

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

FARNOLIA GARRETT, et al.,
Plaintiffs,

Case No. 1:13-cv-499
Beckwith, J.
Litkovitz, M.J.

vs.

WEST CHESTER POLICE DEPT., et al.,
Defendants.

**ORDER AND REPORT
AND RECOMMENDATION**

Plaintiffs Farnolia Garrett and Martel Garrett, proceeding pro se, bring this action claiming violations of their civil rights. They name as defendants the West Chester Police Department, Andrew Schweier, Bradford Walraven, and Erik Niehaus (collectively, the “West Chester defendants”); the Hamilton County Sheriff’s Department (RECI) and John Ruebusch, individually (collectively, the “Hamilton County defendants”); “Agent 1-John Hand (previous 7441 Apt. 10)”;

“Agent 2-Unknown John Doe 7441 Apt. 11”; “Agent 3 unknown Jane Doe (Previous 7441 Apt. 12)”;

“Agent 4 Mike (last name unknown) 7438 building”; and “Richard Barrett (Previous 7441 Apt. 10).” The matter is before the Court on the motion to dismiss by the West Chester defendants (Doc. 17), plaintiffs’ opposing memorandum (styled as plaintiffs’ motion to deny the motion to dismiss) (Doc. 21), and defendants’ reply memorandum. (Doc. 22). The matter is also before the Court on a number of additional motions filed by the parties, which are addressed herein. For the reasons that follow, the undersigned recommends the motion to dismiss be granted and this action be dismissed as to the West Chester defendants.

I. Procedural history

A. Allegations of the complaint

Plaintiffs filed the original complaint in this action on August 2, 2013. (Doc. 3).

Plaintiffs indicate on the first page of the complaint that this matter is a civil appeal from a civil rights complaint filed under 42 U.S.C. § 1983 in the Butler County, Ohio Court of Common Pleas, Civil Action CV2013 04 1047. Plaintiffs allege in the federal complaint that they are the victims of police misconduct, and they are suing defendants in both their personal and official capacities pursuant to 42 U.S.C. §§ 1981, 1982 and 1988 for violations of their civil rights under the Fourth and Fourteenth Amendments to the United States Constitution. (*Id.* at 1-2). Plaintiffs allege the Court has jurisdiction over this matter under 28 U.S.C. §§ 1331 and 1343.

As best the Court is able to discern, plaintiffs' lawsuit arises out of an alleged series of illegal searches of their apartment, the illegal seizure of their belongings, and illegal surveillance and wiretapping of their apartment and cell phones. Plaintiffs make the following allegations in support of their claims: Plaintiffs Farnolia Garrett ("F. Garrett") and Martel Garrett ("M. Garrett") are adults domiciled in West Chester, Ohio. (*Id.* at 2). At all relevant times, the individual defendants were police officers employed by the City of West Chester, which subcontracted with agencies listed as the John Doe defendants in the complaint. (*Id.*). On April 10, 2012, F. Garrett returned home to plaintiffs' apartment and found that an unauthorized individual had been inside and had thrown a computer tower on the floor. (*Id.*). After the maintenance supervisor at the apartment complex changed the door lock, another unlawful entry occurred. (*Id.*). On April 19, 2012, an individual observed the maintenance supervisor give a man who plaintiff later identified as Schweier the key to enter plaintiffs' apartment. (*Id.* at 3; *Id.*, Exhs. B-C, Aff. of Courtney Holt). When F. Garrett returned home that day, she noticed that her mail had been opened and displaced and old check stubs were out of place. (*Id.*).

On April 28, 2012, F. Garrett noticed another entry in which a black purse with mail inside

was returned. (*Id.* at 3). Purses, new clothing, jewelry, undergarments and money were taken from inside a night stand drawer of F. Garrett's room, and a credit card was removed from a dresser. (*Id.*).

On May 4, 2012, F. Garrett overheard the apartment manager tell a Cincinnati Bell representative how worried the maintenance supervisor was about the possibility of having been seen on camera when he brought two black purses inside plaintiffs' apartment. (*Id.* at 3). Plaintiff F. Garrett reported this to another entity, who took a complaint and promised her a call back from the District Manager, which never occurred. (*Id.*).

Plaintiff F. Garrett asked the defendant police officers to fingerprint and investigate the removal and return by subjects of several large bags of personal belonging and items from her apartment. (*Id.*). Defendant Walraven signed and dated the formal complaint filed by plaintiffs with the West Chester Police Department on June 15, 2012. (*Id.*). Defendants declined to investigate the situation, and defendant Niehaus told F. Garrett there would be no investigation because the formal complaint filed by plaintiffs was a civil matter, not a criminal one. (*Id.*). Defendants Walraven and Niehaus refused to investigate misconduct by Detective Schweier and instead assisted his malfeasance. (*Id.*). F. Garrett identified herself as plaintiffs' attorney, but defendants refused to assist her, stating that plaintiffs needed an attorney to file a civil complaint. (*Id.*). Defendant Walraven admitted to F. Garrett on June 15, 2012, that the West Chester police and agencies executed a search of her apartment, and he could not disclose the items that were confiscated. (*Id.* at 4). He informed plaintiff she needed to obtain an attorney to discover what items were confiscated. (*Id.* at 5).

Defendant Schweier opened mail belonging to plaintiff. (*Id.* at 6). He created fake

documents, sent inappropriate pictures to F. Garrett's cell phone, created a fake forensic report, and tampered with evidence. (*Id.* at 4, citing Exhs. 1, 2, 3). Schweier placed the inside of plaintiffs' apartment under surveillance and obtained inappropriate pictures of plaintiff. (*Id.* at 4). Defendant Schweier subcontracted with defendant Ruebusch to perform forensic testing on plaintiffs' laptop and F. Garrett's cell phone. (*Id.* at 5). Schweier informed F. Garrett that he delivered the items to the Regional Electronics Computer Investigations (RECI) Section on April 13, 2012, but defendant Ruebusch stated that he received the property on a different date. (*Id.*). Defendant Ruebusch tampered with evidence and lied to cover up the inappropriate fake pictures that defendant Schweier created and sent to F. Garrett's cell phone, together with an inappropriate video of plaintiff that defendant Schweier had taken under surveillance. (*Id.*). Ruebusch helped Schweier confiscate the inappropriate pictures and videos that Schweier had created in an effort to harm plaintiffs. (*Id.*).

Defendant John Hand, who worked as a maintenance supervisor at Tall Timber Apartments from June 2012 to January 2013 and lived in the same building as plaintiffs, continuously entered plaintiffs' apartment in violation of their Fourth Amendment rights and engaged in unauthorized use of plaintiffs' internet services provided by Cincinnati Bell Fioptics. (*Id.* at 6, citing Exh. X).

Defendants 7 and 8, unknown agencies who lived in the same building as plaintiffs, continuously violated 42 U.S.C. § 1983 and violated 42 U.S.C. § 1988 through the unauthorized use of plaintiffs' internet services. (*Id.* at 6).

Plaintiff F. Garrett notified defendant Schweier that her email at Capella University was hacked into, but he refused to investigate the issue. (*Id.*). Schweier and other agents were

interfering with F. Garrett's access to her online class. (*Id.*) Plaintiff was forced to go to the public library, but defendant learned her log-on identification for the library. (*Id.*) As of May 1, 2013, plaintiff was still being harassed in this way even though she had enrolled in a new school. (*Id.*)

Plaintiffs allege that the City of West Chester has a policy, practice and custom to not intervene when police officers use excessive harassment; to conduct a minimal investigation designed to exonerate the officer involved when allegations of excessive harassment are made by a citizen; to allow the police officers to engage in excessive force; and to inadequately supervise and discipline law enforcement officers who engage in excessive misconduct. (*Id.* at 7). They allege that the inadequate supervision and discipline of police officers by the City has led to the illegal use of excessive harassment over cell phones and the internet, including wiretaps. They allege that the above policies and practices have resulted in a culture of violence in which the use of excessive force and harassment is an accepted and customary part of police work in West Chester. (*Id.*)

Plaintiffs claim that defendants' actions were under color of law and were excessive, and thus constitute an unreasonable seizure and an illegal entry without a warrant in violation of plaintiffs' Fourth Amendment rights under 42 U.S.C. § 1983; discrimination in violation of 42 U.S.C. § 1981; and illegal wiretapping in violation of 42 U.S.C. § 1988. (*Id.* at 7-8). Plaintiffs further claim that defendants violated their due process rights under the Fourteenth Amendment and their privacy rights under the Fourth Amendment. (*Id.* at 8). Plaintiffs claim they have sustained damage to their furniture and other personal belongings, as well as mental anxiety and stress. (*Id.*) Plaintiffs seek \$100,000.00 in compensatory and punitive damages from each

defendant officer. (*Id.* at 9).

B. Plaintiffs' state court actions

Prior to filing their lawsuit in federal court, plaintiffs filed a lawsuit against the West Chester defendants in the Butler County, Ohio, Court of Common Pleas- *Farnolia Garrett, et al. v. West Chester Township Police Dept., et al.*, Case No. CV 2012 12 4574- on December 27, 2012. See http://pa.butlercountyclerk.org/pa/pa.urd/pamw2000-o_case_sum?34871473. Plaintiffs claimed that defendants made multiple illegal entries into their apartment without a warrant or proper documentation, removed and returned personal belongings, and harassed plaintiffs. Plaintiffs alleged the West Chester Police Department opened and tampered with mail; that Niehaus told plaintiffs their complaint would not be treated as a criminal matter and there would be no investigation; and that Schweier was fabricating evidence in an effort to protect himself. On March 4, 2013, the Court of Common Pleas granted the West Chester Police Department's motion to dismiss, finding the Police Department is not an entity that can be sued. On March 28, 2013, the Court of Common Pleas granted a motion to dismiss filed by the individual West Chester defendants for failure to state a claim to relief, finding plaintiffs had raised "mere allegations without support" and had failed to "provide the Court with a clear claim for resolution. . . ." *Id.* Plaintiffs did not appeal the orders granting defendants' motions to dismiss. (*See* Doc. 17, Exh. 2, p. 1).

Plaintiffs filed two more lawsuits against the West Chester defendants in the common pleas court: (1) *Farnolia Garrett, et al. v. Andrew Schweier, et al.*, Case No. CV 2013 04 986, filed on April 2, 2013 (http://pa.butlercountyclerk.org/pa/pa.urd/pamw2000-docket_lst?96685624), and (2) *Farnolia Garrett, et al. v. Andrew Schweier, et al.*, Case No. CV 2013 04 1047, filed on April

8, 2013. (*See* Doc. 17, Exh. 4). Plaintiffs brought claims under 42 U.S.C. §§ 1981 and 1983 against the West Chester defendants, alleging violations of plaintiffs' Fourth Amendment rights and race discrimination in violation of the Fourteenth Amendment. (*Id.*, Exh. 4) Plaintiffs claimed that defendants executed a warrant without proper documentation and without probable cause; that Schweier fabricated and created fake documents and pictures, tampered with evidence, and created a fake forensics report; and that Walraven and Niehaus ignored a complaint against Schweier and protected him instead of conducting an investigation. (*Id.*). Plaintiffs alleged that they suffered damage to furniture and other personal belongings as well as mental anxiety and stress, and they sought damages for "excessive harassment over electronic devices, cell phones, internet (Cinti Bell Fioptics), unauthorized use of cable services, wiretapp [sic]." (*Id.*, p. 3). The Common Pleas Court issued a decision and entry granting defendants' motion for summary judgment filed in both cases on July 10, 2013, under Case Nos. CV 2013 04 1047/2013 04 986. (Doc. 17, Exh. 2). The Court stated that plaintiffs had re-filed their complaints against defendants after the Court of Common Pleas dismissed their earlier complaints with prejudice, a decision from which plaintiffs had not appealed. (*Id.*, pp. 1-2). The Court granted summary judgment in defendants' favor on the grounds that: (1) plaintiffs had failed to meet their burden to show a genuine issue of material fact existed; and (2) the doctrine of res judicata precluded plaintiffs from making filings on the same issues and claims given that the allegations in the complaint had previously been dismissed with prejudice. (*Id.*, p. 4). The Court of Common Pleas issued a final judgment entry and final appealable order entering final judgment in favor of the West Chester defendants on July 24, 2013. (*Id.*, Exh. 3).

II. Defendants' motion to dismiss

The West Chester defendants move to dismiss the complaint pursuant to Fed. R. Civ. P.

12(b)(1) and 12(b)(6) on the grounds: (1) this lawsuit is an appeal of a state court judgment over which this Court lacks jurisdiction, and (2) the lawsuit is barred by res judicata. (Doc. 17).

Defendants contend it is clear from the face of the complaint that plaintiffs are appealing a decision issued by the Butler County, Ohio, Court of Common Pleas in the case of *Farnolia Garrett, et al. v. Andrew Schweier, et al.*, Case No. CV 2013 04 1047. Defendants contend that because the present case is an appeal of a state common pleas court decision, this Court does not have original jurisdiction over the matter under 28 U.S.C. § 1331 or § 1343.¹ Rather, defendants contend this Court lacks jurisdiction over the complaint under the *Rooker-Feldman* doctrine, which bars “state court losers complaining of injuries caused by state court judgments rendered before the district court proceedings commenced” from obtaining district court review and rejection of those judgments. *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005).

Defendants argue that even if this Court has jurisdiction over the lawsuit, the claims against them must be dismissed under the principle of res judicata, and specifically under the doctrine of claim preclusion. Defendants assert that plaintiffs previously alleged the same claims they bring in this lawsuit against the West Chester defendants in the Butler County Court of Common Pleas, which dismissed plaintiffs’ claims on the merits. (Doc. 17, citing Exhs. 2, 3).

In response, plaintiffs argue that this case is not an appeal from Case No. CV 2013 04 1047 filed in the Butler County Court of Common Pleas, but it is a separate case filed in this Court which involves “other intervening Agents, from The City of Cincinnati Police Dept.” (Doc. 21 at 2). They allege that this case was filed due to the discovery of new defendants and new evidence. (*Id.*

¹ Title 28 U.S.C. § 1331 vests the federal court with “original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” Title 28 U.S.C. § 1343 vests the Court with “original jurisdiction” over lawsuits seeking redress for deprivation, under color of state law, of any right, privilege or immunity secured by the United States Constitution.

at 4). Plaintiffs assert that they have supported their claims with exhibits from the state court case because F. Garrett discovered the West Chester Police Department had “intervening agents” from the City of Cincinnati Police Department living in three apartments on the same floor of plaintiffs’ apartment building where plaintiffs’ apartment is located. (*Id.* at 3). Plaintiffs allege F. Garrett discovered the alleged entries into their apartment by defendants began in March 2012. (*Id.*).

III. Standard of Review

When reviewing a Rule 12(b)(6) motion to dismiss for failure to state a claim, the Court must “construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff.” *Bassett v. National Collegiate Athletic Ass’n*, 528 F.3d 426, 430 (6th Cir. 2008) (quoting *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007)). “[T]o survive a motion to dismiss, a complaint must contain (1) ‘enough facts to state a claim to relief that is plausible,’ (2) more than ‘a formulaic recitation of a cause of action’s elements,’ and (3) allegations that suggest a ‘right to relief above a speculative level.’” *Tackett v. M&G Polymers, USA, LLC*, 561 F.3d 478, 488 (6th Cir. 2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). In ruling on a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction which questions the sufficiency of the pleading, the Court likewise accepts the allegations of the complaint as true. *Ohio Nat. Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990).

The Court may consider documents integral to or attached to the pleadings when ruling on a Rule 12(b)(6) motion to dismiss without converting the motion to one for summary judgment.

Commercial Money Center, Inc. v. Illinois Union Ins. Co., 508 F.3d 327, 336 (6th Cir. 2007). In addition, the court may examine public documents without converting the motion into one for summary judgment. *Wyser-Pratte Management Co., Inc. v. Telxon Corp.*, 413 F.3d 553, 560 (6th Cir. 2005) (citing *Kostrzewa v. City of Troy*, 347 F.3d 633, 644 (6th Cir. 2001)). The Court “may take judicial notice of proceedings in other courts of record. . . .” *Rodic v. Thistledown Racing Club, Inc.*, 615 F.2d 736, 738 (6th Cir. 1980) (quoting *Granader v. Public Bank*, 417 F.2d 75, 82-83 (6th Cir. 1969)).

It is well-settled that a document filed pro se is “to be liberally construed,” and that a pro se complaint, “however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers. . . .” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). However, the Sixth Circuit has recognized the Supreme Court’s “liberal construction” case law has not had the effect of “abrogat[ing] basic pleading essentials” in pro se suits. *Wells v. Brown*, 891 F.2d 591, 594 (6th Cir. 1989). Courts are not required to devote time to a case when the nature of a pro se plaintiff’s claim “defies comprehension.” *Roper v. Ford Motor Co.*, No. 1:09cv427, 2010 WL 2670827, at *3 (S.D. Ohio April 6, 2010) (Report and Recommendation), *adopted*, 2010 WL 2670697 (S.D. Ohio July 1, 2010) (quotation omitted).

IV. Res judicata

Res judicata encompasses two separate forms of preclusion: claim preclusion and issue preclusion. *Heyliger v. State Univ. and Cmty. Coll. Sys. of Tenn.*, 126 F.3d 849, 852 (6th Cir. 1997). Issue preclusion, or collateral estoppel, “refers to the effect of a judgment in foreclosing relitigation of a matter than has been litigated and decided.” *Id.* (quoting *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984)). Claim preclusion, or res judicata in its

narrow sense, “refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit.” *Id.* (quoting *Migra*, 465 U.S. at 77 n.1).

A federal court must give the same preclusive effect to a state court judgment in a § 1983 action as the judgment would be given under the law of the state in which the judgment was rendered. *Migra*, 465 U.S. at 83. Thus, “if an individual is precluded from litigating a suit in a state court by the traditional principles of *res judicata*, he is similarly precluded from litigating the suit in federal court.” *Gutierrez v. Lynch*, 826 F.2d 1534, 1537 (6th Cir. 1987) (citation omitted). The federal court must look “to the state’s law to assess the preclusive effect it would attach to that judgment.” (*Id.*).

Under Ohio law, “an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were *or might have been* litigated in the first lawsuit.” *National Amusements, Inc. v. City of Springdale*, 558 N.E.2d 1178, 1180 (Ohio 1990) (emphasis in the original) (quotation omitted). *See also Grava v. Parkman Twp.*, 653 N.E.2d 226, 229 (Ohio 1995) (“[t]he doctrine of *res judicata* requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it”) (quotation omitted). *See also State v. Dick*, 738 N.E.2d 456, 460 (Ohio App. 3d Dist. 2000) (“*res judicata* bars a subsequent action based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action, *whether or not that particular claim was litigated*, so long as there has been a valid, final judgment rendered upon the merits”) (emphasis in the original) (citing *Grava*, 653 N.E.2d 226 at syllabus). Under Ohio law, the doctrine of *res judicata*, or claim preclusion, has four elements: (1) there is a final, valid decision on the merits by a court of competent jurisdiction; (2) the second

action involves the same parties or their privies as the first; (3) the second action raises claims that were or could have been litigated in the first action; and (4) the second action arises out of the transaction or occurrence that was the subject matter of the previous action. *Portage County Bd. of Commissioners v. City of Akron*, 846 N.E.2d 478, 495 (Ohio 2006) (citation omitted). A “transaction” is defined as a “common nucleus of operative facts.” *Id.* (quotation omitted).

V. The West Chester defendants’ motion to dismiss should be granted.

The West Chester defendants move to dismiss the complaint against them on the grounds that (1) this lawsuit is an appeal of a state court decision over which the Court lacks jurisdiction, and (2) plaintiffs’ complaint is barred by res judicata.

Plaintiffs styled the complaint filed in this lawsuit as an appeal of the judgment rendered against plaintiffs by the Butler County Court of Common Pleas in Case No. CV 2013 04 1047. (Doc. 3). The complaint in this lawsuit is captioned “Civil Appeal from Common Pleas, Butler County, Ohio, Attorney Case Number: CV 2013 04 1047.” However, in the complaint, plaintiffs do not indicate they are challenging the findings of the state court and the state court judgment itself. Nor does plaintiffs’ alleged injury arise from the state court judgment. Rather, in their federal complaint, plaintiffs simply reassert the claims they previously alleged against the West Chester defendants in the state court action and seek a second bite at the apple. The *Rooker-Feldman* bar does not apply in this scenario. *See Hutcherson v. Lauderdale Cnty., Tennessee*, 326 F.3d 747, 755-756 (6th Cir. 2003) (stating that the *Rooker-Feldman* doctrine does not apply where the injury alleged is distinct from the state court judgment and that as a general rule, if the federal plaintiff bringing the federal claim due to unhappiness with a prior state court ruling was the plaintiff in the state court proceeding, res judicata rather than *Rooker-Feldman* applies to bar the plaintiff’s federal claim.). Thus, the doctrine of res judicata applies under these

circumstances.

A review of the record shows that the four elements of res judicata under Ohio law are clearly satisfied here. First, there is a “prior, final valid decision on the merits.” *Portage County Bd. of Commissioners*, 846 N.E.2d at 495. Plaintiffs previously initiated three separate actions in the Butler County Court of Common Pleas. A final judgment on the merits in Case No. CV 2012 12 4574 was issued in March 2013. A final judgment on the merits was issued in Case Nos. CV 2013 04 1047/CV 2013 04 986 on July 24, 2013. (Doc. 17, Exh. 3). Plaintiffs filed the complaint in this action on August 2, 2013. (Doc. 3).

Second, the West Chester defendants were parties to the state court litigation and have been named as parties in this lawsuit.

Third, the present action raises claims that were or could have been litigated in the state court actions. In both this action and in the state court lawsuits, plaintiffs claimed defendants conducted illegal searches of plaintiffs’ apartment during the same time period at issue in this lawsuit; seized and returned their personal belongings; discriminated against them and harassed them; and failed to investigate the alleged violations of their rights. Plaintiffs allege that they have discovered new evidence and named new defendants in this lawsuit, but plaintiffs have not made any allegations which indicate that they could not have asserted the claims alleged here against the West Chester defendants in their prior lawsuits.

Finally, the instant action arises out of the same occurrences that were the subject of the previous actions. In fact, plaintiffs submitted the same supporting documentation with the present complaint that they attached to the state court complaint in Case No. CV 2013 04 1047. (See Doc. 3, Exhs. 1-3, Exhs. A-H; Doc. 17, Exh. 4). Plaintiffs also attached other filings from

that state court action to the complaint filed in this court. (*Id.*, Exhs. I, J). The facts alleged here are directly related to the facts alleged in the state court lawsuits, all of which revolve around the alleged illegal searches of plaintiffs' apartment, surveillance of the apartment, seizure and return of their personal belongings, and defendants' failure to investigate plaintiffs' complaints.

For these reasons, plaintiffs' federal complaint against the West Chester defendants is barred by the doctrine of res judicata. The motion to dismiss should therefore be granted on this ground.

VI. Plaintiffs' motion to amend the complaint (Doc. 14) should be denied.

Plaintiffs filed a motion for leave to amend the complaint on August 26, 2013, to add the City of Cincinnati Police Department and "Agencies" as defendants.² (Doc. 14). Plaintiffs allege that the West Chester and City of Cincinnati Police Departments have conspired since March of 2012 to harm plaintiffs. Plaintiffs allege the two police departments and agencies have conspired to engage in "cyber spying, cyber stalking, and cyber Terrorism, Identity Theft, and Malware. . . ." (*Id.* at 3). Plaintiffs apparently seek to attribute malware on F. Garrett's computer and unauthorized access to F. Garrett's facebook account to these defendants. Plaintiffs also allege that these entities have illegally authorized changes to F. Garrett's cellphone account.

The motion for leave to amend the complaint filed by plaintiffs should be denied because the proposed amendment would be futile. *See Coe v. Bell*, 161 F.3d 320, 341-42 (6th Cir. 1998) (citing *Brooks v. Celeste*, 39 F.3d 125, 130 (6th Cir. 1994)). There is no allegation in the

² Plaintiffs filed an affidavit and exhibits in support of the motion to amend on December 2, 2013 (Doc. 39) and December 12, 2013 (Doc. 42). Defendants filed a memorandum in opposition to the motion for leave to amend on December 13, 2013. (Doc. 45). The Court need not consider these untimely filings because the motion for leave to amend is clearly futile. In any event, the exhibits do not assist the Court in resolving the motion to amend as they consist of a few pages of information regarding plaintiff F. Garrett's email account and numerous pages of largely indecipherable computer data. There is no information in the exhibits that ties them to the defendants or the allegations plaintiffs have made in this lawsuit.

proposed amended complaint that ties any defendant to the unauthorized access of F. Garrett's computer or changes to her cell phone account. The proposed complaint provides no factual content or context from which the Court may reasonably infer that defendants conspired with others to violate plaintiffs' federal rights. Plaintiffs' proposed amendment does not contain sufficient factual matter, accepted as true, to state a claim to relief against these defendants that is plausible on its face. *Twombly*, 550 U.S. at 570. Rather, plaintiffs continue to assert factual allegations that defy comprehension. *See Roper*, No. 1:09cv427, 2010 WL 2670827, at *3. For these reasons, plaintiffs' motion for leave to amend the complaint should be denied.

VII. Plaintiffs' motions for Court Orders (Docs. 15, 40) should be denied.

Plaintiffs have filed a motion for a Court Order to stop the West Chester and City of Cincinnati Police Departments from violating their rights at their new place of residence and online. (Doc. 15). Plaintiffs have also filed a motion requiring the defendant police officers to remove all "SSL Proxy Certificates etc. Remove The Tagged Logins that are being illegally used for facebook and all other Social Networks." (Doc. 40). The motions should be denied as moot in view of the recommended dismissal of the West Chester defendants from this lawsuit.

VIII. Defendants' motion to strike (Doc. 25) is granted, and plaintiffs' motion to deny defendants' motion to strike (Doc. 27) is denied.

The West Chester defendants move the Court to strike plaintiffs' reply memorandum in response to the Hamilton County defendants' answer to the complaint filed on September 18, 2013 (Doc. 24), asserting that it contains scandalous allegations and that a reply to an answer is not a permissible filing under the rules. (Doc. 25). The Court will grant the motion and order that plaintiffs' "Reply Memorandum for Hamilton Cty. SHERIFF OFFICE John Ruebusch" (Doc. 24) be stricken from the docket as an improper filing. The Court will deny plaintiffs' motion to deny

defendants' motion to strike as unfounded.

IX. Plaintiffs' motion to strike the Hamilton County defendants' answer (Doc. 28) is denied.

Plaintiffs move to strike the answer of the Hamilton County defendants to the complaint on the ground they purportedly failed to timely file an answer by September 3, 2013. (Doc. 28). Plaintiffs suggest that they are entitled to default judgment against these defendants for this reason. In response, defendants state that they filed their answer and served it on plaintiffs on August 30, 2013. (Doc. 31, citing Doc. 19). In reply, plaintiffs allege they did not receive the answer until September 17, 2013. (Doc. 32).

The docket sheet reflects that these defendants timely filed their answer and certified that they served it on plaintiffs by ordinary U.S. mail on August 30, 2013. (Doc. 19). Plaintiffs' motion to strike is therefore denied.

X. Plaintiffs' motion to examine all personnel files (Doc. 36) is denied.

Plaintiffs move for a discovery order authorizing them to examine the personnel file of each defendant officer. (Doc. 36). The Hamilton County defendants oppose the motion (Doc. 37), and plaintiffs have filed a reply in support of the motion (Doc. 38).

Plaintiffs' request is moot as to the West Chester defendants. With respect to the remaining defendant law enforcement officers, plaintiffs' motion must be denied. Pursuant to Fed. R. Civ. P. 37, motions to compel discovery must include a certification that extrajudicial attempts have been made to secure responses to discovery requests. Fed. R. Civ. P. 37(a)(1) provides: "On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery." Such a motion "*must* include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make

disclosure or discovery in an effort to obtain it without court action.” *Id.* (emphasis added).

Similarly, S.D. Ohio Civ. R. 37.1 provides that motions relating to discovery “shall not be filed in this Court, under any provision in Fed. R. Civ. P. 26 or 37 unless counsel have first exhausted among themselves all extrajudicial means for resolving the differences. . . .”

Plaintiffs’ motion fails to include the necessary certification that plaintiffs conferred or attempted to confer with defendant about the instant discovery dispute prior to filing their motion to compel with the Court. Nor is there any indication from plaintiffs’ motion that the parties attempted to resolve this dispute prior to the filing of the motion and seeking the Court’s intervention. “The obligation of counsel to meet and confer to resolve differences as to discovery disputes is a requirement of the Federal Rules of Civil Procedure as well as of the Local Rules of this Court.” *Inhalation Plastics, Inc. v. Medex Cardio-Pulmonary, Inc.*, No. 2:07-cv-116, 2010 WL 1445171, at *2 (S.D. Ohio April 12, 2010). *See also Ross v. Citifinancial, Inc.*, 203 F.R.D. 239, 240 (S.D. Miss. 2001) (“This prerequisite [of a good faith certificate] is not an empty formality. On the contrary, it has been the Court’s experience that obliging attorneys to certify to the Court that they have conferred in good faith results, in a large number of cases, in resolution of discovery disputes by counsel without intervention of the Court.”). The Court will therefore deny plaintiffs’ motion for failure to show compliance with the Federal Rules of Civil Procedure and the Local Rules of this Court.³

³Having determined that plaintiffs failed to satisfy the requirements of Rule 37, the Court need not decide whether the requested discovery is outside the scope of Fed. R. Civ. P. 26.

IT IS THEREFORE ORDERED THAT:

- 1) Defendants' motion to strike (Doc. 25) is **GRANTED**. Plaintiffs' "Reply Memorandum for Hamilton Cty. SHERIFF OFFICE John Ruebusch" (Doc. 24) is hereby **STRICKEN** from the record.
- 2) Plaintiffs' motion to deny defendants' motion to strike (Doc. 27) is **DENIED**.
- 3) Plaintiff's motion to strike the Hamilton County defendants' answer (Doc. 28) is **DENIED**.
- 4) Plaintiffs' motion to examine all personnel files (Doc. 36) is **DENIED**.

IT IS THEREFORE RECOMMENDED THAT:

- 1) The West Chester defendants' motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) (Doc. 17) be **GRANTED**.
- 2) Plaintiff's motion for leave to amend the complaint (Doc. 14) be **DENIED**.
- 3) Plaintiffs' motions for Court Orders (Docs. 15, 40) be **DENIED** as moot.

Date: 12/16/13


Karen L. Litkovitz
United States Magistrate Judge

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

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Defendants.

NOTICE

Pursuant to Fed. R. Civ. P. 72(b), **WITHIN 14 DAYS** after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. This period may be extended further by the Court on timely motion for an extension. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendation is based in whole or in part upon matters occurring on the record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon, or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections **WITHIN 14 DAYS** after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

*Farnolia Garrett
Martel Garrett
5381 Genesis Ct.
Liberty Township, OH 45044*

COMPLETE THIS SECTION ON DELIVERY

A. Signature Agent Addressee
 B. Received by (Printed Name) C. Date of Delivery

D. Is delivery address different from item 1? Yes
If YES, enter delivery address below: No

3. Service Type Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee) Yes

2. Article Number
(Transfer from service label)

7011 3500 0001 5345 9688

PS Form 3811, February 2004

Domestic Return Receipt

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