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United States District Court,
D. Massachusetts.
Steven Jude HOFFENBERG Plaintiff,
v.
FEDERAL BUREAU OF PRISONS, Henry J. Sadowski, Edward Motley, Harrell Watts, David Porter, Jr., Tim Fazenbaker, Lynne Balzewsski, Chris Harding, David Winn and 30 John Doe Prison Staff, Defendants
**No. 4:03-40226-GAO.**

June 15, 2004.
Sept. 14, 2004.

Steven Jude Hoffenberg, Ayer, MA, pro se.

Oliver W. McDaniel, US Attorney's Office, Washington, DC, for Defendants.

*MEMORANDUM AND ORDER*

OTOOLE, J.

***1** This matter was referred to the Chief Magistrate Judge for a report and recommendation on the defendants' motion to dismiss or, in the alternative, for summary judgment. After review, I am satisfied that the Chief Magistrate Judge correctly resolved the issues addressed and I therefore adopt her report and recommendation to the extent it allowed the defendants' motion in part. After careful consideration of the parties' briefs submitted in response to the report and recommendation, I also conclude that judgment ought to be granted for the defendants on the plaintiff's remaining claims, as identified by the Chief Magistrate Judge, namely: (i) the *Bivens* [FN1] claims in causes of action two and three, (ii) the Federal Tort Claims Act ("FTCA") [FN2] claims in causes of action one, two, three and four, and (iii) claims for violation of 28 C.F.R. §§ 540.103 and 545.10.

FN1. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

FN2. 28 U.S.C. §§ 1346(b) and 2671-2680.

A. *The Bivens Claims*

The only constitutional rights even remotely implicated in the plaintiff's second and third causes of action appear to be the right to counsel and the right of access to the courts, neither of which provides any basis for a claim in the circumstances pleaded. The right to counsel under the Sixth Amendment is limited to the defense of criminal prosecutions and is not applicable to the plaintiff's pursuit of civil actions for damages. The constitutional right of access to the courts is also narrow in scope and does not give the plaintiff a constitutional right to the assistance of counsel in civil cases. *Boivin v. Black,* 225 F.3d 36, 42 (1st Cir.2000). Rather, it is limited to appeals from criminal convictions, petitions for habeas corpus, and civil rights actions. *Lewis v. Casey,* 518 U.S. 343, 354, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996). Furthermore, the right of access to courts "does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims." *Id.* at 355. Nor does it enable prisoners to "litigate with maximum effectiveness once in court." *Boivin,* 225 F.3d at 42.

Hoffenberg does not here challenge either his sentence or the physical conditions of his confinement. Instead he claims that limiting the extent of his telephone calls within any given month prevents him from retaining and using his attorney's services to help him collect, via various lawsuits, money he could use to pay the restitution imposed by his criminal judgment. Assuming *arguendo* that the

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limitation on Hoffenberg's telephonic access to counsel could be a considered a "condition of confinement," it is nonetheless far too insubstantial a limitation to amount to a constitutional deprivation remediable under *Bivens.* At the very least, such a proposition has not been "clearly established," and the defendants would be entitled to qualified immunity as to such a claim. *See Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987).

B. *The FTCA Claims*

***2** Giving Hoffenberg the full benefit of the doubt on the issue of exhaustion, he still does not state a cause of action under the FTCA because the asserted prison regulations and policy statements do not create a legal right enforceable in an action for damages and Hoffenberg provides no other substantive, viable source for his FTCA claims.

The regulations at issue here, 28 C.F.R. §§ 540.103, 543.12, and 545.10, relate to the institutional management of the Bureau of Prisons and regulate the conduct of its employees. On their face, they do not provide for a private right of action and there is no indication that Congress intended them to create an implied private right of action. *See Bonano v. East Caribbean Airline Corp.,* 365 F.3d 81, 84 (1st Cir.2004) ("[A] regulation, on its own, cannot create a private right of action."). *See also,* 18 U.S.C. §§ 4001, 4042. Hoffenberg's putative constitutional tort claims are also not actionable under the FTCA, and he has failed to plead and prove a source of substantive liability under state tort law. *F.D.I.C. v. Meyer,* 510 U.S. 471, 477-78, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994).

C. *The Claims for Violations of 28 C.F.R. §§ 540.103 and 545.10*

As noted above, Hoffenberg has no cause of action for violations of the asserted Bureau of Prison regulations. To the extent such claims were allowed by the Chief Magistrate Judge to remain in the action, they are now dismissed.

D. *Conclusion*

For the foregoing reasons, I adopt the report and recommendation of the Chief Magistrate Judge to the extent it recommended dismissal of claims, but not otherwise. I grant judgment for the defendants dismissing all of the plaintiff's claims against them.

It is SO ORDERED.

*REPORT AND RECOMMENDATION RE: MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT (DOCKET ENTRY # 39)*

BOWLER, Chief Magistrate J.

Pending before this court is the above styled motion. Although styled in the alternative as a motion to dismiss or for summary judgment, this court notified the parties that it would treat the motion as one for summary judgment. With the time period for submitting additional material having elapsed, FN1 the motion for summary judgment (Docket Entry # 39), is ripe for review.

FN1. Plaintiff Steven Jude Hoffenberg ("Hoffenberg") made an additional timely filing.

*PROCEDURAL BACKGROUND*

Hoffenberg, an inmate at the Federal Medical Center in Devens, Massachusetts ("FMC Devens"), initially filed this action in the United States District Court for the District of Columbia. On November 29, 2002, he filed a motion for leave to file a supplemental exhibit. (Docket Entry # 6). Pursuant to Rule 15(d), Fed.R.Civ.P., the motion sought leave to amend the complaint to include an exhibit and to include alleged violations of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b) & 2671-2680, based upon the complaint's allegations.

The District of Columbia court allowed the motion on December 3, 2002. Hence, the original complaint (Docket Entry # 1), as amended to include the supplemental exhibit and to raise violations of the FTCA based upon the complaint's allegations (Docket Entry # 6), governs these proceedings. In addition to the FTCA, the complaint alleges liability against defendants for violating Hoffenberg's constitutional rights under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) ( *"Bivens"* ).[FN2] (Docket Entry # 1, pp. 19-20; Docket Entry # 36, p. 1).

FN2. *Bivens* and the FTCA therefore form the gravamen of each cause of action in the complaint.

***3** On August 1, 2003, the District of Columbia court transferred the matter to this district due to improper venue. The court also deemed moot a motion for leave to file an amended complaint.[FN3]

FN3. Although Hoffenberg refers to a November 12, 2003 motion to amend and asks this court to incorporate the document by reference (Docket Entry # 42, p. 15), no such document dated November 12, 2003 exists in the file. Other than the motion to file the supplemental exhibit (Docket Entry # 6), the only motion to amend referenced on the docket sheet is the motion filed on March 31, 2003, which the District of Columbia court deemed moot.

The complaint names the following defendants: the Federal Bureau of Prisons ("BOP"); Harrell Watts ("Watts"), Administrator of National Inmate Appeals for the BOP; Henry Sadowski ("Sadowski"), Northeast Regional Counsel for the BOP; David Winn ("Winn"), Warden of FMC Devens; Edward Motley ("Motley"), Associate Warden of FMC Devens; David Porter, Jr. ("Porter"), Executive Assistant to the Warden of FMC Devens; Tim Fazenbaker ("Fazenbaker"), Unit Manager at FMC Devens; Lynne Balzewsski, Case Manager at FMC Devens; Chris Harding ("Harding"), former Inmate Counselor at FMC Devens; and 30 John Doe prison staff members (collectively: "defendants").

In April 1995, Hoffenberg, former Chief Executive Officer, President and Chairman of the Board of Towers Financial Corporation ("Towers"), pled guilty to conspiracy to violate the securities laws in violation of 18 U.S.C. § 371, mail fraud in violation of 18 U.S.C. §§ 1341 and 1342, conspiracy to obstruct justice in violation of 18 U.S.C. § 371, and tax evasion in violation of 26 U.S.C. § 7201. *United States v. Hoffenberg,* 1997 WL 96563 at *8 (S.D.N.Y. March 5, 1997). The charges and resulting guilty plea stem from an elaborate and complex Ponzi scheme orchestrated by Hoffenberg, using his position at Towers, that resulted in losses of "over half a billion dollars" and the victimization of "over 3,000 individuals, companies, trust funds and pension plans." *United States v. Hoffenberg,* 1997 WL 96563 at *11-12 (S.D.N.Y. March 5, 1997) (comprehensively discussing the scheme's intricacies); *Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin,* 135 F.3d 837, 838 (2d Cir.1998) (describing "massive 'Ponzi scheme' perpetrated by [Towers] whereby Towers raised approximately $245 million through fraudulent offering memoranda and kept its failing enterprise afloat by using the principal payments of investors to make interest payments to other investors"). In an upward sentencing departure, Hoffenberg received a 20 year sentence, followed by three years supervised release and, more significantly for purposes of these proceedings, an order to make restitution in the amount of $475,157,340 and to pay a fine of $1,000,000. *United States v. Hoffenberg,* 1997 WL 96563 at *1 (S.D.N.Y. March 5, 1997).

*THE COMPLAINT'S ALLEGATIONS*

The complaint revolves around Hoffenberg's unsuccessful attempts to make telephone calls to his attorneys in excess of the 300 minute monthly prison allotment. Hoffenberg attempted to obtain relief by utilizing the administrative remedies available at

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FMC Devens. During the administrative appeal, various defendants purportedly wrote or signed false documents thereby violating a BOP restitution policy set forth in a January 3, 2000 Program Statement entitled *Financial Responsibility Program, Inmate* ("the Financial Responsibility Program Statement") and depriving Hoffenberg of access to the courts. Letters in 2002 from two different law firms representing or assisting Hoffenberg implored the BOP to allow Hoffenberg unfettered access to the telephone to speak with them about legal matters concerning Hoffenberg's efforts to pay restitution. Hoffenberg summarizes his efforts to pay restitution in a 1998 repayment plan attached as exhibit three to the complaint. (Docket Entry # 1, Ex. 3). The repayment plan recounts a number of subject areas wherein Hoffenberg attempted or purportedly could attempt, primarily through litigation, to collect the money and satisfy the restitution obligation. FN4 All of these appear untimely or otherwise frivolous. In addition to the subject areas recounted in exhibit three, Hoffenberg contends that defendants impeded his efforts to collect restitution by preventing him from successfully litigating a *Bivens* prison civil rights action in the Western District of Pennsylvania, *Hoffenberg v. Bureau of Prisons et al.,* ("the Pennsylvania action"). FN5 Sadowski and Watts are defendants in that action.

FN4. The lawsuits and investigations principally involve the alleged mishandling or disappearance of Tower's assets by the courts or certain individuals. The first subject area proposes an investigation into the fairness of certain bondholders settling litigation against Shawmut Bank, *see* *LaSalle National Bank v. Duff & Phelps Credit Rating Company,* 951 F.Supp. 1071 (S.D.N.Y.1996); *LaSalle National Bank v. Duff & Phelps Credit Rating Company,* 1996 WL 393212 (S.D.N.Y. April 11, 1996), in 1997 for themselves thereby usurping potential claims of various noteholders. The statute of limitations for misappropriation under New York law is three years. *See* *Dumas v. Levitsky,* 291 A.D.2d 653, 738 N.Y.S.2d 402, 408 (N.Y.App.Div.2002). The second subject area raises malpractice, misappropriation and breach of fiduciary duty claims occurring in 1997 which also appear untimely. *See* *Kaufman v. Cohen,* 307 A.D.2d 113, 760 N.Y.S.2d 157, 164-165 (N.Y.App.Div.2003) (six year limitations period governs breach of fiduciary duty claim seeking equitable relief whereas three year period governs claims seeking monetary relief). The third subject area, which involves Hoffenberg's brief tenure running the New York Post in 1993, *see* *United States v. Hoffenberg,* 1997 WL 96563 at *10 (S.D.N.Y. March 5, 1997) (describing Hoffenberg's attempt to purchase the failing New York Post in 1993), seeks to evaluate the possibility of suing a law firm due to its conflict of interest in representing various entities with respect to the 1993 bailout of the New York Post. It also appears time barred. *See* *Wells Fargo Home Mortgage, Inc. v. Zeichner, Ellman & Krause,* 5 A.D.3d 128, 771 N.Y.S.2d 892, 2004 WL 383617 at *1 (N.Y.App.Div. March 2, 2004) (three year limitations period applies to legal malpractice and time begins to run when malpractice is committed as opposed to when the plaintiff discovers the injury). The other subject areas primarily involve the distribution of assets in bankruptcy court after Towers declared bankruptcy in March 1993 and request investigations on behalf of Towers noteholders or an accounting. *See* *United States v. Hoffenberg,* 1997 WL 96563 at *6 (S.D.N.Y. March 5, 1997) (describing bankruptcy proceedings). They also appear untimely and/or barred under principles of issue and claim preclusion.

FN5. The complaint identifies the lawsuit as "Docket 027 (2002) SJM W.D.PA."

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(Docket Entry # 1, p. 8). This court reasonably infers that Hoffenberg filed the suit in 2002. In the suit, Hoffenberg alleges that, together with other defendants, Sadowski and Watts retaliated against Hoffenberg by denying him telephone access to his attorneys at FMC Devens in 2002.

***4** In the complaint, Hoffenberg also claims that defendants violated or "breached" three BOP policies, to wit, the BOP restitution policy, the BOP "legal calls policy" and "the inmate legal work policy." (Docket Entry # 42, pp. 8-9; Docket Entry # 1). Arguing that he has causes of action under these policies, Hoffenberg describes the restitution policy as contained in the aforementioned Financial Responsibility Program Statement that requires law enforcement agencies to make a "diligent effort ... to collect court-ordered financial obligations." (Docket Entry # 1, Ex. 1). To bolster this restitution policy, Hoffenberg cites 28 C.F.R. § 545.10 ("section 545.10").[FN6] (Docket Entry # 1, p. 4). Captioned "Purpose and Scope," section 545.10 states that the BOP "encourages each sentenced inmate to meet his or her legitimate financial obligations" and "will assist the inmate in developing a financial plan." 28 C.F.R. § 545.10.

FN6. The complaint also cites 18 U.S.C. "Section 3663-4" and submits that defendants violated "clear restitution law" by materially breaching the above described BOP restitution policy by obstructing Hoffenberg's access to his attorneys to satisfy the restitution obligation. (Docket Entry # 1, pp. 8 & 11). Defendants represent that Hoffenberg alleges a cause of action under 18 U.S.C. §§ 3663 and 3664. (Docket Entry # 40, p. 4). Hoffenberg, however, characterizes the representation as "false" and that 18 U.S.C. §§ 3663 and 3664 "are not the basis of the three prison policies the defendants violated in the complaint." (Docket Entry # 42, p. 8). Accordingly, this court does not construe the complaint as raising a cause of action under 18 U.S.C. §§ 3663 and 3664.

Hoffenberg grounds the BOP's "legal calls policy" as established under 28 C.F.R. § 540.103. This section prohibits a warden from applying frequency limitations to an inmate's telephone calls with his attorney when the inmate demonstrates that other forms of communication are inadequate. Captioned "Inmate telephone calls to attorneys," it reads as follows:

> The Warden may not apply frequency limitations on inmate telephone calls to attorneys when the inmate demonstrates that communication with attorneys by correspondence, visiting, or normal telephone use is not adequate.

28 C.F.R. § 540.103.[FN7]

FN7. Because Hoffenberg is proceeding pro se, this court interprets the complaint as alleging, inter alia, causes of action for the violation of these regulations, 28 C.F.R. § 545.10 and 28 C.F.R. § 540.103. Although such claims are decidedly weak, *see Harper v.. Williford,* 96 F.3d 1526, 1528 (D.C.Cir.1996); *Ashbrook v. Block,* 917 F.2d 918, 925 (6th Cir.1990); *Lechtner v. Brownyard,* 679 F.2d 322, 325-326 (3rd Cir.1982), defendants' summary judgment papers do not address the viability of the causes of action under 28 C.F.R. § 545.10 and 28 C.F.R. § 540.103. Accordingly, they remain in this action at this juncture. The "inmate legal work" policy is subsumed within the first cause of action alleging a denial of access to the courts detailed *infra.*

Hoffenberg references paragraphs six, 11, 12, 24 and 38 of the complaint as showing the "inmate legal work policy." (Docket Entry # 42, p. 8). These paragraphs recite the aforementioned allegations concerning defendants' obstruction of Hoffenberg's efforts to litigate the Pennsylvania action and pur-

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sue the subject areas recounted in exhibit three.

Hoffenberg further alleges that Watts' August 9, 2002 letter misrepresented BOP restitution policy. (Docket Entry # 1, ¶¶ 27-30 & 37). Sadowski, as "a main bad actor," likewise allegedly violated BOP restitution policy by creating a false June 13, 2002 document thereby depriving Hoffenberg of court access. (Docket Entry # 1, ¶¶ 20-25). Similarly, Fazenbaker and Harding filed a false government document dated April 17, 2002, in contravention of the BOP restitution policy set forth in the Financial Responsibility Program Statement thereby depriving Hoffenberg of court access. (Docket Entry # 1, ¶¶ 13-16). Winn likewise created a false document dated May 3, 2002, in violation of the BOP restitution policy thereby impeding Hoffenberg's access to the courts. (Docket Entry # 1, ¶¶ 17-19). All of these documents concern Hoffenberg's administrative appeal objecting to the restrictions placed upon the telephone calls to his attorneys.

The complaint additionally alleges that Motley lied in a June 21, 2002 letter to U.S. Senator John F. Kerry. The letter explains the restrictions placed upon Hoffenberg's telephone calls. (Docket Entry # 1, ¶ 32). The complaint also cites 28 C.F.R. § 543.12 (Docket Entry # 1, ¶ 31) which provides that:

> ***5** The Warden shall allow an inmate to contact and retain attorneys. With the written consent of the inmate, staff may advise an attorney of the inmate's available funds. Staff may not interfere with selection and retention of attorneys if the inmate has attained majority and is mentally competent. If the inmate is a mental incompetent or a minor, the Warden shall refer to the inmate's guardian or to the appropriate court all matters concerning the retention and payment of attorneys.

28 C.F.R. § 543.12(a).

The District of Columbia court succinctly summarized the complaint's allegations as claiming "that defendants violated [Hoffenberg's] constitutional rights by obstructing his attempts to contact his attorney in violation of 28 C.F.R. § 540.103, preventing him from obtaining an attorney in violation of 28 C.F.R. § 543.12, and otherwise disabling him from recovering funds that would be used to pay his court-ordered restitution in violation of 28 C.F.R. § 545 .10." (Docket Entry # 36). Elaborating upon these three causes of action and liberally construing the complaint, *see Haines v. Kerner,* 404 U.S. 519, 520-521, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972), it alleges the following causes of action: FN8 (1) denial of access to the courts by obstructing Hoffenberg's efforts to litigate the Pennsylvania action and the subject matters in exhibit three by preventing or limiting his telephone calls to his attorneys and violating the BOP's "legal calls" policy set forth in 28 C.F.R. § 540.103 under the FTCA and *Bivens;* (2) violation of 28 C.F.R. § 543.12 by preventing Hoffenberg from retaining an attorney under the FTCA and *Bivens* (Docket Entry # 1, ¶ 31; Docket Entry # 36, p. 1); (3) violation of the BOP restitution policy's "diligent effort" requirement as set forth in the Financial Responsibility Program Statement and 28 C .F.R. § 545.10 under the FTCA and *Bivens;* FN9 and (4) filing false documents in the administrative appeal and in the June 21, 2002 letter to Senator Kerry thereby depriving Hoffenberg of court access in the administrative appeal and impeding his efforts to collect restitution in the Pennsylvania action and through the subject matters in exhibit three (Docket Entry # 1, ¶¶ 13, 18 & 20) under the FTCA and *Bivens.* The fourth cause of action with respect to Sadowski and Watts includes an allegation that Sadowski and Watts filed the false documents in retaliation for Hoffenberg's litigating the Pennsylvania action. FN10 (Docket Entry # 1, ¶¶ 12 & 20).

FN8. See also footnote number seven.

FN9. Subsumed within this claim is the argument that Congress intended criminal defendants to pay court ordered restitution with Congressional intent evidenced by 18

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U.S.C. §§ 3613(a) and 3615.

FN10. Even liberally construing the complaint, this "retaliation" claim does not extend beyond Watts and Sadowski filing the false documents.

*STANDARD OF REVIEW*

Summary judgment "is appropriate where there are no genuine disputes as to material facts and the moving party is entitled to judgment as a matter of law." *Saenger Organization v. Nationwide Insurance Associates,* 119 F.3d 55, 57 (1st Cir.1997). In this respect, a "genuine" issue exists where "the evidence relevant to the issue, viewed in the light most flattering to the party opposing the motion, [is] sufficiently open-ended to permit a rational factfinder to resolve the issue in favor of either side." *National Amusements, Inc. v. Town of Dedham,* 43 F.3d 731, 735 (1st Cir.1995). " '[M]aterial' means that a contested issue of fact has the potential to alter the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant." *Smith v. Morse & Company, Inc.,* 76 F.3d 413, 428 (1st Cir.1996).

***6** The moving party bears the initial burden of informing the "court of the basis for the motion, and identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact." *DeNovellis v. Shalala,* 124 F.3d 298, 306 (1st Cir.1997). "As to issues on which the summary judgment target bears the ultimate burden of proof, [he] cannot rely on an absence of competent evidence, but must affirmatively point to specific facts that demonstrate the existence of an authentic dispute." *McCarthy v. Northwest Airlines, Inc.,* 56 F.3d 313, 315 (1st Cir.1995); *accord DeNovellis v. Shalala,* 124 F.3d at 306.

Factual disputes are resolved in favor of Hoffenberg as the nonmoving party. *See Saenger Organization v. Nationwide Insurance Associates,* 119 F.3d at 56; *accord Rosenberg v. City of Everett,* 328 F.3d 12, 17 (1st Cir.2003) (construing summary judgment record in favor of non-movant and "resolving all reasonable inferences in his favor"). Although pro se pleadings receive a liberal construction, Hoffenberg's pro se status does not insulate him " 'from complying with procedural and substantive law." ' *Kenda Corp., Inc. v. Pot O'Gold Money Leagues,* 329 F.3d 216, 225 n. 7 (1st Cir.2003) (citing principle that " '[p]ro se status does not insulate a party from complying with procedural and substantive law" ' and finding that pro se plaintiff's failure to develop legal argument resulted in waiver).

*FACTUAL BACKGROUND*

As noted above, in April 1995, Hoffenberg pled guilty and was ordered to pay restitution in the amount of $475,157,340.[FN11] Hoffenberg began serving the sentence in April 1997. (Docket Entry # 40, Ex. A).

FN11. The previously described facts in the Procedural Background involving this litigation form part of the summary judgment factual record.

Beginning in late 1999, Hoffenberg was incarcerated at FCI McKean (MCK) in Bradford, Pennsylvania (Docket Entry # 40, Ex. N) before being transferred to FCI Ray Brook (RBK) in Ray Brook, New York. (Docket Entry # 40, Ex. N).[FN12] In 2002, Hoffenberg filed the Pennsylvania action alleging a violation of his civil rights presumably involving misconduct occurring at MCK or RBK.[FN13]

FN12. Exhibit N only refers to "MCK" and "RBK." The official website of the Federal Bureau of Prisons identifies the facilities with these abbreviations as FCI McKean and FCI Ray Brook. *See* http://www.bop.gov.

FN13. The only references to the Pennsylvania action occur in the com-

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plaint. Although the unverified complaint is not part of the factual record on summary judgment, this court will assume arguendo that Hoffenberg filed such an action and that, as stated in the complaint, it is "pending" and "ongoing."

On January 10, 2002, Hoffenberg was transferred from RBK to FMC Devens. Inmates at FMC Devens are allotted 300 minutes per month to make telephone calls for any purpose. BOP policy with respect to inmate telephone calls is set forth in 28 C.F.R. § 540.103, quoted above, and in a January 31, 2002 BOP Program Statement entitled *Telephone Regulations for Inmates* ("the Telephone Use Program Statement"). 28 C.F.R. § 540.103; (Docket Entry # 40, Ex. E). The program statement begins by quoting the following language from 28 C . F.R. § 540.100(a):

The Bureau of Prisons extends telephone privileges to inmates as part of its overall correctional management. Telephone privileges are a supplemental means of maintaining community and family ties that will contribute to an inmate's personal development. An inmate may request to call a person of his or her choice outside the institution on a telephone provided for that purpose. However, limitations and conditions may be imposed upon an inmate's telephone privileges to ensure that these are consistent with other aspects of the Bureau's correctional management responsibilities. In addition to the procedures set forth in this subpart, inmate telephone use is subject to those limitations which the Warden determines are necessary to ensure the security or good order, including discipline, of the institution or to protect the public. Restrictions on inmate telephone use may also be imposed as a disciplinary sanction (see 28 CFR part 541).

***7** 28 C.F.R. § 540.100; (Docket Entry # 40, Ex. E, ¶ 1).

The Telephone Use Program Statement reflects that the warden is responsible for implementing the telephone policy at the particular correctional facility. The warden also has the authority to restrict or suspend telephone privileges as a disciplinary measure.

Significantly, the program statement establishes a 300 minute monthly allotment of inmate telephone time.[FN14] The program statement justifies the limitation as protecting "the security and good order of Bureau institutions." (Docket Entry # 40, Ex. E, ¶ 10(d)(1)). It further notes that inmates who exhaust the 300 minute limitation "may be provided, at the warden's discretion, a telephone call for good cause." (Docket Entry # 40, Ex. E, ¶ 10(d)(1)).

FN14. The program statement is dated January 31, 2002, shortly after Hoffenberg's transfer to FMC Devens. The date explains why Hoffenberg notes that he did not have these telephone restrictions at FCI Ray Brook. (Docket Entry # 1, Ex. 5).

The Telephone Use Program Statement also sets forth the BOP's policy of monitoring non-attorney telephone calls. The program statement directs each warden to establish procedures to enable the monitoring of telephone conversations on telephones located inside the warden's institution. (Docket Entry # 40, Ex. E, ¶ 11). The monitoring policy quotes the language of 28 C.F.R. § 540.102 which allows such monitoring "to preserve the security and orderly management of the institution and to protect the public." 28 C.F.R. § 540.102; (Docket Entry # 40, Ex. E, ¶ 11). Inmates are notified of the monitoring and the monitoring does not apply to an inmate's telephone calls to his attorney. 28 C.F.R. § 540.102 ; (Docket Entry # 40, Ex. E, ¶ 11).

Particular procedures apply to an inmate's telephone calls to his attorney. BOP policy, as shown in 28 C.F.R. § 540.103 and the portion of the Telephone Use Program Statement that quotes and implements this regulation, prevents a warden from imposing "frequency limitations on inmate telephone calls to attorneys when the inmate demonstrates that communication with attorneys by correspondence, visiting, or normal telephone use is

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not adequate." 28 C.F.R. § 540.103; (Docket Entry # 40, Ex. E, ¶ 12). The pertinent provisions of the program statement clarify that frequent telephone calls with an inmate's attorney "should be allowed only when an inmate demonstrates that communication with his or her attorney by other means is not adequate." (Docket Entry # 40, Ex. E, ¶ 12). Such "other means" include correspondence and visits between the inmate and his attorney. (Docket Entry # 40, Ex. E, ¶ 12). The only example in the program statement that shows the inadequacy of "other means" is "when the inmate or the inmate's attorney can demonstrate an imminent court deadline." (Docket Entry # 40, Ex. E, ¶ 12).

Shortly after his transfer to FMC Devens, Hoffenberg encountered difficulties with the telephone restrictions. In late January 2002, Attorney David G. Zanardi ("Attorney Zanardi"), a member of a Washington, D.C. law firm coordinating Hoffenberg's legal efforts regarding the court ordered restitution, wrote to Winn and requested a waiver of Hoffenberg's telephone restriction. Explaining that Hoffenberg must "converse with upwards of 20 financial services corporations, attorneys, broker-dealers and other individuals on an almost daily basis," Attorney Zanardi asked that Hoffenberg be afforded unlimited telephone access to resolve legal matters. (Docket Entry # 1, Ex. 2). He further noted that Hoffenberg would "not be engaged in running a business" but was only "seeking to resolve the restitution and other legal matters." (Docket Entry # 1, Ex. 2; *cf.* Docket Entry # 1, Ex. 8, ¶ 4).

***8** By letter dated February 6, 2002 letter, Winn explained to Attorney Zanardi that there were "no compelling circumstances that would demonstrate that this communication cannot be accomplished by methods other than normal methods." (Docket Entry # 1, Ex. 2). The letter further advised Hoffenberg's attorney that Hoffenberg could appeal the decision through the administrative remedy process. On February 18, 2002, Attorney Zanardi wrote Winn a second letter citing 28 C.F.R. § 540.103 FN15 and stating it was necessary for him to speak with Hoffenberg on a regular basis to coordinate legal matters. (Docket Entry # 1, Ex. 2).

FN15. This court assumes that the citation in the letter to "28 CFR 540.03" was a typographical error inasmuch as there is no such section.

Hoffenberg attempted to obtain additional telephone time with his attorneys through the administrative remedies at FMC Devens. On April 16, 2002, he filed an inmate request enclosing letters from his attorneys setting forth his need for greater telephone access with his attorneys. The request cited the need to make court ordered restitution, alleged a *Bivens* violation and asserted that BOP officials were violating BOP policy requiring such restitution.FN16 (Docket Entry # 1, Ex. 5).

FN16. In the summary judgment papers, defendants argue, in part, that Hoffenberg failed to exhaust administrative remedies relative to Hoffenberg's claims that Watts and Sadowski misrepresented BOP policy and caused other BOP employees to interfere with Hoffenberg's access to the courts and that Motley lied in the June 21, 2002 letter to Senator Kerry.

Harding and Fazenbaker denied the request on April 17, 2002. In the April 17, 2002 denial, Harding explained that Hoffenberg had "not demonstrated an imminent court deadline as required by policy." (Docket Entry # 1, Ex. 4). BOP policy, as reflected in the Telephone Use Program Statement program statement, requires the inmate or his attorney to establish an imminent court deadline or similar necessity in order to prevent the warden from applying frequency limitations upon an inmate's unmonitored telephone calls to his attorney. 28 C.F.R. § 540.103; (Docket Entry # 40, Ex. E, ¶ 12). Consistent with the policy reflected in the program statement, 28 C.F.R. § 543.11(i), which governs inmate legal research, a warden should give an inmate a special time allowance for research and preparation of documents if he "demonstrates a re-

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quirement to meet an imminent court deadline." FN17 28 C.F.R. § 543.11(i).

FN17. As previously indicated, the complaint alleges that Harding and Fazenbaker filed "false answers" in the April 17, 2002 document which, according to Hoffenberg, misrepresents BOP policy in the Financial Responsibility Program Statement which urges law enforcement agencies to make a "diligent effort" to collect "court-ordered financial obligations." (Docket Entry # 1, Ex. 1).

By letter dated April 24, 2002, Attorney David Gossack ("Attorney Gossack"), who practices in Hull, Massachusetts, wrote to Fazenbaker FN18 and asked him to reconsider his position. Arguing that the law entitled Hoffenberg to consult with counsel by telephone, he noted that the calls would concern court ordered restitution work. (Docket Entry # 1, Ex. 2; Docket Entry # 42, Ex. 2).

FN18. The attorney spells Fazenbaker's name as "Fasenbacher." The above spelling is taken from the complaint.

In a May 3, 2002 response to Hoffenberg's inmate request, Winn fully explained BOP telephone policy. He noted the 300 minute monthly allotment. He also quoted and explained the Telephone Use Program Statement and advised Hoffenberg that, particularly where other methods of communication exist, the BOP "provides inmates with telephone access consistent with the requirements of sound correctional management." (Docket Entry # 1, Ex. 6); *accord* 28 C.F.R. § 543.100(a). Finally, Winn explained that Hoffenberg failed to demonstrate the unavailability of alternative means of communication and the outstanding restitution obligation was "not justification of an imminent court deadline." FN19 (Docket Entry # 1, Ex. 6).

FN19. The complaint asserts that Winn's May 3, 2002 response was false and violated the BOP's restitution policy.

***9** Hoffenberg filed an appeal with the BOP Regional Director on May 12, 2002. Similar to the initial appeal, Hoffenberg claimed that Winn was violating the BOP's restitution policy contained in the Financial Responsibility Program Statement requiring Winn to make a "diligent effort" to assist Hoffenberg in collecting money to pay the court ordered restitution. Hoffenberg also asserted that Winn's conduct amounted to a *Bivens* violation and that Winn was obstructing his access to the courts and preventing legal telephone calls. (Docket Entry # 1, Ex. 7).

In a document dated June 13, 2002, Sadowski denied the regional appeal. Sadowski explained that the Telephone Use Program Statement allowed frequent unmonitored telephone calls with an attorney "only when an inmate demonstrates that communication with his or her attorney by correspondence, visiting or normal telephone use is not adequate." (Docket Entry # 1, Ex. 8). The response indicated that the BOP had not prohibited all telephone calls with his attorney inasmuch as Hoffenberg received unmonitored telephone calls with his attorney on April 15 and 30, 2002. It also noted the variety of ways to contact an attorney including "inmate-attorney legal mail, private inmate attorney visitations and occasional unmonitored legal telephone calls to an attorney." (Docket Entry # 1, Ex. 8). Sadowski denied additional unmonitored telephone use because Hoffenberg had not demonstrated an imminent court deadline that would warrant more frequent telephone contact. He also pointed out that Hoffenberg was convicted for fraudulent activity in the pursuit of money and that he could not expect to be allowed "to attempt to raise vast amounts of money, regardless of the intended purpose." FN20 (Docket Entry # 1, Ex. 8).

FN20. The letter also referred to the BOP's prohibition against allowing inmates to use the telephone to conduct a business. Again, the complaint characterizes the document as "false" and "deceptive" and that Sadowski's misconduct violated the BOP resti-

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tution policy in the Financial Responsibility Program Statement requiring him to make a "diligent effort" to collect court-ordered restitution. (Docket Entry # 1, ¶¶ 20, 22-23 & 25).

Hoffenberg appealed Sadowski's denial to the BOP Central Office. He repeated the allegation of being prevented court access and alleged violations of the BOP restitution policy in the Financial Responsibility Program Statement's "diligent effort" obligation and that prison staff were violating 28 C.F.R. § 540.103 by restricting his legal telephone calls. (Docket Entry # 1, Ex. 9).

On August 9, 2002, Watts denied the appeal. He found that there was no evidence of a violation of the Financial Responsibility Program Statement and that prison staff acted "in compliance with policy." (Docket Entry # 1, Ex. 10). He noted that Hoffenberg was allowed to make unmonitored legal telephone calls on April 15 and 30, 2002, and that Hoffenberg failed to provide the necessary documentation to permit additional legal telephone calls. (Docket Entry # 1, Ex. 10).

In a detailed letter dated September 5, 2002, Attorney Grossack wrote to the U.S. Department of Justice complaining about the denial of unmonitored legal telephone calls between himself and Hoffenberg. He explained that the telephone calls were necessary to comply with the "court order to make $475 million in restitution." (Docket Entry # 42, Attached Exhibit). He also discounted the ability to communicate by other means inasmuch as his office was a two hour drive to FMC Devens and using the mail was "too cumbersome and slow" to provide the necessary legal assistance. (Docket Entry # 42, Attached Exhibit).

***10** In a separate matter, Hoffenberg filed a claim under the FTCA seeking compensatory damages because of the interference with his ability to make the court ordered restitution payments and consequent violation of the BOP restitution policy set forth in the Financial Responsibility Program Statement. (Docket Entry # 6, Attached Exhibit). The FTCA claim also alleged that prison staff at FMC Devens interfered with Hoffenberg's "collection litigation and court access." (Docket Entry # 6, Attached Exhibit). On October 2, 2002, Sadowski, reviewing the FTCA claim as BOP Regional Counsel, refused to enter into a settlement. He noted that Hoffenberg's financial responsibility payments were increased from $25 on August 2, 2002, but that Hoffenberg refused to make the increased payments notwithstanding Hoffenberg's available financial resources.[FN21] (Docket Entry # 6, Attached Exhibit). He additionally explained that Hoffenberg was not prevented from telephoning his attorney but was not given unrestricted telephone privileges, all in accordance with BOP policy. (Docket Entry # 6, Attached Exhibit).

FN21. On August 5, 2002, as a result of the refusal to pay the increased amount, an FMC Devens Unit Counselor disciplined Hoffenberg by, *inter alia,* denying him work assignments outside the facility, notifying the Parole Board of the infraction and placing him in "the lowest housing status." (Docket Entry # 42, Attached Exhibit).

On October 23, 2002, Hoffenberg filed the present lawsuit.

*DISCUSSION*

Defendants proffer seven arguments to support summary judgment and dismiss the complaint.[FN22] Defendants do not directly address the FTCA claims in their papers. As the movants, defendants bear the initial burden of informing this court of the basis for summary judgment. Because defendants fail to mention the FTCA claims, let alone proffer an argument to support summary judgment, such claims remain in this action at this juncture regardless of their merit.

FN22. The motion itself seeks dismissal

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for failure to state a claim, lack of subject matter jurisdiction or, alternatively, summary judgment and then moves to dismiss the entire complaint. (Docket Entry # 39).

Turning to the seven arguments *seriatim* as they apply to the *Bivens* claims, defendants first sumit that the BOP should be dismissed as a defendant under the doctrine of sovereign immunity. "[A] *Bivens* claim cannot be brought against the BOP, as a federal agency, or the other defendants in their official capacities ." FN23 *Rio Grande Silvery Minnow v. Keys,* 355 F.3d 1215, 1214 (10th Cir.2004). Succinctly stated, the Supreme Court refuses "to recognize a *Bivens* remedy against federal agencies." *Tapia-Tapia v. Potter,* 322 F.3d 742, 746 (1st Cir.2003) (citing *Federal Deposit Insurance Corp. v. Meyer,* 510 U.S. 471, 484, 486, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994)). Hoffenberg recognizes this well settled principle inasmuch as he states that, "The complaint should not be interpreted under any *Bivens* claims against the B.O.P." (Docket Entry # 42, p. 8). The *Bivens* claims against the BOP are therefore subject to summary judgment.

FN23. In contrast, the FTCA provides a "limited waiver of sovereign immunity which allows an injured party to sue the United States for torts" to the same extent a private person is liable to the claimant. *Corte-Real v. United States,* 949 F.2d 484, 485 (1st Cir.1991).

The second argument seeks dismissal of the claims under 18 U.S.C. §§ 3663 and 3664. As previously discussed in footnote six, the complaint does not raise such claims and the argument is therefore irrelevant.

Turning to defendants' third argument, they maintain that Hoffenberg failed to administratively exhaust the claims under the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a), that allege: (1) an interference with access to the courts; FN24 (2) a misrepresentation of BOP policy in the documents submitted during the administrative appeal; and (3) that Motley lied to Senator Kerry in the June 21, 2002 letter. The PLRA's exhaustion requirement, set forth in 42 U.S.C. § 1997e(a), while not jurisdictional is nevertheless mandatory. *Casanova v. DuBois,* 289 F.3d 142, 147 (1st Cir.2002) (further noting that case must be dismissed if the plaintiffs fail to satisfy PLRA's exhaustion requirement). The exhaustion provision also applies to all actions challenging prison conditions including suits asserting *Bivens* claims. *See Porter v. Nussle,* 534 U.S. 516, 524, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002) (under section 1997e(a), "federal prisoners suing under [*Bivens* ] must first exhaust inmate grievance procedures").

FN24. Defendants' characterization of this claim appears to limit it to the conduct of Watts and Sadowski causing or provoking other defendants to interfere with Hoffenberg's court access. The complaint, however, raises a denial of access to the courts on the part of all defendants. (Docket Entry # 1, ¶ 5, "THE DEFENDANTS ... DEPRIVING PRO-SE DAILY COURT ACCESS ...; ¶ 9, "Each defendant obstructed Pro-Se court access ...; ¶ 10, "All the defendants understood Pro-Se was obstructed from court access; ¶ 13, "DEFENDANTS FAZENBAKER AND HARDING DEPRIVATION OF PRO-SE COURT ACCESS").

***11** The dominant concerns of the PLRA are "to promote administrative redress, filter out groundless claims, and foster better prepared litigation of claims aired in court." *Porter v. Nussle,* 534 U.S. 516, 528, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002). The administrative, statutorily imposed exhaustion requirement serves these goals. It provides that, "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a).

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Defendants' challenge applies to the scope or reach of the issues raised by Hoffenberg in the administrative grievances. The "requirements of administrative issue exhaustion are largely creatures of statute." *Sims v. Apfel,* 530 U.S. 103, 107, 120 S.Ct. 2080, 147 L.Ed.2d 80 (2000) (distinguishing between statutorily imposed and judicially imposed issue exhaustion). Where, as here, administrative regulations require issue exhaustion, "courts reviewing agency action regularly ensure against bypassing of that requirement by refusing to consider unexhausted issues." *Sims v. Apfel,* 530 U.S. at 108.

BOP regulations detail the procedures for filing an administrative grievance in federal prisons. *See* 28 C.F.R. §§ 542.10-542.19. Although not cited by the parties, the relevant regulation requires issue exhaustion. *See generally Sims v.. Apfel,* 530 U.S. at 108 ( providing example of agency regulation that requires issue exhaustion). It reads as follows:

> The inmate shall place a single complaint or a reasonable number of closely related issues on the form. If the inmate includes on a single form multiple unrelated issues, the submission shall be rejected and returned without response, and the inmate shall be advised to use a separate form for each unrelated issue. For DHO and UDC appeals, each separate incident report number must be appealed on a separate form.

28 C.F.R. § 542.14(c)(2).

Although inmates are "generally the epitome of the lay person, unassisted by a trained lawyer, seeking to invoke the legal process," *Thomas v. Woolum,* 337 F.3d 720, 729 (6th Cir.2002),[FN25] the BOP regulations clarify that the inmate must include closely related issues on the initial administrative remedy request and that unrelated issues require a separate request. The deadline for filing an internal claim is 20 days from the date of the incident. 28 C.F.R. § 542.14(a).

> FN25. The Sixth Circuit panel in *Thomas* reluctantly abided by a previous panel's decision and required the inmate, who filed a grievance complaining of a prison beating by a corrections officer, to exhaust the failure to protect claim against officers who witnessed the beating but were not identified in the grievance. *Thomas v. Woolum,* 337 F.3d at 724 & 733-735.

Turning to the initial administrative request, it requested attorney legal calls in order to collect the $475 million court ordered restitution. Citing *Bivens,* the grievance alleged that "BOP staff" must make a "diligent effort" and attached a cover page to the "$500 million dollar-pending BOP *Bivens* litigation [presumably the Pennsylvania action] ... as notice of your *Bivens* violations harming the 100,000 Hoffenberg restitution victims." (Docket Entry # 1, Ex. 5). The grievance alleged that BOP staff obstructed Hoffenberg's collection efforts by preventing the legal telephone calls. Arguably, the grievance therefore encompassed a claim that BOP staff were hampering Hoffenberg's court access to collect the court ordered restitution. Indeed, the formal responses from both Harding and Winn denied the grievance because Hoffenberg failed to show "an imminent *court* deadline." (Docket Entry # 1, Ex. 4 & 6; emphasis added).

***12** In the grievance filed on appeal, Hoffenberg alleged that Winn had violated the Financial Responsibility Program Statement by failing "TO MAKE A DILIGENT EFFORT assisting Hoffenberg['s]" collection efforts of the $475 million restitution obligation. The grievance expressly accused Winn of obstructing Hoffenberg's "COURT ACCESS." [FN26] (Docket Entry # 1, Ex. 7). BOP regulations bar an inmate from raising "issues not raised in the lower level filings." 28 C.F.R. § 542.15(b)(2) . BOP officials, however, did not object to the denial of court access claim explicitly claimed in the regional appeal grievance. To the contrary, in the formal response, Sadowski described Hoffenberg's claim as stating that "the Warden at FMC Devens is obstructing your court access by preventing you from making legal calls." (Docket Entry # 1, Ex. 8).

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BOP officials involved in responding to Hoffenberg's grievance therefore construed and addressed the claim as one alleging the denial of court access.

FN26. Hoffenberg repeated the allegation of *"Obstructing* Court Access" in the appeal to the BOP Central Office. (Docket Entry # 1, Ex. 9).

Defendants nevertheless argue that Hoffenberg failed to exhaust administrative remedies with respect to the denial of access claim.[FN27] The argument is overly technical. Inasmuch as Hoffenberg arguably raised and the BOP officials addressed the denial of access claim thereby serving the purpose of the PLRA's administrative exhaustion requirement, the argument is unavailing.

FN27. Defendants do not argue that Hoffenberg failed to exhaust administrative remedies by failing to name the particular BOP official. *See Irvin v. Zamora,* 161 F.Supp.2d 1125, 1130-1132 (S.D.Cal.2001) (discussing different approaches taken by sixth and eleventh circuits vis-à-vis identifying the individual prison officer involved). Hence, this court does *not* address the argument. Instead, defendants interpret the denial of access claim as alleging that "Watts and Sadowski caused other Bureau of Prison employees to interfere with his access to the courts" (Docket Entry # 40, pp. 5 & 6) and simply argue that Hoffenberg did not exhaust administrative remedies on the issue.

Defendants also assert that Hoffenberg failed to administratively exhaust the issue of the BOP administrators' lies and misrepresentations regarding the law and BOP policy in their responses to Hoffenberg's grievances. They also submit that Hoffenberg did not exhaust the claim that Motley lied in the June 21, 2002 letter to Senator Kerry.[FN28] Defendants are correct.

FN28. The argument addresses administrative exhaustion relative to the fourth cause of action described on page ten.

The initial grievance does not refer to any of the documents wherein various defendants purportedly lied and misrepresented BOP policy. Nor does the initial grievance refer to Watts or Sadowski's submission of false documents in retaliation for Hoffenberg's litigation of the Pennsylvania action. Indeed, such documents were created after Hoffenberg filed the initial grievance. Neither the initial grievance nor the requests for regional and central office review refer to BOP officials filing any false documents or connect such documents to being denied access to the administrative remedy, the Pennsylvania action or the subject matters in exhibit three. The fact that the requests for regional and central office review complain of being denied legal calls or being denied court access does not imply or otherwise alert BOP officials to a claim of creating false government documents. The grievance connected the denial of court access to the inability to collect restitution and the denial of legal telephone calls and not to the creation of false government documents, as alleged in the complaint. Finally, no mention is made of the June 21, 2002 letter to Senator Kerry in the initial grievance or the requests for regional and central office review. No such reference is possible inasmuch as the letter post-dates Hoffenberg's final appeal to the BOP Central Office.

***13** Courts addressing PLRA administrative exhaustion of claims involving similar connections, or lack thereof, consider such claims unexhausted. *See, e.g., Cherry v. Selsky,* 2000 WL 943436 at *1 & 7 (S.D.N.Y. July 7, 2000) (administrative grievance challenging disciplinary action did not exhaust the claim that the officer filed a false disciplinary report); *see also Bey v. Pennsylvania Department of Corrections,* 98 F.Supp.2d 650, 660-661 (E.D.Pa.2000) (appeal of disciplinary finding resulting from assault did not exhaust claim challenging resulting administrative custody status or medical treatment resulting from the altercation);

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*Payton v. Horn,* 49 F.Supp.2d 791, 796 (E.D.Pa.1999) (administrative exhaustion of disciplinary action did not exhaust resulting decision to keep the plaintiff in administrative custody or the improper withdrawal of funds from the plaintiff's inmate account). Accordingly, the fourth cause of action under *Bivens* for filing false government documents is not administratively exhausted as required under the PLRA, 28 U.S.C. § 1997e(a), and therefore subject to summary judgment.

Defendants next argue that Hoffenberg's denial of access to the courts claim fails on the merits due to the absence of an actual injury and because the type of lawsuit impinged is not constitutionally protected. This argument attacks the viability of the first cause of action.

It is undeniable that prisoners have a constitutional right of access to the courts. *Boivin v. Black,* 225 F.3d 36, 42 (1st Cir.2000). Such access must be “adequate, effective and meaningful .” *Bounds v. Smith,* 430 U.S. 817, 821, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977).

The right, however, “is narrow in scope.” *Boivin v. Black,* 225 F.3d at 42 (citing *Lewis v. Casey,* 518 U.S. 343, 360, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996)). As narrowly confined by the Supreme Court in *Lewis,* Hoffenberg's denial of access to the courts claim fails to withstand summary judgment. In order to demonstrate a violation of the right of access to the courts, the inmate “must show actual injury.” *Boivin v. Black,* 225 F.3d at 42 n. 5 (citing *Lewis v. Casey,* 518 U.S. at 349). The Supreme Court in *Lewis* defined an “actual injury” as “a non-frivolous legal claim [that] had been frustrated or was being impeded.” *Lewis v. Casey,* 518 U.S. at 353; *Boivin v. Black,* 225 F.3d at 43 n. 5.

Hoffenberg fails to satisfy the actual injury requirement for two reasons. First, he fails to demonstrate the type of injury encompassed within the right. The examples provided by the Court in *Lewis* of such actual injuries demonstrate the futility of Hoffenberg's claim. *See, e.g., Lewis v. Casey,* 518 U.S. at 351 (having a complaint dismissed for technical reason because deficiencies of law library prevented inmate from learning about the technical requirement; inmate so stymied by inadequacies of law library that he could not file a complaint).

In contrast to the examples of satisfactory actual injuries given in *Lewis,* Hoffenberg simply points out that he lost three of the cases identified by defendants in their brief.[FN29] He also relies on the subject areas in exhibit three and the Pennsylvania action as constituting an actual injury. It is readily evident, however, that Hoffenberg was not denied access to these courts. He was able to file complaints and litigate these proceedings in court on procedural or substantive grounds. Although he may have lost the legal proceedings, he did not lose access to the legal forums. Being deprived a legal victory for a claim is not synonymous to being deprived access to the courts to resolve that claim.

FN29. *Hoffenberg v. Hoffman, Pollok & Picholz, LLP,* 2002 WL 992806 (2d Cir. May 13, 2002) (reversing lower court's November 2001 order, an order made at a time when Hoffenberg was not incarcerated at FMC Devens, to dismiss case for lack of service); *Hoffenberg v. Meyers,* 2002 WL 57252 (S.D.N.Y. Jan.16, 2002) (legal malpractice action against attorneys who represented Hoffenberg in criminal proceeding; court allowed summary judgment motion prior to Hoffenberg's transfer to FMC Devens), *aff'd, as modified,* 2003 WL 21069844 (2nd Cir. May 12, 2003); *Hoffenberg v. Bodell,* 2002 WL 31163871 (S.D.N.Y. Sept.30, 2002) (legal malpractice claims against attorney representing Hoffenberg on appeal of criminal conviction dismissed as time barred and for failure to state a claim).

***14** Second, even putting aside the issue of the existence of an adequate law library at FMC Devens or means other than unlimited telephone access to contact an attorney as providing the necessary

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meaningful court access, *see Hannon v. Allen,* 241 F.Supp.2d 71, 74 (D.Mass.2003) (citing First Circuit case for principle that a prison need not provide both a law library and access to legal assistance); *accord Lewis v. Casey,* 518 U.S. at 351 ( *Bounds* stressed that law library facilities were only one method to assure meaningful access and that the decision did " 'not foreclose alternative means to achieve that goal" '), Hoffenberg fails to demonstrate the type of legal claim that *Bounds* protects. *See Lewis v. Casey,* 518 U.S. at 354-355 & n. 3. The Supreme Court in *Lewis* limited *Bounds* to legal claims attacking a criminal conviction on direct appeal, habeas petitions and civil rights actions challenging the conditions of an inmate's confinement to vindicate a basic constitutional right. *See Hannon v. Allen,* 241 F.Supp.2d at 74. The limitation is explained in the following passage from *Lewis:*

> Finally, we must observe that the injury requirement is not satisfied by just any type of frustrated legal claim. Nearly all of the access-to-courts cases in the *Bounds* line involved attempts by inmates to pursue direct appeals from the convictions for which they were incarcerated or habeas petitions. In *Wolff v. McDonnell,* 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974), we extended this universe of relevant claims only slightly, to "civil rights actions"-i.e., actions under 42 U.S.C. § 1983 to vindicate "basic constitutional rights." 418 U.S. at 579, 94 S.Ct. at 2986.... In other words, *Bounds* does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims. The tools it requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment of any other litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration.

*Lewis v. Casey,* 518 U.S. at 354-355 (citations omitted). The only legal claim that falls within this prescription is the Pennsylvania action. For reasons discussed in the previous paragraph, the Pennsylvania action cannot support a denial of access claim. Hoffenberg admits the proceedings are ongoing.

Finally, the frivolous nature of the subject matters set forth in exhibit three precludes an access to the courts claim based upon such claims. *See Lewis v. Casey,* 518 U.S. at 353 n. 3; *see Penrod v. Zavaras,* 94 F.3d 1399, 1403 (10th Cir.1996) ("inmate must satisfy the standing requirement of 'actual injury' by showing that the denial of legal resources hindered the prisoner's efforts to pursue a non-frivolous claim").

***15** In a related argument, defendants assert that the restrictions placed upon Hoffenberg's telephone access do not violate his constitutional rights. The absence of an actual injury likewise precludes any assertion that the failure to abide by 28 C.F.R. § 540 .103 amounted to a denial of Hoffenberg's constitutional right of access to the courts.FN30 In sum, the *Bivens* claim in the first cause of action fails to withstand summary judgment.

> FN30. Although this court does not interpret the complaint as raising a constitutional claim based upon the right to make unmonitored, private telephone calls, such a claim is devoid of merit. *See United States v. Workman,* 80 F.3d 688, 692-692 (2nd Cir.1996). Nor, absent allowance of a motion for leave to file an amended complaint, does the complaint include a First Amendment retaliation claim for Hoffenberg's litigating the Pennsylvania action. Rather, the retaliation claim is based upon the submission of false government documents.

Defendants next argue that verbal abuse does not rise to the level of a constitutional violation. The argument implicates the fourth cause of action.

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Inasmuch as the *Bivens* claim in the fourth cause of action alleging the filing of false documents in the administrative appeal and false statements in the June 21, 2002 letter to Senator Kerry are subject to dismissal due to lack of administrative exhaustion, this court need not address this alternative argument for summary judgment.

Defendants' qualified immunity argument only addresses the *Bivens'* claims regarding the denial of access to the courts and the creation of false government documents, including Motley's June 21, 2002 letter, that this court already deems subject to dismissal due to the lack of PLRA exhaustion or the absence of an actual injury. The argument does not reference or address the constitutional right at issue in the second and third causes of action or otherwise explain how defendants did not in good faith violate that constitutional right.[FN31] A more detailed argument is therefore required if defendants wish to raise the qualified immunity defense as it pertains to the second and third causes of action.

> FN31. Indeed, defendants nowhere address the merits of the *Bivens'* claims in the second and third causes of action. The omissions are understandable given the difficulties of deciphering the allegations in the pro se complaint.

As a final matter, defendants argue that the complaint fails to assert the violation of any constitutional right in sufficient factual detail against the 30 unidentified John Doe individuals. "Because *Bivens* actions redress only constitutional violations, the absence of a constitutional violation necessarily precludes a *Bivens* action." *Northern Voyager, Limited Partnership v. Thames Shipyard and Repair Co.,* 2000 WL 33177236 at *2 (D.Mass. March 29, 2000). In the face of defendants' argument, Hoffenberg states that he "withdraws the John Doe defendants from the complaint." (Docket Entry # 42, pp. 15-16). The John Doe defendants are therefore subject to dismissal.

*CONCLUSION*

In accordance with the foregoing discussion, this court RECOMMENDS [FN32] that defendants' motion for summary judgment (Docket Entry # 39), be ALLOWED as to the first and fourth causes of action under *Bivens.* The motion is also ALLOWED to the extent that the BOP and the 30 unidentified John Doe individuals are DISMISSED. The motion is otherwise DENIED. Claims remaining in this action include the FTCA claims under the first, second, third and fourth causes of action,[FN33] the *Bivens* claims under the second and third causes of action and the causes of action under 28 C.F.R. § 545.10 and 28 C.F.R. § 540.103.[FN34]

> FN32. Any objections to this Report and Recommendation must be filed with the Clerk of Court within ten days of receipt of the Report and Recommendation to which objection is made and the basis for such objection. Any party may respond to another party's objections within ten days after service of the objections. Failure to file objections within the specified time waives the right to appeal the order. *United States v. Escoboza Vega,* 678 F.2d 376, 378-379 (1st Cir.1982); *United States v. Valencia-Copete,* 792 F.2d 4, 6 (1st Cir.1986).

> FN33. See pages nine through ten for a description of the causes of action.

> FN34. See footnote number seven.

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