IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

FRANCIS SHAEFFER COX,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 17−cv–0338−JPG**
	)	
WILLIAM TRUE,	)	
KATHERINE SIEREVELD,	)	
ANGELA DUNBAR,	)	
KATHY HILL,	)	
GARY BURGESS,	)	
R. BLYTHE,	)	
R. BASKERVILLE,	)	
C. KRAWCYZK, and	)	
FEDERAL BUREAU OF PRISONS	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

GILBERT, District Judge:

Plaintiff Francis Schaeffer Cox, an inmate in U.S. Penitentiary Marion, brings this action for deprivations of his constitutional rights by persons acting under the color of federal authority pursuant to *Bivens v. Six Unknown Agents of the Bureau of Narcotics*, 403 U.S. 388 (1971) and the Federal Torts Claims Act, 28 U.S.C. §§ 1346, 2671-2680. Plaintiff requests injunctive relief, declarative relief, as well as nominal, punitive, and compensatory damages. This case is now before the Court for a preliminary review of the Complaint pursuant to 28 U.S.C. § 1915A, which provides:

> (a) **Screening** – The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.

> (b) **Grounds for Dismissal** – On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint–
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> (1) is frivolous, malicious, or fails to state a claim on which relief may be granted; or
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> (2) seeks monetary relief from a defendant who is immune from such relief.

An action or claim is frivolous if "it lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). Frivolousness is an objective standard that refers to a claim that any reasonable person would find meritless. *Lee v. Clinton*, 209 F.3d 1025, 1026-27 (7th Cir. 2000). An action fails to state a claim upon which relief can be granted if it does not plead "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). The claim of entitlement to relief must cross "the line between possibility and plausibility." *Id*. at 557. At this juncture, the factual allegations of the *pro se* complaint are to be liberally construed. *See Rodriguez v. Plymouth Ambulance Serv.*, 577 F.3d 816, 821 (7th Cir. 2009).

Upon careful review of the Complaint and any supporting exhibits, the Court finds it appropriate to exercise its authority under § 1915A; portions of this action are subject to summary dismissal.

The Complaint

Plaintiff is a federal prison inmate serving a 310 month sentence. (Doc. 1, p. 10). His conviction is controversial, and his supporters have conducted mass mailings to raise funds for his legal defense. *Id.* These mailings have been critical of the Federal Bureau of Prisons ("BOP") and the Defendants. *Id.* As much as $3 million dollars has been raised by these mailings. *Id.*

Plaintiff was placed in the Communications Management Unit ("CMU") at Marion in February 2013. *Id.* Plaintiff was discharged from that unit on February 18, 2016, having gotten 1 incident report during that period. *Id.*

During the summer of 2016, Plaintiff got into a dispute with some of his supporters over the disbursement of funds raised of his legal defense. (Doc. 1, p. 11). Plaintiff has been involved in legal negotiations with that group of supporters, and has turned to a new group of supporters to assist him in fund-raising. *Id.*

On June 20, 2016, Joshua Ligairi of Icarus Entertainment contacted Plaintiff about securing the rights to Plaintiff's life story for the purpose of making a documentary. *Id.* Hill, the Intelligence Research Specialist for Marion, confronted Plaintiff over the correspondence from Ligairi. *Id.* Hill threatened Plaintiff with new charges if he gave his story to a publisher. *Id.* She also stated that the Counter-Terrorism Unit ("CTU") would put him back in CMU, and would otherwise be displeased if Plaintiff's story got out. *Id.* Plaintiff believes that Dunbar, Siereveld, Burgess, Blythe, Baskerville and others are members of the CTU. *Id.* Ultimately, Plaintiff was deprived of the opportunity to participate in the film, which has since been made. (Doc. 1, p. 12).

On August 9 or 10, 2016[1] Blythe, an intelligence analyst, wrote incident report #2882521 against Plaintiff. *Id.*; (Doc. 1-1, p. 15). The incident report alleged that Plaintiff had attempted to transfer money to another inmate, Gino-Gabino Andolini through an attorney in Kerrville Texas. (Doc. 1, p. 12). Plaintiff alleges that the letter was forged, but claims that Blythe wrote the ticket in retaliation for the correspondence with Ligairi. *Id.* Plaintiff further alleges that the retaliation continued when Krawcyzk, acting as a Unit Disciplinary Committee ("UDC"),

[1] Plaintiff's Complaint states 2017, but the Court presumes this was an error.

referred incident report #2882521 to a Disciplinary Hearing Officer despite knowing that it was baseless. *Id.* Plaintiff alleges the conspiracy continued 2 months later when Hill and Burgess, acting as a UDC found Plaintiff involved in the incident without sufficient evidence. (Doc. 1, p. 13).

On August 30, 2016, Dunbar, the Assistant Regional Director for the BOP North Central Region, placed Cox in the CMU once again without due process. (Doc. 1, pp. 2, 12-13). Plaintiff alleges that Dunbar acted out of a conspiracy against him. (Doc. 1, p. 13).

Plaintiff caught another incident report, #2914557, from Blythe on November 3 or 4th, 2016. *Id.* That report alleged that Plaintiff used a pre-approved phone call to call into the Wiley Drake radio program. *Id*.; (Doc. 1-1, p. 16). Plaintiff alleges that the report was without evidentiary basis and in furtherance of the conspiracy. (Doc. 1, p. 13). Hill and Burgess served as the UDC on that report and recommended that it be referred to the Disciplinary Hearing Officer, despite knowing that it was baseless, where it remains pending. *Id*.

Plaintiff received incident report #2931834 on December 22, 2016. *Id*.; (Doc. 1-1, p. 17). The report alleged that Plaintiff was operating a business in violation of BOP PS 5270.09 Code 334. (Doc. 1, p. 13). Plaintiff alleges that he was not operating a business, but rather attempting to gain control of funds raised for his legal defense, raise additional funds for his legal defense, and communicate with his supporters. *Id.* Plaintiff alleges that Siereveld and Blythe wrote the report, despite knowing that it was baseless. *Id.* On December 28, 2016, Hill and Baskerville, acting as UDC, found the report substantiated, despite knowing that the report was without evidentiary foundation. (Doc. 1, p. 14).

Plaintiff alleges that the retaliation continued from December 22, 2016 through January 9, 2016 when Siereveld, and True began to deny Plaintiff his mail on the theory that the mail was

part of Plaintiff's efforts to conduct a business. (Doc. 1, pp. 13-14). Plaintiff caught another incident report, #2967316 on March 27, 2017 for writing a letter to a supporter requesting that the supporter conduct a fund-raising mailing. (Doc. 1, p. 14). Plaintiff alleges that this disciplinary report was also without evidentiary foundation. *Id.*

Discussion

Based on the allegations of the Complaint, the Court finds it convenient to divide the pro se action into 15 counts.[2] These designations supersede Plaintiff's designations. The parties and the Court will use these designations in all future pleadings and orders, unless otherwise directed by a judicial officer of this Court. The following claims survive threshold review:

> **Count 1 –** The Federal Bureau of Prisons' policy statements on "conducting a business," BOP PS 5265.14 and BOP PS 5270.09 are facially void for vagueness and as-applied to Plaintiff by Defendants True, Siereveld, Dunbar, Hill, Burgess, Blythe, Baskerville, and Krawcyzk;
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> **Count 2 –** Defendants Blythe, True, and Siereveld denied Plaintiff his First Amendment rights when they disciplined him and withheld specific items of Plaintiff's mail for allegedly conducting a business between December 22, 2016 and January 9, 2017;
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> **Count 3 –** Defendant Hill violated Plaintiff's First Amendment rights when she instructed Plaintiff not to communicate with Ligairi and in fact caused Plaintiff not to communicate further with Ligairi
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> **Count 4 –** Defendant Hill retaliated against Plaintiff for attempting to communicate with the media in violation of the First Amendment when she approved discipline against him, as recounted in disciplinary report #2882521, #2914457, and #2931834;

[2] The Court did not understand Plaintiff to be making an independent claim based on the incident described in conduct report #2914557 regarding his telephone call to the Wiley Drake radio show, because Plaintiff did not include facts regarding that incident in his statement of claim, other than to incorporate the disciplinary report itself. The Court understood Plaintiff to be alleging that the report was written in retaliation. If Plaintiff intended to also bring a stand-alone claim outside of the retaliation claim, he should file an amended complaint incorporating the incident.

Plaintiff has also attempted to bring other Counts, but for the reasons elucidated below, these claims do not survive threshold review.

> **Count 5 –** Defendants True, Siereveld, Dunbar, Hill, Burgess, Blythe, Baskerville, and Krawcyzk conspired to violate Plaintiff's First and Fifth Amendment rights in violation of 42 U.S.C. § 1985(3) when they retaliated against Plaintiff for receiving a letter from Ligairi;
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> **Count 6 –** Defendants Dunbar, True, and Siereveld were negligent in failing to prevent the conspiracy amongst True, Siereveld, Dunbar, Hill, Burgess, Blythe, Baskerville, and Krawcyzk in violation of Plaintiff's First and Fifth Amendment rights pursuant to 42 U.S.C. § 1986;
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> **Count 7 –** Defendant Dunbar denied Plaintiff his due process rights under the Fifth Amendment when she transferred him from USP Marion's general population to the Communications Management Unit on August 30, 2016;
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> **Count 8 –** Defendant Dunbar retaliated against Plaintiff for the exercise of his First Amendment rights when she transferred him from USP Marion's general population to the Communications Management Unit on August 30, 2016;
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> **Count 9 –** Defendant Burgess retaliated against Plaintiff when he substantiated incident reports #2882521 and #2914557 in violation of Plaintiff's First Amendment Rights without sufficient evidence;
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> **Count 10 –** Defendant Baskerville retaliated against Plaintiff when he substantiated incident report #2931834 in violation of Plaintiff's First Amendment Rights without sufficient evidence;
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> **Count 11 –** Defendant Krawcyzk retaliated against Plaintiff when he substantiated incident report #2882521 in violation of Plaintiff's First Amendment Rights without sufficient evidence;
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> **Count 12 –** Defendant Burgess deprived Plaintiff of his due process rights in violation of the Fifth Amendment when he substantiated incident reports #2882521, #2914457, and #2931834 without sufficient evidence;
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> **Count 13 –** Defendant Krawcyzk violated Plaintiff's due process rights when he referred the incident report #2882521 to a Disciplinary Hearing Officer despite knowing that the report was unsupported by evidence;

> **Count 14 –** Defendant Baskerville violated Plaintiff's due process rights under the Fifth Amendment when he substantiated incident report #2931834 without sufficient evidence;
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> **Count 15 –** Defendant Blythe denied Plaintiff his due process rights under the Fifth Amendment when she issued incident reports #2882521, #2914557, and #2967316; and Blythe and Siereveld denied Plaintiff his due process rights when they jointly issued incident report #2931834, despite knowing the reports were false in violation of the Fifth Amendment.

As an initial matter, Plaintiff has indicated that he brings this suit pursuant to both 28 U.S.C. § 1331 and the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671-2680. But all of Plaintiff's claims appear to allege constitutional violations; there is no claim that sounds in state tort law. Additionally, Plaintiff has not named the United States as a defendant. For this reason, the Court will only analyze the claims under a *Bivens* theory of liability pursuant to the subject matter jurisdiction conferred by 28 U.S.C. § 1331, and will disregard the references to the Federal Tort Claims Act.

In **Count 1**, Plaintiff presents claims that prison regulations were unconstitutional as applied to him and vague on their face. The distinction between an as-applied challenge and a facial challenge turns only on the choice of remedy available, "not on what must be pleaded in the complaint." *Six Star Holdings, LLC v. City of Milwaukee*, 821 F.3d 795, 803 (7th Cir. 2016). Plaintiff has asked the Court to declare 2 BOP regulations void and impose injunctive relief on that basis; he also requests compensatory damages. *Id.* ("[A] facial challenge usually invites prospective relief, such as an injunction, whereas an as-applied challenge invites narrower, retrospective relief, such as damages"). It is therefore appropriate to view Plaintiff's claims under both the as-applied and facial challenge standards because he has requested both injunctive relief and damages.

There are 2 regulations at issue: BOP Regulation 5265.14, § 540.14(d)(4) permits the Warden to reject correspondence sent to or from an inmate on the grounds that it contains directions for a business; Plaintiff also takes issue with BOP regulation 5270.09, which categorizes conducting a business as a moderately severe level disciplinary infraction. Plaintiff alleges that he was disciplined and letters were withheld from him on the basis of these regulations. He further alleges that these actions were taken because he was attempting to communicate with various groups of supporters about efforts to raise funds for his continued legal proceedings over his convictions.

The prohibition on conducting a business has been found to be a permissible restriction on prisoners' residual freedom. *King v. Federal Bureau of Prisons*, 415 F.3d 634, 636 (7th Cir. 2005). But Plaintiff alleges that he is not actually conducting a business. Instead, the regulations have been unreasonably interpreted to prevent Plaintiff from writing to his supporters, receiving their mail in return, and directing the disposition of funds raised for his legal defense. Plaintiff's claim turns on whether the regulations are a permissible infringement on his First Amendment rights to communicate in general.

The Supreme Court has delineated 4 factors for determining whether a specific regulation or practice serves a legitimate penological interest. *Turner v. Safely*, 482 U.S. 78, 89-90 (1987). The primary factor is whether a valid, rational connection exists between the restriction and a legitimate interest. *Id.* A restriction on speech that fails to meet this connection fails under *Turner*. *See Shaw v. Murphy*, 532 U.S. 223, 229-30 (2001). The other factors relevant in determining a restriction's reasonableness include whether the inmate has alternative means of exercising the right; the impact accommodation of the asserted right would have on guards, other

inmates, and prison resources; and the absence of a reasonable alternative to the regulation or practice. *Turner*, 482 U.S. at 90.

To state a vagueness challenge, a plaintiff must show that the regulation fails to define the relevant conduct with sufficient definiteness so that the average person would understand what conduct is forbidden. *Koutnik v. Brown*, 456 F.3d 777, 783 (7th Cir. 2006) (citing *Fuller by Fuller v. Decatur Pub. Sch. Bd. of Educ. Sch. Dist. 61*, 251 F.3d 662, 666 (7th Cir. 2001). Unlike an as-applied challenge, a plaintiff bringing a vagueness challenge must show that the law is impermissibly vague in all of its applications. *Koutnik*, 456 F.3d at 783. The context in which the regulation is promulgated is also significant; specifically, prisons in particular are permitted to have "some open-ended quality" in their regulations to preserve maximum flexibility in addressing safety and security. *Borzych v. Frank*, 439 F.3d 388, 392 (7th Cir. 2006).

At the pleading stage, the Court finds that asking for donations to cover legal fees, and communicating with those tasked with managing that money, which notably was not going directly to Plaintiff, would not necessarily appear to the average person to fall under the rubric of "conducting a business." The Court finds that Plaintiff has adequately stated a claim on the grounds that the regulations at issue are unconstitutionally vague and have been applied to him in an unreasonable matter. However, Plaintiff has named the Bureau of Prisons, presumably on this count for the purposes of injunctive relief. The Bureau of Prisons is not a proper defendant. *King*, 415 F.3d at 636. Accordingly the Court adds Thomas R. Kane, the Acting Director of the Federal Bureau of Prisons, as a defendant for the purposes of Plaintiff's facial challenge and request for injunctive relief only. The Court also finds that Warden True is an appropriate party for injunctive relief. As to the as-applied challenge, because it appears that Siereveld, Dunbar,

Hill, Burgess, Blythe, Baskerville, and Krawcyzk all took action on the basis of the disputed regulations, that claim will proceed against them.

In **Count 2**, Plaintiff has alleged that True and Siereveld interfered with his mail in violation of the First Amendment, and that Blythe wrote disciplinary reports purporting to justify the interference. Plaintiff has a limited First Amendment right in receiving and sending mail. *Thornburgh v. Abbott*, 490 U.S. 401 (1989); *Turner v. Safley*, 482 U.S. 78 (1987). The reasonableness of a restriction on outgoing mail turns on whether the censorship is justified by a substantial penological interest and if the means employed are no more intrusive than necessary to achieve that goal. *Procunier v. Martinez*, 416 U.S. 396, 413 (1974) *overruled on other grounds Thornburgh v. Abbott*, 490 U.S. 401, 412-13 (1989); *Koutnik v. Brown*, 456 F.3d 777, 781 (7th Cir. 2006); *see also Gaines v. Lane*, 790 F.2d 1299 (7th Cir. 1986). As to the incoming mail, the standard is different. Pursuant to *Turner*, the regulations regarding incoming mail must only be "reasonably related to legitimate penological interests." 482 U.S. at 89.

The treatment of Plaintiff's incoming and outgoing mail implicates his First Amendment rights. He has identified at least 7 letters[3] that were intercepted by prison authorities for allegedly violating the prohibition on running a business. Plaintiff then received disciplinary reports written by Blythe to justify the interception. Although he has not specifically alleged that any of his outgoing mail was withheld, the Complaint suggests that the Defendants have disapproved of his efforts to communicate with his supporters on this subject, which could have plausibly chilled Plaintiff's speech. Plaintiff has also alleged that he has wrongfully been placed

[3] Specifically, Plaintiff alleges that True and Siereveld denied Plaintiff the right to receive 1) a December 22, 2016 letter from Ryan Mobley; 2) a December 22, 2016 letter from Liz Sarver; 3) a December 22, 2016 letter from Angela Clemmons; 4) a January 3, 2017 letter from Rudy Davis; 5) a January 5, 2017 letter from Angela Clemmons; 6) a January 5, 2017 letter from Liz Sarver; and 7) a January 9, 2017 letter from Angela Clemmons. (Doc. 1, p. 9). Plaintiff's Memo in support of the Complaint alleges that 9 pieces of mail were withheld, but does not get into specifics. (Doc. 1-2, p. 8).

in the CMU, suggesting that his communication, both incoming and outgoing, has been subjected to higher scrutiny, possibly due to Plaintiff's activities with his fundraisers. At this time, Plaintiff has adequately alleged that Blythe, True, and Siereveld interfered with his First Amendment rights, and **Count 2** will be permitted to proceed against them.[4]

In **Count 3**, Plaintiff has alleged that Hill told him he could not communicate with Ligairi because she believed that Plaintiff would benefit from his crime by participating in the documentary, which is prohibited. Although the Ligairi letter acknowledges that Plaintiff cannot profit from his crime and suggests investigating alternative means of remuneration, Plaintiff alleges that his discussions with Ligairi had never reached a stage where money was to be exchanged. Given as Plaintiff alleges that he was not permitted to respond to the letter, this allegation seems plausible. Plaintiff has also implied that he would have been willing to participate in the film without payment. Additionally, the Court is concerned that Plaintiff was prohibited from communicating with a member of the media by letter, as many decisions have assumed that this option remains available to all prisoners at all times.

Like other First Amendment rights, an inmate's right to access the media is limited and defined by his status as a prisoner. *Pell v. Procunier*, 417 U.S. 817, 822 (1974). Any regulation on correspondence between press and prisoners must be "reasonably related to legitimate security interests." *Turner*, 482 U.S. at 91. In *Pell*, the Supreme Court upheld a prison regulation that limited in-person media interviews with specific inmates, but the holding was grounded in part on the assumption that alternative means, like letter writing and phone calls

[4] The Court does not understand Plaintiff to be alleging that the regulations impermissibly infringe on his right to counsel pursuant to the Sixth Amendment or his due process rights under the Fifth Amendment. To the extent that the Complaint contains this allegation, it is dismissed without prejudice for failure to state a claim. If Plaintiff intended to raise those grounds, he should file an amended complaint containing facts that would show such claims are plausible.

were available for communication with the press. 417 U.S. at 825-26; *See also Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974) (applying *Pell* analysis to the Federal prison system); *Hammer v. Ashcroft*, 570 F.3d 798, 804-05 (7th Cir. 2009).

Plaintiff has alleged that Hill prohibited him from communicating with a member of the media at all, and that her threat chilled his speech so that he did not communicate with a member of the media. Although Plaintiff has alleged that Hill cited to "profit" as her rationale, it is not clear whether Hill was relying on the BOP regulations otherwise at issue in this case, other regulations regarding media access, or her own subjective judgment. Regardless, Plaintiff has made a plausible allegation that Hill's prohibition was unreasonable as a blanket prohibition. Accordingly, Plaintiff's claim against Hill for denying him his First Amendment rights will proceed in **Count 3**.

Plaintiff has also alleged that Hill retaliated against him for receiving the letter in **Count 4**. To succeed on a First Amendment retaliation claim, a plaintiff must prove 1) that he engaged in conduct protected by the First Amendment; 2) that he suffered a deprivation that would likely deter First Amendment activity in the future; and 3) that the protected conduct was a "motivating factor" for taking the retaliatory action. *Bridges v. Gilbert*, 557 F.3d 541, 546 (7th Cir. 2009).

As the Court has determined that Hill's conduct regarding the Ligairi correspondence may have infringed on Plaintiff's First Amendment rights, it is clear that Plaintiff has plausibly alleged that he engaged in conduct protected by the First Amendment. Plaintiff has also alleged that Hill was involved in multiple disciplinary proceedings against him in the months after their confrontation. Moreover, Plaintiff has alleged that he did not respond to the correspondence as a result of Hill's conduct. At this state, Plaintiff has alleged a viable retaliation claim against Hill, and **Count 4** will be allowed to proceed.

None of Plaintiff's other claims survive threshold review. In **Count 5**, Plaintiff has alleged that that he was subjected to a conspiracy to retaliate against him and deny him his rights pursuant to 42 U.S.C. § 1985. To make a claim of conspiracy under § 1985(3), a plaintiff must show 1) a conspiracy; 2) for the purpose of depriving a person or class of persons equal protection under the laws; 3) an act in furtherance of the conspiracy; and 4) an injury to person or property or a deprivation of a right or privilege granted to U.S. citizens." *Green v. Benden*, 281 F.3d 661, 665 (7th Cir. 2002) (citing *Hernandez v. Joliet Police Dep't*, 197 F.3d 256, 263 (7th Cir. 1999). To establish the second prong, it is necessary to show a class-based discriminatory animus, like racism. *Xiong v. Wagner*, 700 F.3d 282 (7th Cir. 2012). The plaintiff must also show that there was agreement between the conspirators to cause the harm complained of; the general nature and scope of the conspiracy must be known to each conspirator. *Id.*

Additionally, federal officials are not liable in their official capacities under § 1985(3); they may only be sued in their official capacities. *See Benson v. United States*, 969 F.Supp 1129, 1135 (N.D. Ill. 1997). The Court will presume that Plaintiff's conspiracy claim is directed at the defendants in their individual capacities only, and to the extent that it is not, those claims are dismissed with prejudice. The Seventh Circuit has also suggested that § 1985(3) conspiracy claims are superfluous in situations where all of the named defendants are state actors because the purpose of the statute is to permit recovery from a private actor who has conspired with state actors. *Fairley v. Andrews*, 578 F.3d 518, 526 (7th Cir. 2009); *See also Turley v. Rednour*, 729 F.3d 645, 649, n. 2 (7th Cir. 2013). All of the defendants here are BOP employees, and so this is precisely the situation where the conspiracy allegation adds nothing to the underlying claims. Plaintiff attempts to get around this by citing to *Hartman v. Board of Trustees of Community College Dist. No. 508*, 4 F.3d 465 (7th Cir. 1992) for the proposition that the intra-corporate

conspiracy theory does not apply under 18 U.S.C. §§ 241-242, but criminal statutes like §§ 241-242 do not create individually enforceable rights, and so §§ 241-242 is not relevant here. *Chicago Title & Land Trust Co. v. Rabin*, No. 11-cv-425, 2012 WL 266387 at *5 (N.D. Ill. January 30, 2012); *Lovelace v. Whitney*, 684 F.Supp. 1438, 1441 (N.D. Ill. 1988) *aff'd sub nom. Lovelace v. Hall*, 886 F.2d 332 (7th Cir. 1989).

But the real flaw in Plaintiff's conspiracy allegation is that he has not alleged that he is part of a protected class. To get around this, Plaintiff has argued that his equal protection claim is a "class of one." However, that theory has been foreclosed by the relevant case law; Plaintiff cannot proceed under § 1985(3) as a class-of-one. *See Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971) ("[T]here must be some racial or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action."); *Smith v. Gomez*, 550 F.3d 613, 617 (7th Cir. 2008) (finding plaintiff's status as a parolee is not considered a "suspect class" for equal-protection purposes); *Bowman v. City of Franklin*, 980 F.2d 1104, 1109 (7th Cir. 1992) (rejecting plaintiff's allegations of conspiracy where plaintiff failed to alleged that their proposed class had racial or other class-based characteristics, and specifically rejecting plaintiffs' arguments that they had adequately pleaded that they were part of a geographic or political class); *Thorncreek Apts. I, LLC v. Village of Park Forest*, 08 C 869, 08 C 1225, 08 C 4303, 2015 WL 2444498 (N.D. Ill. May 20, 2015); *see also Underfer v. Univ. Toledo*, 36 F. App'x 831, 833-34 (6th Cir. 2002) (holding that a class of one claim cannot underlie a § 1985(3) claim); *Grimes v. Smith*, 585 F.Supp. 1084, 1089-90 (N.D. Ind. 1984) (Posner, J.) (rejecting a § 1985(3) claim because "there is no racial or similar hostility behind the conspiracy in the present case that would take it out of the category of purely political conspiracies), *aff'd* 776 F.2d 1359 (7th Cir. 1985); *Snyder v. Smith*, 7 F.Supp.3d 842, 850 (S.D. Ind. 2014) ("Neither the Supreme Court nor

the Seventh Circuit has credited a 'class of one' conspiracy claim under Section 1985(3), and such a broad interpretation would be inconsistent with the Supreme Court's command that the statute should be construed in a limited manner.")

Even if Plaintiff could proceed under a class-of-one theory, he has not adequately pleaded it. A plaintiff states a class of one claim where the plaintiff alleges that he has been treated differently from others similarly situated and there is no rational basis for the difference in treatment. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Plaintiff has only alleged that he is part of a class of individuals seeking to exercise their First Amendment rights; he has not alleged that he has been treated differently than any similarly situated individuals or mentioned similarly situated individuals in any manner other than a conclusory statement that he proceeds as a class of one. As Plaintiff has not adequately alleged the requisite intent for a § 1985(3) claim, his conspiracy claim in **Count 5** will be dismissed without prejudice.

As Plaintiff has failed to state a conspiracy claim, his claim against Dunbar, True, and Siereveld in **Count 6** for negligent failure to prevent a conspiracy must also be dismissed. Section 1986 is a companion statute to § 1985(3) and permits recovery against "every person who, having knowledge that any of the wrongs conspired to be done, . . . are about to be committed, and having the power to prevent or aid in preventing the commission of the same, neglects or refuses to do so . . ." *Bell v. City of Milwaukee*, 746 F.2d 1205, 1233 (7th Cir. 1984) *overruled on other grounds by Russ v. Watts*, 414 F.3d 783 (7th Cir. 2005). As the liability in § 1986 is completely dependent and derivative of the liability under § 1985(3), the failure of Plaintiff's § 1985(3) claim likewise dooms his negligent failure to prevent the conspiracy claim. *Rodgers v. Lincoln Towing Service, Inc.*, 771 F.2d 194, 202 (7th Cir. 1985). **Count 6** will also be dismissed with prejudice.

Next, Plaintiff has alleged in **Count 7** that his due process rights were violated when Dunbar re-designated him to the CMU on August 30, 2016. Not every placement decision implicates the due process clause; rather courts examine whether the new placement imposes an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 483-84 (1995). When there is no change in the conditions of confinement; no process is due. *Lagerstrom v. Kingston*, 463 F.3d 621, 623 (7th Cir. 2006); *see e.g., Furrow v. Marberry*, 412 F. App'x 880, 882-83 (7th Cir. 2011) (no due process claim when a prisoner housed under restrictive conditions was moved to slightly better conditions).

BOP regulations describe CMUs as "a general population housing unit where inmates ordinarily reside, eat, and participate in all educational, recreational, religious, visiting, unit management, and work programming within the confines of the CMU . . . [for the purpose of] enabl[ing] staff to more effectively monitor communication between inmates in CMUs and persons in the community." 28 C.F.R. §§ 540.200 (b) & (c). At the present moment, it is an open legal question whether CMUs pose atypical and significant hardships. While the 7th Circuit has not addressed the question, *see Amawi v. Walton*, No. 13-cv-0866-JPG-RJD, 2016 WL 7364768 (S.D. Ill. November 17, 2016) (recommending that the district judge grant qualified immunity to defendants on a due process claim regarding placement in the CMU in part because the 7th Circuit had not addressed the issue), other courts have found that CMU placement satisfies the "atypical and significant hardship" standard. *Aref v. Lynch*, 833 F.3d 242, 257 (D.C. Cir. 2016). The Court will not wrestle with the question of whether the CMU at Marion poses a significant and atypical hardship at this point because Plaintiff has not alleged that it has, other than to provide a sole conclusory citation to *Aref*. *Aref* is not binding on this

court, and even if it were, Plaintiff must still allege that the conditions of confinement he experienced met the "significant and atypical" standard. Instead his Complaint is completely silent on the specific conditions in the CMU that he endured. Without these facts, Plaintiff's allegation does not cross the line from conclusory to plausible. **Count 7** will be dismissed from this case without prejudice for failure to state a claim.

Plaintiff has also alleged that Dunbar transferred him to the CMU as part of a conspiracy to retaliate against him for receiving the Ligairi correspondence in **Count 8**. Having rejected Plaintiff's conspiracy claims, the retaliation claims against the individual defendants must stand or fall on their own. The Court finds that Plaintiff's allegations of retaliation are conclusory as to Dunbar. Plaintiff repeatedly states that Dunbar was retaliating against him, but he does not allege that Dunbar knew about the receipt of the Ligairi correspondence or was involved in any way in prohibiting Plaintiff from communicating with Ligairi. Plaintiff has not alleged that he engaged in any other protected conduct that could form the basis for a retaliation claim with regards to Dunbar. Thus, Plaintiff has not adequately identified any protected conduct that could provide the basis for Dunbar's retaliation.[5] Accordingly, Plaintiff's claim that he was transferred to the CMU in retaliation for the Ligairi correspondence must be dismissed without prejudice at this time for failure to state a claim.

Next, the Court will analyze **Counts 9-11** together, as they all allege that Defendants other than Hill retaliated against Plaintiff through official disciplinary action. Plaintiff alleges that Burgess retaliated against him when he found Plaintiff involved in incident report #2882521, in which Krawcyzk also participated, and #2914557. He likewise alleges that Baskerville

[5] The disciplinary reports attached to the Complaint include recommendations regarding changes in custody levels, but at this time, there is no other indication in the records that authorities acted on those recommendations or that they played a role in Plaintiff's CMU housing assignment.

retaliated against him when he found incident report #2931834 substantiated. Incident report #2882521 addresses correspondence that the prison intercepted when it was returned to sender. (Doc. 1-1, p. 15). Plaintiff was listed as the sender, and the correspondence was addressed to an attorney and marked as legal mail. *Id.* However, the correspondence actually directed the attorney to send funds to another inmate. *Id.* That incident report is signed by Hill, Burgess, and Krawcyzk. *Id.* Incident report #2914557 addresses an incident where Plaintiff called into a live radio program and gave an interview without prior approval. (Doc. 1-1, p. 16). The signature line is cut off. *Id.* Finally, incident report #2931834 alleges that Plaintiff's correspondence to his supporters is impermissibly conducting a business, as further addressed in Counts 1 and 2. (Doc. 1-1, p. 16).

Although the Court has found that Plaintiff has stated a claim against Hill for retaliation, the Court finds that the allegations are insufficient as to Burgess, Krawcyzk, and Baskerville. Plaintiff points to the Ligairi correspondence as the basis for his retaliation claims, but as Plaintiff has not adequately pleaded a conspiracy claim, in order to state a retaliation claim against Burgess, Krawcyzk or Baskerville, he has to state that they knew that Plaintiff engaged in conduct protected by the First Amendment and retaliated against him on that basis. There is no allegation that Burgess, Krawcyzk, and/or Baskerville knew about the Ligairi correspondence or that Hill communicated with any of them about it. There is also no allegation that Burgess, Krawcyzk, and/or Baskerville were retaliating against Plaintiff based on any other incident. Accordingly, **Counts 9-11** must be dismissed without prejudice for failure to state a claim.

Plaintiff's allegations in **Counts 12-14** are that Defendants Burgess, Krawcyzk, and Baskerville violated Plaintiff's due process rights based on various incident reports and the subsequent discipline. All of these claims fail for the same reasons, and so the Court will

analyze them together. As discussed above, Plaintiff must allege that he was deprived of a liberty interest in order to state a due process claim. Plaintiff has not alleged that he was deprived of an interest in life, liberty or property as a result of the disciplinary reports, and while it is possible that he suffered such a deprivation, the Court will not speculate without a concrete allegation. That alone would be enough to dismiss these claims without prejudice for failure to state a claim.

But even if Plaintiff had alleged that he was deprived of a liberty interest, he has not made a sufficient allegation that he was deprived of due process of law. In *Wolff v. McDonnell*, 418 U.S. 539 (1974), the Supreme Court set out the minimal procedural protections that must be provided to a prisoner in disciplinary proceedings in which the prisoner loses good time, is confined to a disciplinary segregation, or otherwise subjected to some comparable deprivation of a constitutionally protected liberty interest. *Id.* at 556-572.

> *Wolff* required that inmates facing disciplinary charges for misconduct be accorded [1] 24 hours' advance written notice of the charges against them; [2] a right to call witnesses and present documentary evidence in defense, unless doing so would jeopardize institutional safety or correctional goals; [3] the aid of a staff member or inmate in presenting a defense, provided the inmate is illiterate or the issues complex; [4] an impartial tribunal; and [5] a written statement of reasons relied on by the tribunal. 418 U.S. at 563-572.

> *Hewitt v. Helms*, 459 U.S. 460, 466 n.3 (1983) *overruled on other grounds Sandin*, 515 U.S. 472.

The Supreme Court has also held that due process requires that the findings of the disciplinary tribunal must be supported by some evidence in the record. *Superintendent v. Hill*, 472 U.S. 445, 455 (1985); *McPherson v. McBride*, 188 F.3d 784, 786 (7th Cir. 1999).

> Ascertaining whether this standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board.

Hill, 472 U.S. at 455-56.

Plaintiff's allegation as to each of his due process claims is that the defendants took action against him despite knowing that there was no evidentiary basis for the findings. (Doc. 1-2, p. 8). However, it is clear from the exhibits and the Complaint that the discipline Plaintiff received was supported by "some evidence." *Scruggs v. Jordan*, 485 F.3d 934, 941 (7th Cir. 2007) (finding that even a meager amount of supporting evidence is sufficient to satisfy *Wolff*). For example, as to incident report #2882521, Plaintiff alleges that he actually did write to Attorney Pearson, but that the correspondence therein regarding another inmate was forged. Plaintiff does not deny that he wrote to the attorney or that when the mail was returned, it contained a request that Pearson forward money to another inmate. What he contests is that the disciplinary committee did not find his testimony credible when he stated that the correspondence directing the attorney to forward the money was a forgery. This is a credibility determination, not a lack of evidence. *See Superintendent, Massachusetts Correctional Institution, Walpole v. Hill*, 472 U.S. 445, 455-56 (1985) (evaluation of the "some evidence" standard does not require courts to independently evaluate credibility). Plaintiff cannot claim that the report was written without evidence or that the defendants made their decision without evidence because he does not deny that he wrote to the attorney, which is "some evidence" of attempting to send money to another inmate.

The same holds true for the other disciplinary reports at issue here. The next report at issue, #2914557, is for calling into a live radio show. While Plaintiff has alleged in a conclusory fashion he was also disciplined based on this report without some evidence, he has not alleged that he did not call into the Wiley Drake radio show. In fact, the disciplinary report contains a link to the radio show at issue, and the radio show features a caller purported to be Schaeffer

Cox, the Plaintiff in this action. http://www.ustream.tv/recorded/92595918 (34.34 minute mark) (last visited July 5, 2017). While the Court does not presume to state conclusively that Plaintiff did call into the radio show, the existence of the website shows that there was "some evidence" to support the factual allegations at issue in this report.

The last 2 reports both address Plaintiff's attempts to communicate with his supporters regarding fund raising and the use of those funds for legal purposes. This is the very conduct that Plaintiff alleges Defendants interfered with in violation of his First Amendment rights. By putting the interpretation of the relevant regulations at issue, Plaintiff is essentially conceding that he engaged in the conduct. Why else would he contest the regulations? Plaintiff's allegations that there was no evidence in support of incident reports are patently frivolous because he has alleged that his conduct at issue in the reports did not violate prison regulations in other counts. Clearly, there was "some evidence" to justify the discipline.

As Plaintiff has inadequately alleged that he was deprived of a liberty interest and that the defendants actually denied him due process, his claims in **Counts 12-14** will be dismissed without prejudice for failure to state a claim.

Finally as to **Count 15**, Plaintiff has attempted to name Blythe and Siereveld for writing the incident reports. Although Plaintiff's allegation that the reports were false is thin for the reasons explained above, this claim fails because allegations of false disciplinary reports do not state a claim where due process is afforded. *Hadley v. Peters*, 841 F. Supp. 850, 856 (C.D. Ill. 1994) *aff'd*, 70 F.3d 117 (7th Cir. 1995); *Hanrahan v. Lane*, 747 F.2d 1137, 1140 (7th Cir. 1984). The Seventh Circuit Court of Appeals has reasoned that the due process safeguards associated with prison disciplinary proceedings are sufficient to guard against potential abuses. A hearing before a presumably impartial Adjustment Committee terminates an officer's possible liability

for the filing of an allegedly false disciplinary report. *Hawkins v. O'Leary*, 729 F. Supp. 600, 602 (N.D. Ill. 1990), relying on *Hanrahan v. Lane*, supra, 747 F.2d at 1141. The procedural requirements of a disciplinary hearing protect prisoners from arbitrary actions of prison officials. *McKinney v. Meese*, 831 F.2d 728, 733 (7th Cir. 1987). Accordingly, **Count 15** will be dismissed without prejudice for failure to state a claim.

Pending Motions

Plaintiff Motion for a Preliminary Injunction will be referred to a United States Magistrate Judge for disposition. (Doc. 2).

Disposition

IT IS HEREBY ORDERED that **Counts 1-4** survive threshold review against Defendants True, Blythe, Siereveld, Dunbar, Hill, Burgess, Baskerville, and Krawcyzk. The Clerk of Court is directed to add Thomas R. Kane in his official capacity to the docket as a defendant in Count 1, and for the purposes of injunctive relief. The Federal Bureau of Prisons is **DISMISSED with prejudice**. **Counts 5-15** are **DISMISSED without prejudice** for failure to state a claim on which relief can be granted.

IT IS ORDERED that the Clerk of Court shall prepare for Defendants True, Siereveld, Dunbar, Hill, Burgess, Blythe, Baskerville, Krawcyzk, and Kane: (1) Form 5 (Notice of a Lawsuit and Request to Waive Service of a Summons), and (2) Form 6 (Waiver of Service of Summons). The Clerk is **DIRECTED** to mail these forms, a copy of the complaint, and this Memorandum and Order to each Defendant's place of employment as identified by Plaintiff. If a Defendant fails to sign and return the Waiver of Service of Summons (Form 6) to the Clerk within 30 days from the date the forms were sent, the Clerk shall take appropriate steps to effect

formal service on that Defendant, and the Court will require that Defendant to pay the full costs of formal service, to the extent authorized by the Federal Rules of Civil Procedure.

IT IS FURTHER ORDERED that, with respect to a Defendant who no longer can be found at the work address provided by Plaintiff, the employer shall furnish the Clerk with the Defendant's current work address, or, if not known, the Defendant's last-known address. This information shall be used only for sending the forms as directed above or for formally effecting service. Any documentation of the address shall be retained only by the Clerk. Address information shall not be maintained in the court file or disclosed by the Clerk.

IT IS FURTHER ORDERED that Plaintiff shall serve upon Defendants (or upon defense counsel once an appearance is entered), a copy of every pleading or other document submitted for consideration by the Court. Plaintiff shall include with the original paper to be filed a certificate stating the date on which a true and correct copy of the document was served on Defendants or counsel. Any paper received by a district judge or magistrate judge that has not been filed with the Clerk or that fails to include a certificate of service will be disregarded by the Court.

Defendants are **ORDERED** to timely file an appropriate responsive pleading to the complaint and shall not waive filing a reply pursuant to 42 U.S.C. § 1997e(g).

Pursuant to Local Rule 72.1(a)(2), this action is **REFERRED** to a United States Magistrate Judge for further pre-trial proceedings.

Further, this entire matter is **REFERRED** to a United States Magistrate Judge for disposition, as contemplated by Local Rule 72.2(b)(2) and 28 U.S.C. § 636(c), *should all the parties consent to such a referral.*

IT IS FURTHER ORDERED that if judgment is rendered against Plaintiff, and the judgment includes the payment of costs under Section 1915, Plaintiff will be required to pay the full amount of the costs, notwithstanding that his application to proceed *in forma pauperis* has been granted. *See* 28 U.S.C. § 1915(f)(2)(A).

Plaintiff is **ADVISED** that at the time application was made under 28 U.S.C. § 1915 for leave to commence this civil action without being required to prepay fees and costs or give security for the same, the applicant and his or her attorney were deemed to have entered into a stipulation that the recovery, if any, secured in the action shall be paid to the Clerk of the Court, who shall pay therefrom all unpaid costs taxed against plaintiff and remit the balance to plaintiff. Local Rule 3.1(c)(1)

Finally, Plaintiff is **ADVISED** that he is under a continuing obligation to keep the Clerk of Court and each opposing party informed of any change in his address; the Court will not independently investigate his whereabouts. This shall be done in writing and not later than **7 days** after a transfer or other change in address occurs. Failure to comply with this order will cause a delay in the transmission of court documents and may result in dismissal of this action for want of prosecution. *See* FED. R. CIV. P. 41(b).

IT IS SO ORDERED.

DATED: July 18, 2017

s/J. Phil Gilbert
U.S. District Judge