UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Rex Thompson,

Plaintiff,

v. **Case No. 2:08-cv-500**

Craig Flaherty, et al. **Judge Michael H. Watson**
Magistrate Judge King

Defendants.

ORDER

Before the Court is the October 22, 2009 Motion of Defendants Columbus Chief of Police James G. Jackson and Sgt. Brooke Wilson (collectively, "Defendants") for judgment on the pleadings. (Doc. 24.) Plaintiff Rex Thompson (hereafter, "Plaintiff") brings this action against Defendants in their individual capacities[1] under 42 U.S.C. § 1983 alleging violation of Plaintiff's Fourteenth Amendment right to due process. For

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[1] During meetings with Magistrate Judge King, Counsel for Plaintiff repeatedly stated Plaintiff was suing Defendants Wilson and Jackson in their individual capacities. For clarification purposes, Magistrate Judge King requested Plaintiff submit an amended complaint with separate claims for each Defendant. Counsel for Plaintiff declined to provide this amended complaint. Though Counsel for Plaintiff repeatedly stated Plaintiff sues Defendants Wilson and Jackson in their individual capacities in the Response to Defendant's Motion for Judgment on the Pleadings, Plaintiff, at times, seems to suggest he is suing Defendant Jackson in both his official and individual capacity. (Pl.'s Resp. in Opp. to Mot. of Defs.' for J. on the Pleadings 8–9.) Indeed, Plaintiff asserts arguments regarding policies evidencing deliberate indifference and ratification of other's 42 U.S.C. § 1983 violations. As these are arguments used to assert 42 U.S.C. § 1983 liability against municipalities (albeit sometimes through their agents or officers), they are properly asserted against defendants sued in their official capacities. The Court responds to those claims against Defendants Wilson and Jackson in their individual capacities that it can deduce from the claims asserted in the Complaint. (Doc. 3.) Defendants also note this statement by Plaintiff of intention to pursue claims against Defendants Wilson and Jackson in their individual capacities. (Defs.' Reply to Pl.'s Mem. in Opp. to Mot. for J. on the Pleadings (Doc. 26.) 5, n.5 ("During the continued preliminary pretrial conference, Plaintiff reiterated the intention of his Complaint was to sue Defendants Wilson and Jackson in their individual capacities. Plaintiff declined to amend his Complaint again or to add the City and the [Fraternal Order of Police] as defendants in order to proceed with his Fourteenth Amendment challenge to

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the reasons that follow, Defendants' Motion for Judgment on the Pleadings (Doc. 24.) is hereby **GRANTED**.

I. FACTS

Plaintiff filed a citizen complaint against Defendant Flaherty, a Columbus, Ohio police officer, on August 14, 2006. In that complaint, Plaintiff alleged that during a July 2006 narcotics investigation of an alleged "crack" house in Columbus, Defendant Flaherty used excessive force against Plaintiff. The citizen complaint was assigned to Defendant Wilson, a sergeant in the police department's Internal Affairs Bureau. An investigation by Defendant Wilson determined that Plaintiff had "exaggerated his claim of injury and had diminished his credibility as a witness." (Compl. ¶ 9.) Defendant Wilson did not conduct a polygraph examination of Plaintiff.

Plaintiff subsequently brought this action against Defendants Flaherty, Wilson, and Jackson.[2] The only claims at issue in the motion before the Court are those against Defendants Wilson and Jackson. Those claims are brought under 42 U.S.C. § 1983, alleging Plaintiff's Fourteenth Amendment due process rights were violated by Defendants Wilson and Jackson in their individual capacities. Plaintiff argues Defendant Wilson's refusal to conduct a polygraph test during the investigation of the

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[2] The following is derived from Plaintiff's Response in Opposition to Defendants' Wilson and Jackson's Motion for Judgment on the Pleadings (Doc. 25.): Plaintiff originally filed suit in the Court of Common Pleas, Franklin County, Ohio in January 2007. (Pl.'s Resp. 1.) In December 2007, Plaintiff filed a motion to amend his complaint and added Defendants Wilson and Jackson and added federal civil rights allegations against Defendant Flaherty. (*Id.*) In February 2008, the Court of Common Pleas denied the motion to file the amended complaint and granted summary judgment to Defendant Flaherty. (*Id.*) Plaintiff appealed to the Court of Appeals of Ohio, Tenth Appellate District, which overruled the trial court. (*Id.*) Plaintiff filed a second complaint raising federal civil rights claims against Defendant Flaherty and civil rights issues against Defendants Wilson and Jackson. (*Id.*) Defendants removed the case to this Court. (*Id.*) This Court granted the motion to file an amended complaint, joining the pendant state law assault claim. (*Id.*)

citizen complaint constituted a denial of due process. Plaintiff further asserts that Defendant Jackson violated his Fourteenth Amendment rights by contracting with the Fraternal Order of Police to prohibit certain uses of polygraph examinations.

II. STANDARD OF REVIEW: MOTION FOR JUDGMENT ON THE PLEADINGS

"For purposes of a motion for judgment on the pleadings, all well-pleaded material allegations of the pleadings of the opposing party must be taken as true, and the motion may be granted only if the moving party is nevertheless clearly entitled to judgment." *Fritz v. Charter Twp. of Comstock*, 592 F.3d 718, 722 (6th Cir. 2010) (citing *JPMorgan Chase Bank v. Winget*, 510 F.3d 577, 581 (6th Cir. 2007) (internal citations and quotation marks omitted)). "The standard of review for a Rule 12(c) motion is the same as for a motion under Rule 12(b)(6) for failure to state a claim upon which relief can be granted." *Ziegler v. IBP Hog Market, Inc.*, 249 F.3d 509, 511–12 (6th Cir. 2001) (citing *Mixon v. Ohio*, 193 F.3d 389, 399–400 (6th Cir. 1999)). As with a 12(b)(6) motion, "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief.' Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "The factual allegations in the complaint need to be sufficient to give notice to the defendant as to what claims are alleged, and the plaintiff must plead 'sufficient factual matter' to render the legal claim plausible, i.e., more than merely possible." *Fritz*, 592 F.3d at 722 (quoting *Ashcroft v. Iqbal*, --- U.S. ----, 129 S.Ct. 1937, 1949–50 (2009)). In *Twombly*, the Supreme Court stated, "a plaintiff's obligation to provide the 'grounds' of 'his

entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. . . . Factual allegations must be enough to raise a right to relief above the speculative level. . . ." 550 U.S. at 1964–65 (internal citations omitted).

III. ANALYSIS

A motion for judgment on the pleadings determines whether, assuming all allegations in the complaint and pleadings are true, the moving party is entitled to judgment as a matter of law. Defendants contend that in the instant case, even if all allegations are taken as true, Plaintiff cannot state a claim against Defendants. The Court agrees.

A. 42 U.S.C. § 1983 Claims

The successful allegation of a 42 U.S.C. § 1983 claim requires a two-part showing: "a plaintiff must allege the violation of a right secured by the federal Constitution or laws and must show that the deprivation was committed by a person acting under color of state law." *Stubl v. Place*, 2:07-cv-204, 2008 WL 1732948, at *2 (W.D. Mich. Apr. 10, 2008) (citing *West v. Atkins*, 487 U.S. 42, 48 (1988); *Street v. Corr. Corp. of Am.*, 102 F.3d 810, 814 (6th Cir. 1996)); *accord Adams v. Metiva*, 31 F.3d 375, 386 (6th Cir. 1994). Because Section 1983 provides only a remedy for violations of federal rights, rather than supplying the substantive rights themselves, the first step in the analysis is to determine which federal rights, if any, were violated. *Albright v. Oliver*, 510 U.S. 266, 271 (1994); *Johnson v. Ward*, 43 Fed. Appx. 779, 782 (6th Cir. 2002); *Upsher v. Grosse Pointe Pub. Sch. Sys.*, 285 F.3d 448, 452 (6th Cir.

2002); *Stubl*, 2008 WL 1732948, at *2; *Otero v. Wood*, 316 F. Supp. 2d. 612, 620 (S.D. Ohio 2004).

Plaintiff argues Defendants violated his Fourteenth Amendment due process rights which, according to Plaintiff, require the police to conduct a full and fair investigation of any alleged misconduct by police officers. (Compl. ¶ 11.) Plaintiff argues Defendant Wilson violated Plaintiff's due process rights when, in the face of conflicting statements from Plaintiff and Defendant Flaherty, she denied Plaintiff's request that she order polygraph tests to resolve Plaintiff and Defendant Flaherty's credibility. (Compl. ¶¶ 10, 12–13.) Plaintiff contends Defendant Jackson violated Plaintiff's due process rights by improperly contracting with the Fraternal Order of Police to prohibit the ordering of polygraphs to resolve questions of credibility in police misconduct investigations. (Compl. ¶¶ 11–13.)

The Plaintiff initially premises his Section 1983 claim on the denial of a polygraph test during a police investigation of misconduct, but there is no federal right that entitles Plaintiff to the polygraph exam. *Charles v. Otts*, No. 08-6095, 2009 WL 1175170, at *2 (W.D. Ark. Apr. 28, 2009) ("there is no federal constitutional right to undergo polygraph examination" (citing *United States v. Scheffer*, 523 U.S. 303 (1998) (Per se rule against admission of polygraph did not violate Fifth or Sixth Amendment right to present defense))); *Stubl*, 2008 WL 1732948, at *2; *Miller v. Brown*, Civil No. 07-2020(JLL), 2007 WL 1876506, at *8 (D.N.J. June 26, 2007) (citing *Counterman v. Fauver*, CIV. A. No. 83-4839, 1989 WL 200954 (D.N.J. Nov. 24, 1989) (refusal to satisfy plaintiff's demand for polygraph did not violate plaintiff's Due Process rights)); *Bell v. Lyons*, No.

04-C-0926, 2006 WL 3692634, at *11 (E.D. Wis. Dec. 11, 2006) (*aff'd* 253 Fed. Appx. 595 (7th Cir. 2007)) ("There is no statutory or constitutional right to a lie detector test before being detained on parole hold."); *Luckett v. Berghuis*, No. 04-cv-73037-DT, 2006 WL 1779383, at *8 (E.D. Mich. June 26, 2006) (citing *Scheffer*, 523 U.S. 303 (1998)) ("Petitioner did not possess a constitutional right to take a polygraph test"); *Terrell v. Godinez*, No. 95 C 4679, 1995 WL 678525, at *2 (N.D. Ill. Nov. 8, 1995) (Even if polygraph administrator incompetently or maliciously failed Plaintiff during polygraph examination, "he did not deprive [plaintiff] of any federal or Constitutional right. [Plaintiff] had no right to a polygraph examination in the first place."); *Wilson v. State*, 639 S.W.2d 45, 48 (Ark. 1982) ("There is no constitutional right to a polygraph test."); *People v. Rios*, Docket No. 271833, 2007 WL 2559377, at *1 (Mich. App. Sept. 6, 2007) (right to a polygraph is not constitutional but is provided by Michigan state law). Therefore, even if Defendant Wilson did deny the requested polygraph exam, she violated no federal or Constitutional right.

In his Response, Plaintiff argues the ninety day timeline for the investigation by Defendant Wilson is arbitrary and unreasonably short. (Pl.'s Resp. to Defs.' Mot. for J. on the Pleadings 9.) Plaintiff does not, however, assert that the allegedly unconstitutional timeline is Defendant Wilson's fault, nor that the deadline was missed. The only claim asserted against Defendant Wilson in her individual capacity is premised on her refusal to order a polygraph test. As this is not a violation of a Constitutional or federal right, there is no viable claim asserted against Defendant Wilson.

Plaintiff also argues the contract between the City of Columbus and the Fraternal

Order of Police, allegedly entered into by Defendant Jackson, violates citizens' due process rights by prohibiting the ordering of polygraphs as a mandatory part of police officer misconduct investigations. (Compl. ¶ 11.) Nothing in the record — short of a single conclusory allegation (*id.*) — suggests the contract between the City of Columbus and the Fraternal Order of Police included such a prohibition, or that Defendant Jackson in any way negotiated, was a party to, suggested, approved, or adopted the contract. However, even taking this allegation as true, such a contractual prohibition is not unconstitutional because there is no federal or constitutional right to a polygraph test. Thus, Plaintiff fails to provide the Court with any violation of federal law to support his Section 1983 claims against Defendants. Therefore, as a matter of law, Plaintiff has no cause of action against Defendants.

In the alternative, while Counsel for Plaintiff repeatedly stated he intends these allegations to support a claim against Defendants Wilson and Jackson in their individual capacities, even if he meant the allegations to support a claim against Defendants in their official capacities, and meant to argue the Defendants are liable through the theory of ratification for their failure to meaningfully investigate, the Complaint and incorporated exhibits would fail to provide sufficient allegations to support such a claim.

The Complaint provides that Defendant Wilson investigated the misconduct complaint made by Plaintiff against Defendant Flaherty, and determined that Plaintiff had exaggerated his claim and had diminished credibility. (Compl. ¶ 9.) Based on this investigation, Defendant Flaherty was not punished. (*Id.*) Further, the Complaint states Defendant Wilson denied Plaintiff a polygraph examination because the Division of

Police did not have provisions for administering a polygraph test under such conditions. (Compl. ¶ 10.) Finally, Plaintiff alleges Defendant Jackson contracted with the Fraternal Order of Police to prohibit a requirement that investigators order a polygraph examinations in situations like the one at issue here, and in so doing, bargained away the right to a full and fair investigation of civil rights for injured citizens. (Compl. ¶ 11.)

To allege a claim against a state actor under 42 U.S.C. § 1983 is, essentially, to sue the state. *Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1246 (6th Cir. 1990). To allege such a claim sufficiently, Plaintiff must allege a violation of his civil rights, and that the violation was by a state actor. *Id.* at 1245. Plaintiff has potentially alleged two violations: first, that he was the victim of excessive force, and second, that he was denied a polygraph examination. As stated in the body of the Opinion, denial of a polygraph examination violates no rights. Therefore, the only potentially actionable violation is the use of excessive force. In this claim it is Defendant Flaherty, rather than Defendants Wilson and Jackson, that is alleged to have used excessive force; therefore, to sustain a Section 1983 claim against Defendants Wilson and Jackson, the deprivation of Plaintiff's rights must be attributed to Defendants Wilson and Jackson through another means, such as through the doctrines of supervisory liability and ratification.

The Sixth Circuit has recognized the doctrine of supervisory liability under 42 U.S.C. § 1983. *Leach*, 891 F.2d at 1246. In *Leach*, the court found liability because the defendant Sheriff's failure to supervise indicated deliberate indifference. *Id.* However, not all failures to supervise lead to Section 1983 liability.

> A failure of a supervisory official to supervise, control, or train the offending individual [employees] is not actionable absent a showing that the official either encouraged or in some way directly participated in it. At a minimum a plaintiff must show that the official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending employees.

Id. To sustain a Section 1983 claim against Defendants Wilson and Jackson in their official capacities, Plaintiff must allege Defendants Wilson and Jackson either encouraged, directly participated in, or implicitly authorized, approved, or knowingly acquiesced in Defendant Flaherty's allegedly offending conduct.

There are no allegations that anyone encouraged or directly participated in Defendant Flaherty's alleged conduct that led to Plaintiff's Complaint. Defendant Wilson participated in the investigation, but there are no allegations that suggest she performed a role as Defendant Flaherty's supervisor; instead, she appears to be an employee of a different investigative branch; thus, she is not subject to supervisory liability for his actions. Defendant Jackson, as Chief of Police, does have a supervisory role, but it is not alleged that he participated directly in any violation of rights, nor that he explicitly encouraged such a violation. Instead, Plaintiff presumably relies on implicit authorization or approval, but unlike cases from the Sixth Circuit, the allegations do not show Defendant Jackson did or had reason to know of the allegedly offending conduct by Defendant Flaherty. *Leach*, 758 F.2d, at 1246 (Sheriff should have known of the repeated mistreatments of invalid prisoners.). Thus, the Court must determine if implicit authorization of the illegal use of excessive force is alleged by statements that one of the Defendants entered into a contract prohibiting the use of polygraph examinations during the investigation of citizen complaints. The Court finds such allegations insufficient.

While the court in *Leach* found the evidence of a history of mistreatment and failure to punish showed the Sheriff implicitly authorized the mistreatment of the inmates, here, the allegations are insufficient to show supervisory liability. Merely contracting with a police union regarding the use of polygraph examinations is not implicitly authorizing police officers to use excessive force on citizens. The Sixth Circuit found in *Marchese v. Lucas* that concealment of violations combined with "a complete failure to initiate and conduct any meaningful investigation" is sufficient to lead to liability under Section 1983, 758 F.2d 181, 187–88 (6th Cir. 1985), but that did not occur here. There was no alleged history of such excessive uses of force, and there was no alleged cover-up; rather, Defendant Wilson conducted an investigation.

Nevertheless, the court in *Leach* found that an official capacity suit does not require a showing of supervisory liability because "an official capacity suit is, for our purpose here, a suit against a governmental entity, [hence] the allegedly unconstitutional action need only be based on a policy or custom of that entity for liability to attach." *Leach*, 891 F.2d at 1246. Plaintiff has not alleged a policy of deliberate indifference, and the allegations in the Complaint and pleadings do not support one.

The Sixth Circuit has repeatedly examined cases for a policy of "deliberate indifference," which is commonly evidenced by knowledge of a problem and failure to investigate and punish. *Leach*, 891 F.2d at 1247 (finding deliberate indifference evidenced where Sheriff knew of multiple other situations involving failure to meet medical needs of incapacitated prisoners and also failed to investigate and punish violating employees); *Marchese*, 758 F.2d at 187–88 (deliberate indifference evidenced

by concealment of prisoner beating followed by complete failure to investigate incident, including failure to identify perpetrators or impose any penalties or reprimands). Here, there are no allegations or evidence, as there was in *Leach* and *Marchese*, to show that Defendant Jackson had reason to know of the potential for such a violation to occur, or that Defendant Flaherty's alleged attack was anything more than an outlier occurrence. This alone shows Plaintiff's allegations are insufficient to support a Section 1983 claim. *See Thomas v. City of Chattanooga*, 398 F.3d 426, 434 (6th Cir. 2005) (distinguishing finding of deliberate indifference in *Leach* because appellants "failed to show several separate instances of the alleged rights violation"); *Berry v. City of Detroit*, 25 F.3d 1342, 1354 (6th Cir. 1994) (to establish failure to discipline liability, plaintiff must evidence "history of widespread abuse that has been ignored" (citing *City of Canton v. Harris*, 489 U.S. 378 (1989))); *Morrison v. Bd. of Trustees of Green Twp.*, 529 F. Supp. 2d 807, 825 (S.D. Ohio 2007) ("inferring a municipal-wide policy based solely on one instance of potential misconduct runs dangerously close to 'the collapsing of the municipal liability standard into a simple *respondeat superior* standard.'" (quoting *Thomas*, 398 F.3d at 432–33)); *Daniels v. City of Columbus*, No. C2-00-562, 2002 WL 484622, at * 6–7 (S.D. Ohio Feb. 20, 2002) (finding actual investigation and failure to allege anything more than an isolated unconstitutional activity to be insufficient to create Section 1983 liability). But even if it were not, Plaintiff further alleges that after he filed a complaint with the police department, an investigation occurred. Courts are reluctant to impose liability based on a ratification theory when an investigation has occurred. *Daniels*, 2002 WL 484622, at *6 (citing *Anthony v. Vaccaro*, 43 F. Supp. 2d 848, 848 (N.D. Ohio 1999); *Walker v.*

Norris, 917 F.2d 1449, 1457 (6th Cir. 1990)) (distinguishing *Marchese* and *Leach* because officer conducted an investigation). Thus, the allegations do not support a Section 1983 claim against Defendants in their official capacities. While Counsel for Plaintiff asserts that the claims are against Defendants in their individual capacities only, even if Plaintiff had claims against the Defendants in their official capacities, the claims would also fail.

B. 42 U.S.C. § 1986 Claims

Claims raised "under 42 U.S.C. § 1986 are 'directed at those who neglect to prevent wrongful acts done pursuant to a [42 U.S.C. §] 1985 conspiracy.'" *Frost v. Boyle*, No. 1:06 CV 2649, 2008 WL 650323, at *12 (N.D. Ohio Mar. 5, 2008) (quoting *Blount v. D. Canale Vevs., Inc.*, No. 02-2813-V, 2003 WL 22890339, at *6 (W.D. Tenn. July 23, 2003)). Liability under § 1986 is derivative of liability under § 1985. *Royal Oak Entm't, LLC v. City of Royal Oak, Mich.*, 205 Fed. Appx. 389 (6th Cir. 2006) ("Section 1986 liability is derivative of § 1985 liability." (citing *Haverstick Enters., Inc. v. Fin. Fed. Credit, Inc.*, 32 F.3d 989, 994 (6th Cir. 1994))); *Cousino v. Nowicki*, 165 F.3d 26 (Table), 1998 WL 708700, at *2 (6th Cir. 1998) (without a violation of § 1985, "there can be no resulting violation of § 1986"). Because Plaintiff raised no § 1985 claims against Defendants, his § 1986 claim fails as a matter of law.

C. Qualified Immunity

Defendants submit that even if their actions had violated Plaintiff's constitutional or federal rights, they would still be entitled to judgment as a matter of law because any claims asserted against them by Plaintiff are barred by the doctrine of qualified

immunity. (Defs.' Mot. for J. on the Pleadings 10; Defs.' Reply to Pl.'s Mem. in Opp. to Mot. for J. on the Pleadings 7.) The Court agrees with Defendants.

"Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzerald*, 457 U.S. 800, 818 (1982). This doctrine "ensure[s] that talented candidates [are] not deterred [from government work] by the threat of damages suits from entertaining public service." *Wyatt v. Cole*, 504 U.S. 158, 167 (1992). But this immunity is not absolute; as stated above, it only protects state actors from the personal liability that would otherwise stem from certain violations. *Harlow*, 457 U.S. at 818. The Sixth Circuit provides a three-part analysis for determining when qualified immunity protects government officials performing discretionary functions:

> First, we determine whether a constitutional violation occurred; second, we determine whether the right that was violated was a clearly established right of which a reasonable person would have known; finally, we determine whether the plaintiff has alleged sufficient facts, and supported the allegations by sufficient evidence, to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights.

Williams v. Mehra, 186 F.3d 685, 691 (6th Cir. 1999) (en banc) (citing *Dickerson v. McClellan*, 101 F.3d 1151, 1157–58 (6th Cir. 1996)). For the purposes of the Court, only the first step is relevant, because, as stated above, no constitutional violation occurred. Therefore, the first step of the *Dickerson* analysis shows the application of qualified immunity to be appropriate for Defendants.

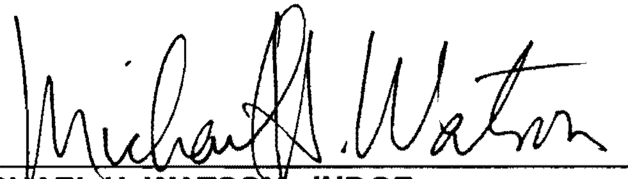
Based on the preceding discussion, the Court finds that taking all well-pleaded

material allegations of the pleadings of Plaintiff as true, Defendants Jackson and Wilson are nevertheless clearly entitled to judgment, and their motion for judgment on the pleadings is hereby **GRANTED**.

IV. DISPOSITION

Based on the above, the Court **GRANTS** Defendants' motion for judgment on the pleadings. (Doc. 24.) Accordingly, the Court **DISMISSES** Plaintiff's claims against Defendants Wilson and Jackson **WITH PREJUDICE**. The Clerk shall remove Doc. 24 from the Court's pending motions list.

IT IS SO ORDERED.



MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT