TO: Members of the Troy City Council
FROM: Lori Grigg Bluhm, City Attorney
Christopher J. Forsyth, Assistant City Attorney
DATE: January 31, 2011
SUBJECT: Stickney v. City of Troy et al.

Enclosed please find the order dismissing Hal Stickney's case against the City of Troy and its individual officers. Plaintiff Stickney filed this lawsuit against the City of Troy and some of its individual officers, as well as other defendants from Oakland County, including but not limited to former Prosecutor David Gorcyca, Sheriff Michael Bouchard, and their assistants, and also Dawn Himes, Michael Himes, Shirley Ann Davis and Jimmy Richardson. This complaint, filed in the U.S. District Court for the Eastern District of Michigan, sought seven million dollars in damages, plus fees and costs.

Plaintiff's complaint unsuccessfully alleged that the Troy defendants failed to follow up on allegedly exculpatory evidence, which Stickney claimed led to his prolonged incarceration in Oakland County facilities. He asserted a conspiracy claim (42 U.S.C. Section 1985), a civil rights claim (42 U.S.C. Section 1982); false arrest, malicious prosecution, intentional infliction of emotional distress, a violation of MCL 752.11 and 18 U.S.C. Sections 241 and 242, and five counts against the non-governmental defendants (he argues that they gave false testimony against him, which led to his incarceration, and deprived him of his business relationships).

On April 20, 2010, we filed a motion to dismiss as our first responsive pleading. This motion was based on the fact that the district court conducted a preliminary examination, and found probable cause to proceed with the criminal charges that Stickney was eventually convicted of. We argued that Plaintiff was collaterally estopped from bringing his lawsuit. Plaintiff did not respond to our motion and instead requested that the case be stayed so that he could hire an attorney. The Court granted a stay of proceedings until November 1, 2010. After the stay expired, Plaintiff was granted additional time to respond to our motion. He did not hire an attorney, and did not file any additional pleadings with the Court. Although Plaintiff had failed to respond to our Motion, Magistrate Judge Mark Randon reviewed the merits of our motion, and recommended dismissal of the City and its officers, since Plaintiff failed to state a valid civil rights violation claim. The Magistrate agreed that Plaintiff's complaint was barred because of collateral estoppel. The Magistrate's recommendation of dismissal was adopted by Judge Rosen, who entered the attached order granting our request for dismissal. The case currently remains pending for the other defendants, but is closed as to the Troy defendants.

If you have any questions concerning the above, please let us know.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HAL BRIAN STICKNEY,

Plaintiff,

v.

COUNTY OF OAKLAND, *et al.*,

Defendants.
_____/

Case No. 10-10487
Hon. Gerald E. Rosen
Magistrate Judge Mark A. Randon

ORDER ADOPTING
MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

At a session of said Court, held in
the U.S. Courthouse, Detroit, Michigan
on January 27, 2011

PRESENT: Honorable Gerald E. Rosen
Chief Judge, United States District Court

On January 4, 2011, Magistrate Judge Mark A. Randon issued a Report and Recommendation ("R & R") recommending that the Court grant a motion to dismiss or, alternatively, for summary judgment brought by Defendants City of Troy, Officer David Nordstrom, Captain Keith Frye, and Sergeant Barry Whiteside (collectively, the "Troy Defendants"). Plaintiff did not respond to the Troy Defendants' motion, and neither has he filed objections to the R & R. Upon reviewing the R & R, the Troy Defendants' underlying motion, and the record as a whole, the Court fully concurs in the analysis of the Magistrate Judge, and adopts the R & R in its entirety.

Accordingly,

NOW, THEREFORE, IT IS HEREBY ORDERED that the Magistrate Judge's January 4, 2011 Report and Recommendation is ADOPTED as the opinion of this Court. IT IS FURTHER ORDERED that, for the reasons stated in the R & R, the Troy Defendants' April 20, 2010 motion to dismiss or for summary judgment (docket #26) is GRANTED.

s/Gerald E. Rosen
Chief Judge, United States District Court

Dated: January 27, 2011

I hereby certify that a copy of the foregoing document was served upon counsel of record on January 27, 2011, by electronic mail and upon Hal Brian Stickney, 4830 Marcella, Shelby Township, MI 48317 by ordinary mail.

s/Ruth A. Gunther
Case Manager

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HAL BRIAN STICKNEY,

Plaintiff,

v.

COUNTY OF OAKLAND, DAVID GORCYCA, DAWN HIMES, MICHAEL SCOTT HIMES, DAVID NORDSTROM, DEREK MEINECKE, MICHAEL J. BOUCHARD, FNU SPIKER, CITY OF TROY, KEITH A. FREY, FNU WHITESIDE, RANDALL PRASKI, SHIRLEY ANN DAVIS, and JIMMY RICHARDSON,

Defendants.
_____/

CIVIL ACTION NO. 10-10487

DISTRICT JUDGE GERALD E. ROSEN

MAGISTRATE JUDGE MARK A. RANDON

REPORT AND RECOMMENDATION TO GRANT THE TROY DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM OR, ALTERNATIVELY, FOR SUMMARY JUDGMENT (DKT. NO. 26)

I. INTRODUCTION

Plaintiff, Hal Stickney, proceeding *pro se*, filed this action pursuant to 42 U.S.C.§ 1983 against multiple defendants alleging that they conspired against him in violation of the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments and several state common laws. Plaintiff's claims emanate from his arrest, pre-trial detention and prosecution on two charges of aggravated stalking. Following separate preliminary examinations, a state court judge determined that probable cause existed and ordered Plaintiff to stand trial on both charges. However, the charges were dropped before trial.

Presently before the Court is the motion to dismiss for failure to state a claim or, alternatively, for summary judgment of defendants City of Troy, Officer David Nordstrom, Captain Keith Frye and Sargent Barry Whiteside (collectively "the Troy Defendants'). (Dkt. No. 26) Plaintiff has failed to respond to the motion. Notwithstanding this lack of opposition, **IT IS RECOMMENDED** that the Troy Defendants' motion be **GRANTED** because Plaintiff's case against them is precluded by the state court's finding of probable cause and it fails to state a claim against the Troy Defendants.

II. FACTS

Plaintiff was twice prosecuted by the State of Michigan for aggravated stalking. The alleged victim in both cases was Defendant Dawn Himes ("Himes"), Plaintiff's former girlfriend. (Dkt. No. 36) The first charge arose on August 18, 2005, when Plaintiff alleges that he was arrested by Oakland County Sheriffs for aggravated stalking based upon a complaint filed by Himes, who had previously obtained a Personal Protection Order ("PPO") against him. (Dkt. No. 1, ¶ 19) Plaintiff alleges that Himes obtained the PPO through "misrepresentation, deceit and false statements." *Id.* at. ¶ 18.

After Plaintiff's arrest, he was incarcerated in the Oakland County Jail. He was arraigned the next day but was unable to gain pre-trial release for several months, until May 8, 2006, when his bond was reduced with conditions. *Id.* at 22. According to Plaintiff, a series of arrests – based on allegations by Himes that he had violated his release conditions – and conditional releases ensued until, finally, Plaintiff was arrested and detained on the second aggravated stalking charge on March 20, 2007. *Id.* at ¶¶23-29.

Following separate preliminary examinations, more than a year apart, a state court judge in Michigan found that probable cause had been established to believe that Plaintiff had committed the charged crimes. Plaintiff was, therefore, ordered to stand trial on both charges. Specifically, according to the official online Register of Actions from Oakland County, Michigan,[1] on January 20, 2006, Plaintiff was bound over as charged on one count of aggravated stalking. Plaintiff was also bound over on the second charge of aggravated stalking and for filing a false felony report on May 22, 2007.[2]

Plaintiff alleges that despite his ongoing protestations of innocence and the fact that he provided "Defendants" with documentation of the false charges made by Himes, Michael Himes, Shirley Davis and Jimmy Richardson, "the Defendants conspired to bribe witnesses, impede, hinder, obstruct or defeat due course of justice of the Plaintiff's criminal prosecution, with the intent to deny him Due Process of Law, equal protection of the laws and keep him in jail."[3] *Id.* at ¶¶ 28, 30. Plaintiff does not allege what, if any, specific conduct the individual Troy Defendants engaged in with respect to the conspiracy, or that any of them testified falsely at either of his preliminary examinations.

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[1] The Court can take judicial notice of official court records. *See Lynch v. Leis*, 382 F.3d 642 F.3d 642, 647 n. 5 (6th Cir. 2004). The records regarding Plaintiff may be found at www.oakgov.com/crts0004/main.

[2] Plaintiff was not convicted on either aggravated stalking charge. The register of actions indicates that a "final *nolle prosequi*"on both cases was entered on February 4, 2008.

[3] Plaintiff does not identify the specific defendant(s) to whom he provided documentation or describe the specific role any of the defendants in the conspiracy.

III. ANALYSIS

A. Motion to Dismiss Standard

When ruling on a motion to dismiss pursuant to Fed. R. Civ. P.12(b)(6), the Court must construe the complaint in a light most favorable to the plaintiff and accept all the factual allegations as true. *See Evans-Marshall v. Board of Educ.*, 428 F.3d 223, 228 (6th Cir. 2005); *Rossborough Mfg. Co. v. Trimble*, 301 F.3d 482, 489 (6th Cir. 2002). In doing so, "the court must draw all reasonable inferences in favor of the plaintiff." *DIRECTV, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007). Yet, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). Although a heightened fact pleading of specifics is not required, the plaintiff must bring forth "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Iqbal*, 566 U.S. at 1950.

Though decidedly generous, this standard of review does require more than the bare assertion of legal conclusions. *See Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716, 726 (6th Cir. 1996).

> [A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the complaint's allegations are true.

Twombly, 550 U.S. at 555 (citations omitted). Further, the complaint must "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (abrogated on different grounds by *Twombly*, 550 U.S. 544). In application, a

"complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Lillard*, 76 F.3d at 726 (citation omitted). A court cannot grant a motion to dismiss under Rule 12(b)(6) based upon its disbelief of a complaint's factual allegations. *Wright v. MetroHealth Med. Ctr.*, 58 F.3d 1130, 1138 (6th Cir. 1995).

A *pro se* litigant's complaint is to be construed liberally. *See Middleton v. McGinnis*, 860 F.Supp. 391, 392 (E.D. Mich. 1994) (citing *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). Further, because access to the courts is essential to the enforcement of laws and protection of the values that are rooted deeply in our democratic form of government, this Court may not treat lightly the claims of any litigant, even those whose contentions appear fantastic and baseless on their face. Each complaint is entitled to a thorough review to determine whether it has merit and states a federally cognizable claim. The cost of this sound judicial policy, measured in the expenditure of judicial resources, is one that is well worth the benefit of open access to the judicial process. *See Dekoven v. Bell*, 140 F.Supp.2d 748 (E.D. Mich. 2001).

B. Summary Judgment Standard

In deciding a motion for summary judgment, the court must view the evidence and draw all reasonable inferences in favor of the non-movant. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 547, 587 (1986); *see also B.F. Goodrich Co. v. U.S. Filter Corp.*, 245 F.3d 587, 591-92 (6th Cir. 2001). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. Once the moving party has carried his burden, the party opposing the motion "must come forward with specific facts showing that there is a genuine issue for trial." *Matsushita*, 475 U.S. at 587. The opposing party cannot merely rest upon the allegations contained in his pleadings. Rather, he must submit evidence demonstrating that material issues of fact exist.

Banks v. Wolfe County Bd. of Educ., 330 F.3d 888, 892 (6th Cir. 2003); Fed. R. Civ. P. 56(e). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587, 106 S. Ct. 1348 (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289, 88 S. Ct. 1575, 1592 (1968)).

C. The Troy Defendants' Motion is Unopposed

United States District Court for the Eastern District of Michigan Local Rule 7.1 (b) states that "[a] respondent opposing a motion must file a response, including a brief and supporting documents then available." "[W]hile pro se litigants may be entitled to some latitude when dealing with sophisticated legal issues, acknowledging their lack of formal training, there is no cause for extending this margin to straightforward procedural requirements that a layperson can comprehend as easily as a lawyer." *Jourdan v. Jabe*, No.90-1850, slip op. at 1-2 (6th Cir. Oct. 9, 1991) (citing *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Haines v. Kerner*, 404 U.S. 519, 520 (1972)).

The Troy Defendants filed the instant motion on April 20, 2010. Plaintiff then sought and was granted a temporary stay of proceedings until November 1, 2010, because he alleged that he was homeless and his "legal papers" were in storage. (Dkt No. 32) Plaintiff was subsequently ordered to respond to the Troy Defendants' motion on or before November 30, 2010. (Dkt. No. 33, 38)[4] To date, however, Plaintiff has failed to respond. Therefore, Defendants' motion may be deemed unopposed. *Humphrey v. U.S. Attorney General's Office*, 279 Fed.Appx. 328, 2008 WL 2080512 (6th Cir., May 15, 2008). Notwithstanding the lack of opposition, Defendants' motion is still well-taken in light of the analysis set forth below.

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[4] Orders requiring Plaintiff to respond to this motion were sent to *both* addresses the Court has on record for Plaintiff.

D. Plaintiff has Failed to State a Claim Against the Troy Defendants

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege the violation of a rightsecured by the federal Constitution or laws and must show that the deprivation was committed by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Street v. Corrs. Corp. of Am.*, 102 F.3d 810, 814 (6th Cir. 1996). Because § 1983 is a method for vindicating federal rights, not a source of substantive rights itself, the first step in an action under § 1983 is to identify the specific constitutional rights allegedly infringed. *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (citing *Graham v. Connor*, 490 U.S. 386, 394 (1989)). A plaintiff must also demonstrate the personal involvement of each defendant in the activity that forms the basis of the complaint. *Ashcroft v. Iqbal,* 129 S.Ct. 1937, 1948 (2009). The acts of one's subordinates, for example, are not enough, nor can supervisory liability be based upon the mere failure to act. *Weaver v. Toombs*, 756 F. Supp. 335, 337 (W.D. Mich. 1989).

Plaintiff's complaint fails to demonstrate the personal involvement of any of the individual Troy Defendants. For instance, Plaintiff alleges that "[t]he **Defendants** intentionally shut down investigations into the criminal misconduct of Himes. . . and conspired for the purposes of keeping Plaintiff incarcerated until he pleaded guilty. . ." (Dkt. No. 1, ¶ 30); and "[t]he **Defendants** fabricated evidence against Plaintiff and suppressed exculpatory evidence. . ." *Id.* at ¶ 32. (Emphasis added). However, Plaintiff's complaint is devoid of even a single allegation describing the specific conduct of Officer Nordstrom, Captain Frye or Sargent Whiteside. As such, Plaintiff's conclusory allegations fail to set forth a plausible claim or provide the individual Troy Defendants with fair notice of what

Plaintiff's claim is and the grounds upon which it rests. Therefore, Plaintiff's claims against the individual Troy Defendants must be dismissed.[5]

E. Plaintiffs Claims against the Troy Defendants are Precluded by Collateral Estoppel

Each of Plaintiff's alleged constitutional violations and state law claims (of false arrest and false imprisonment, malicious prosecution, intentional infliction of emotional distress, violation of M.C.L. 752.11) against the Troy Defendants depend on Plaintiff's contention that there was no basis to arrest and prosecute him. In *Smith v. Thornburg*, 136 F.3d 1070 (6th Cir. 1998), the Sixth Circuit stated:

> The law of our Circuit provides that where the state affords an opportunity for an accused to contest probable cause at a preliminary hearing and the accused does so, a finding of probable cause by the examining magistrate or state judge should foreclose relitigation of that finding in a subsequent § 1983 action.

Id. at 1077. *See also Gumble v. Waterford Township,* 171 Fed.Appx. 502, 507 (6th Cir. 2006) (unpublished) (quoting *Mark v. Furay,* 769 F.2d 1266, 1269 (7th Cir. 1985) ("the existence of probable cause for an arrest totally precludes any section 1983 claim for unlawful arrest, false imprisonment, or malicious prosecution, regardless of whether the defendants had malicious motives for arresting the plaintiff."). Plaintiff's § 1985 conspiracy allegations against the Troy Defendants are similarly subject to dismissal as a matter of law due to collateral estoppel and, additionally, because he failed allege the conspiracy was motivated by class based animus, such as race. *Molnar*

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[5] As to the City of Troy, when viewed in a light most favorable to Plaintiff, paragraph 30 of the complaint read in conjunction with paragraph 43 and 44, arguably states a claim that the "supervisory and policy making officers and officials of the Troy Police Department" had a policy of intentionally keeping criminal defendants jailed until they pled guilty, so as to frustrate any civil lawsuits that a criminal defendant could filed against it. However, the City of Troy should, nonetheless, be dismissed for the reasons stated below.

v. Care House, 359 Fed.Appx. 623 (6th Cir. 2009) (dismissing § 1985 conspiracy claim due to collateral estoppel of prior probable cause determination); *Smith*, 136 F.3d at 1078 (discussing class based animus requirement for § 1985 conspiracy claims). Thus, Plaintiff's claims against the Troy Defendants are foreclosed because he held preliminary examinations on both charges of aggravated stalking (as is evident from the official court records), and a neutral magistrate found probable cause to believe he committed both crimes.[6]

Finally, it should be noted that although Plaintiff has **not** alleged that any of the Troy Defendants fabricated evidence, "[i]t is well established that a person's constitutional rights are violated when evidence is knowingly fabricated *and* a reasonable likelihood exists that the false evidence would have affected the decision *of the jury*." *Gregory v. City of Louisville*, 444 F.3d 725, 737 (6th Cir. 2006) citing *Stemler v. City of Florence*, 126 F.3d 856, 872 (6th Cir. 1997) (emphasis added). In *Gregory*, the plaintiff brought suit against multiple defendants, following exoneration through DNA evidence, after serving seven years of a 70-year sentence for rape, attempted rape and burglary. Gregory's § 1983 suit claimed that his *jury conviction* was based, in-part, on fabricated investigator notes and fabricated evidence that his hairs were a "match" to those found at the crime scene. *Id.* Thus, while it is clear that a separate constitutional violation exists for fabrication of evidence, the violation is actionable only where a plaintiff can prove the fabricated evidence affected the jury's decision. "If the fabricated evidence does not affect a jury's decision, a plaintiff cannot prevail." *Richardson v. Nasser*, No. 08-12951, 2009 WL 4730446 *6 (E.D. Mich.). Here, since

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[6] The remainder of the Troy Defendants' arguments, though well-taken, need not be further analyzed as the two grounds discussed herein are sufficient to grant their motion.

neither of Plaintiff's criminal trials were submitted to the jury, Plaintiff could not prevail as a matter of law on a fabrication of evidence claim against the Troy Defendants.

IV. CONCLUSION

For the reasons set forth above, **IT IS RECOMMENDED** that the Troy Defendants' dispositive motion (Dkt. No. 26) be **GRANTED**.

The parties to this action may object to and seek review of this Report and Recommendation, but are required to act within fourteen (14) days of service of a copy hereof as provided for in 28 U.S.C. § 636(b)(1) and Fed.R.Civ.P. 72(b)(2). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *Howard v. Secretary of HHS*, 932 F.2d 505, 508 (6th Cir. 1991); *United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981). The filing of objections which raise some issues, but fail to raise others with specificity, will not preserve all the objections a party might have to this Report and Recommendation. *Willis v. Secretary of HHS*, 931 F.2d 390, 401 (6th Cir. 1991); *Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this magistrate judge.

Within fourteen (14) days of service of any objecting party's timely filed objections, the opposing party may file a response. The response shall be no more than 20 pages in length unless, by motion and order, the page limit is extended by the court. The response shall address each issue contained within the objections specifically and in the same order raised.

s/Mark A. Randon
MARK A. RANDON
UNITED STATES MAGISTRATE JUDGE

Dated: January 4, 2011

Certificate of Service

I hereby certify that a copy of the foregoing document was served on the parties of record on this date, January 4, 2011, electronically and by first class mail.

s/Melody R. Miles
Case Manager to Magistrate Judge Mark A. Randon

A copy has been mailed to:

Hal Brian Stickney
4830 Marcella
Shelby Township, MI 48317