the existence of the conspiracy and indicating its broad objectives and the role each Defendant allegedly played in carrying out those objectives." Id. A plaintiff cannot rely on subjective suspicions and unsupported speculation. Young v. Kann, 926 F.2d 1396, 1405 n.16 (3d Cir. 1991). Whalley v. Blazick, No. 4:18-CV-1295, 2020 WL 1330683, at *6 (M.D. Pa. Mar. 23, 2020). Therefore, Johnson's complaint simp ly fails to state a federal civil rights conspiracy claim and should be dismissed.

While we have found that this complaint fails as a matter of law in its current form, we recognize that pro se plaintiffs often should be afforded an opportunity to amend a complaint before the complaint is dismissed in its entirety, see Fletcher- Hardee Corp. v. Pote Concrete Contractors, 482 F.3d 247, 253 (3d Cir. 2007), unless

26 granting further leave to amend would be futile or result in undue delay. Alston v. Parker, 363 F.3d 229, 235 (3d Cir. 2004). Therefore, it is recommended that the court dismiss this legally deficient complaint but afford the plaintiff an opportunity to either attempt to amend his complaint to state a federal claim within the jurisdiction of this court. III. Recommendation Accordingly, for the foregoing reasons, IT IS RECOMMENDED THAT the defendants' motion to dismiss (Doc. 3), be GRANTED, and the plaintiff's claims should be dismissed without prejudice to the plaintiff endeavoring to correct the defects cited in this report, provided that the plaintiff acts within 20 days of any dismissal order.

The parties are further placed on notice that pursuant to Local Rule 72.3: Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge,

27 however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses, or recommit the matter to the magistrate judge with instructions.

Submitted this 17th day of July 2023.

S/ Martin C. Carlson Martin C. Carlson United States Magistrate Judge