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CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RAVINDRA SINGH, PH.D.

Plaintiff,

v.

WAL-MART STORES INC,
WAL-MART STORES TEXAS LLC,
ALAN MARTINDALE,
EVA MARIE MOSELEY; and
CITY OF AUSTIN,
AUSTIN POLICE DEPARTMENT,
EX-POLICE CHIEF ART ACEVEDO,
OFFICER RICHARD W. MILLER (AP3538),
OFFICER JOHN DOE I

Defendants.

A17CV1120RP

Civil Action No. _____

JURY TRIAL DEMANDED

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE UNITED STATES DISTRICT COURT:

COMES NOW, Ravindra Singh, Ph.D. ("Dr. Singh") complaining of Wal-Mart Stores Inc., Wal-Mart Stores Texas LLC, Alan Martindale – manager Walmart store #3569 in Austin, Texas and Ms. Eva Marie Moseley ("Ms. Moseley") – loss prevention officer Walmart store #3569, collectively referred to as ("WALMART"); and City of Austin ("City"), Austin Police Department ("APD"), Police Chief (at the time of this incident) Art Acevedo ("Chief Acevedo"), police officers ("officers"), police officer Richard Miller ("officer Miller") (Badge No: AP3538), and an unidentified police officer John Doe I ("officer John Doe I")(expected to be replaced with actual name and badge number upon knowledge) ("City of Austin/APD"), and for cause of action would respectfully show unto this Honorable Court as follows:

I. NATURE OF THE CASE

1. This is a Civil Rights action arising under U.S. Constitution, particularly under the provisions of the First, Fourth and Fourteenth Amendments, and under federal law, particularly Civil Rights Act, Title 42 of the United States Code §§ 1981, 1983, 1985(b)(3); and rights under the Constitution and laws of State of Texas. Plaintiff Dr. Singh seeks damages against defendants for committing acts, under color of state law, with the intent and for the purpose of depriving Dr. Singh's rights secured under the Constitution and laws of the United States, and rights secured under the constitution and the laws of the State of Texas.

2. The incident giving rise to this action occurred on November 26, 2015 – the day of Thanksgiving – at defendant Walmart store in Austin when security officer Mosely, working in concert with officer Miller – working as a paid-security guard in full Austin police uniform –

falsely accused Dr. Singh of shoplifting theft. Dr. Singh was detained, arrested and subjected to search of his body, in full public view, allegedly to recover concealed and stolen merchandise when there was none. When Dr. Singh complained of the officer's misconduct, the police officer – defendant Miller – violently twisted plaintiff's arms behind his back and handcuffed inflicting severe pains and caused severe injury. Next officer John Doe I wrongly interrogated Dr. Singh for a long period of time on a false suspicion of being an illegal alien when Dr. Singh was a bona fide U.S. citizen. Police officers charged Dr. Singh of Disorderly Conduct – a crime punishable by up to 6-month jail time and $500 (Five-Hundred) in fine or both on fabricated and untrue grounds and city of Austin maliciously prosecuted Dr. Singh on the charges. Eventually, an Austin municipal judge dismissed the charges for lack of evidence on prosecutor's motion.

II. PARTIES

3. Plaintiff Ravindra Singh, Ph.D. is a Citizen of United States and the State of Texas, and currently lives in the city of Austin, Texas.

4. Defendant Wal-Mart Stores Inc. is a Delaware corporation and may be served at its principal place of business at 702 S.W. 8th Street, Bentonville, Arkansas 72716

5. Defendant Mal-Mart Stores Texas LLC is a wholly owned subsidiary of Wal-Mart Stores Inc., and is registered to conducts business in the State of Texas, and upon knowledge and belief, it may be served with process by delivering a summons and a true copy of this Complaint to its registered agent for receipt of service of process, CT Corporation System at 365 N St. Paul St., Suite 2900, Dallas, Texas 75201.

6. Defendant Alan Martindale is store manager at Walmart store #3569 in the city of Austin where the incident giving rise to this action occurred and may be served with process at 12900 North I-35 Service Road South Bound, Austin, TX 78753.

7. Defendant Ms. Eva Marie Moseley was employed at Walmart store #3569 as a security officer and may be served at 12900 North I-35 Service Road South Bound, Austin, TX 78753.

8. Defendant City of Austin is a Municipal Corporation, organized under the laws of the State of Texas and operates through its police department to provide police services to resident of the city, and it may be served with process by serving the City Clerk, Mayor Steve Adler, Treasurer, or Secretary at 301 W 2nd Street, Austin, TX 78701

9. Defendant officer Richard W. Miller, Badge No. AP3538 ("officer Miller) is sued in his individual and official capacities and is employed by City of Austin/ Austin Police Department and may be served with process at 715 E. Eighth Street, Austin, TX 78701.

10. Defendant officer John Doe I ("officer John Doe I") is sued in his individual and official capacities and is employed by City of Austin/ Austin Police Department and may be served with process at 715 E. Eighth Street, Austin, TX 78701.

11. Defendant Police Chief Art Acevedo ("Chief Acevedo") was Police Chief for the City of Austin at the time of the incident giving rise to present action is sued in his official capacity and is currently Police for the City of Houston and may be served at City of Houston Police Department, 1200 Travis Street, Houston, TX 77002.

III. JURISDICTION

12. Plaintiff brings this action under US Constitution, 42 U.S.C. §§ 1981, 1982, 1983 and 42 U.S.C. §2000d et seq.

13. The Court has subject matter jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3) – (4); and the Court has supplemental jurisdiction under 28 U.S.C. § 1367 (a) (2000).

IV. VENUE

14. Venue is proper in this Court under 28 U.S.C. § 1391(b)(1) – (2) as Travis County, where the action arose falls within the jurisdiction of this Court.

V. FACTUAL BACKGROUND

A: November 26, 1915: (a) Arrest and body-search for false shoplifting theft charges without any justification whatsoever; (b) retaliation for criticizing unwarranted police action; intentional use of unreasonable and unnecessary physical force without the presence of exigent circumstances resulting in severe pain and lasting bodily injury.

15. On November 26, 2015 – the day of Thanksgiving – plaintiff Dr. Singh visited defendant Walmart store #3569 in Austin, Texas around 10.30 P.M. to shop defendant's Early/Pre-Black-Friday Sale" after learning about the event through defendant's on-line advertising.

16. Dr. Singh was interested in purchasing a notebook computer (known as "laptop") so went directly to the electronics department of the store where computers were normally kept on display. Dr. Singh was well aware of the location of the electronics department as he frequently shopped this particular department.

17. Upon looking at notebooks on sale, Dr. Singh did not find anything that interested him. However, he did find some newer model cell phones prominently displayed in the electronics department and briefly looked at two cell phones on display but he was not looking to purchase any cell phones. He was, however, interested in purchasing a protector if he could find one to fit the cell phone he already owned – he had not been able to find one in the past despite looking for it in several local stores. So he looked for some protector/covers but could not find one that would fit. As a result, Dr. Singh spent only a short period of time in the electronics department, and

subsequently walked over to the adjoining magazine section of the store where he perused some magazines. Dr. Singh did not have his reading glasses with him so he felt discomfort in his eyes after sometime, and decided to leave the store without deciding to buy anything. As Dr. Singh had no merchandise with him – either paid for by him at the cash register in the electronics department or any unpaid merchandise requiring payment at the checkout counter before the exit. So he headed directly towards the exit without going through the checkout counter.

18. As Dr. Singh was heading towards the exit, he saw two Austin police officers – one Anglo (Defendant Richard W. Miller) and another African-American (John Doe II) – approximately 3-4 feet apart, standing in front of the Beauty Shop inside the store, and approximately 15 feet from the nearest checkout counter; and approximately 15-20 feet from the exit/entry way watching shoppers as they headed towards the exit after completing their purchases at the checkout counter or and headed towards the exit without making any purchase bypassing the checkout counter.

It was clear to Dr. Singh that these two officers were working in employ of the Walmart store as he has seen Austin Police officers working in the store as security guards on a regular basis throughout the year, especially on weekends and during the evening hours – the store is opened for business twenty-four hours a day. Walmart stores had hired Austin police officers in larger number on that day anticipating increased volume of shopper-traffic for the Pre-Black Friday Sales event. There was nothing to indicate that the said officers were present in response the store's specific request for police to deal with any shoplifting issues. It was normal police presence as Plaintiff had witnessed on his prior visits but only in larger numbers.

19. When Dr. Singh approached the exit/entry way, he saw Black Friday Sales Circulars stacked in a steel rack or circular-holder, positioned on or very close the exit/entry way. The circulars were strategically positioned in such a manner that customers coming into the store may

be able to pick them up immediately after or as they entered the store area. But Plaintiff did not look for them when he entered the store – he went directly to the electronics department to shop for a laptop computer.

20. Dr. Singh stopped, bent at his waist/knees, and picked up a sales circular. The circular was printed on glossy paper and consisted of multiple pages of photos of items and pricing information. He spent approximately 2-3 minutes glancing through the pages looking for any computer advertising. Dr. Singh was standing, facing south and towards defendant officer Miller as he finished looking at the circular, and not attempting to hide from the officers in any manner while he was looking through the sales circular. After not finding what he was looking for, Dr. Singh decided to leave the store and turned east – towards the exit – and proceeded to leave with a copy of the circular in his right hand.

21. Immediately, Defendant Miller and Officer John Doe II, positioned themselves close to Dr. Singh and blocked him from leaving the store, and Defendant Miller accused Dr. Singh of shoplifting theft by carrying defendant Walmart's merchandize on his person, concealed under his shirt, and exiting the store without paying for them. Defendant Miller, in a stern and insulting tone of voice, as if he was completely certain, demanded to know what Dr. Singh was hiding under his shirt – "what do you have under your shirt?".

22. Defendant Miller and officer John Doe II were in full Austin police uniform. Defendant Miller was fully armed with APD issued weapons and communication equipment. Defendant Miller was the one who made the accusation of shoplifting and he was the team-leader of the Austin police officers moonlighting at the store at that particular time. Officer John Doe II appeared to be of lower in rank, and appeared to be following directions from defendant Miller and was quiet during the course of the entire incident.

23. Plaintiff Dr. Singh was truly shocked at the accusation – first in his life – and felt momentarily paralyzed. When he recovered he felt deeply embarrassed and humiliated by the nature of the accusation in full public view. Dr. Singh felt stripped of his liberties when he was as innocent as anyone can be.

24. Plaintiff Dr. Singh replied clearly to accuser officer Miller that he was not hiding anything, and, wanted defendant Miller to allow him to leave the store. However, defendant Miller refused. Defendant Miller insisted on a body-search of Dr. Singh to recover the alleged stolen merchandise defendant Miller insisted Dr. Singh was concealing under his clothing. Dr. Singh protested the accusation he knew was utterly false. Despite Dr. Singh's protests defendant Miller commanded Dr. Singh to lift his shirt and pull his pants low to expose his mid-section and the groin areas – in full public view. Plaintiff Dr. Singh complied because of the intimidation and threat of physical violence by defendant Miller despite the embarrassment and humiliation caused by defendant Miller's act.

B: Allegations of shoplifting and theft proven completely false as body-search failed to uncover any concealed and or stolen merchandise. No claim of honest mistake on part of Defendants. Defendants failed to offer any apology.

25. The body-search of Dr. Singh by defendant Miller did not reveal any concealed and/or stolen merchandise. The allegation of theft was Dr. Singh plaintiff was proven completely false and without justification by the accuser – defendant Miller himself.

26. The entire incident unfolded directly under store's surveillance video monitor, and was recorded as a matter of defendant Walmart's routine security protocol.

27. Even after establishing conclusively that defendants Wal-Mart and Austin police officers had falsely accused Dr. Singh of shoplifting defendants offered no apology. In particular defendant

Miller and loss-prevention officer defendant Ms. Moseley failed to say that they made an honest mistake. None of the other two Austin police officers present at the scene – John Doe I and John Doe II – offered any apologies either. No one from defendant Walmart store management staff on duty at the time or any associate said they were sorry. To this day, no defendant – either Wal-Mart or City of Austin Police Department - has offered any apology at all. Defendants simply did not, still do not care, especially defendant Alan Martindale – the store manager – who is responsible for what can only be called unlawful race-based profiling and a culture of deliberate indifference, particularly towards minority shoppers.

28. At no time Defendants City of Austin/Austin Police Department, Wal-Mart, and in particular Defendant Miller who wrongly accused Dr. Singh of theft and subjected him to body-search, and loss-prevention officer defendant Ms. Moseley whose job was to keep a watch diligently and carefully and not to falsely accuse shoppers of theft and detain, arrest and subject them to body-search without justification, indicated verbally or otherwise that they made an honest mistake when they accused Dr. Singh of said theft and subsequently subjected him to body search. At no time anyone else claimed Dr. Singh's appearance caused them to misidentify him because some justifiable mix-up with another related suspect for any specific theft incident at the time. In particular, at no time any Walmart employee or management personnel indicated there was any confusion that caused any misidentification. Even after defendants confirmed that they had wrongly accused Dr. Singh without any justification they failed to say they were sorry.

29. Instead of taking responsibility for his actions in falsely accusing Dr. Singh of shoplifting and theft, Defendant Miller gave an utterly preposterous and laughable reason for his misconduct. He blamed it on the size of Dr. Singh's stomach, saying – "you have a big stomach". Dr. Singh is a very-very slim man. He wears 29-inch waist, and measures about thirty (30) inches around his

stomach; weighs approximately 125 lbs. on a five feet five inches (5'5") frame. Dr. Singh has maintained this weight for the most of his adult life including at the time of this incident. It is instructive to compare Dr. Singh's physical size to typical American adult male in the year 2015 (Two Thousand and Fifteen). According to published report from US Center for Diseases Control (CDC) in Atlanta, over sixty percent of US adult population (including Austin population) was overweight or obese. The average waist size of adult male in US in the year 2015 was more than forty inches. Note that typically stomach is larger in size than waist in US adult male population.

30. At the time of this incident Dr. Singh was dressed in a lightweight, charcoal color, long sleeved tee shirt as it was a warm day. He did not have any winter clothes on – or carried one inside the Walmart store. No defendants claimed they witnessed, either in person or through video surveillance that Dr. Singh in fact concealing or attempting to conceal any merchandise under his clothing or in any other manner Under these circumstances no reasonable, unbiased and fair-minded person could have suspected that Dr. Singh was engaged in any shoplifting and theft of store merchandise – only a biased person would think otherwise. Austin Police Department has a long history of engaging in unlawful racial/ethnic profiling as established by numerous reports including a report from US Department of Justice issued in the year 1911 (Nineteen and eleven). Even the Office of Police Monitor for the City of Austin, and city's Citizen's Review Panel have expresses their grave concern over the issue of racial/ethnic proofing by APD officers. Most recently City of Austin's own audit of Austin Police Department's policies published a report in September 2016 based on citizen-complaint data from years 2013, 2014 and 2015 (including the year of this event). The report's findings confirmed serious and systemic problems with Austin Police conduct. The report confirms pattern of violations civil rights, unlawful racial profiling, excessive use of force against minority citizens and falsification and manipulation of policing data

in effort to hide and obscure its unlawful conduct by Austin police officers. Reports by city' civilian police monitor's shows how Austin Police Department's practices and customs skirt civilian oversight and engage in unlawful policing and protect its officers from being disciplined.

31. Dr. Singh witnessed droves of people – white male and female among others – with vastly larger sizes of stomach shopping in the store like himself without being subjected to racial profiling, and leaving the store without having made any purchases and in other respects similar to plaintiff but saw no one being subjected to accusation of theft and he saw no one being body-searched like himself. Clearly Dr. Singh was a victim of unjustified and unlawful profiling on account of his race, ethnicity, and or skin color. Defendant Miller [mis]identified Dr. Singh as being "Hispanic" based on color of his skin in the incident report on the radio. Plaintiff Dr. Singh is not Hispanic. Under US government classification system, he is considered an "Asian" which is a protected class.

C: Refusal to provide identification in violation of the official APD policy and misrepresentation of said policy by defendants Austin police officers; Violation of due process rights; interference with course justice; spoliation of evidence-audio and video footage of incident.

32. Defendant Miller next attempted to cover up the incident and his act misconduct. He ordered Dr. Singh to leave the store immediately without any delay after accusing him of a crime of theft and humiliating him by body-searching in full public view as if nothing had happened. Dr. Singh replied that he would leave as soon as he has gathered witness information at the scene because he needs to document the incident, and asked officer Miller for his identification/business card. At this time Dr. Singh intended to lodge a complaint with the Walmart management and City of Austin/Austin Police Department. Both required defendant officer's identification as well as witness contact information. Particularly, Austin Police Department policy for lodging citizen's

complaint required such information. Without such information complaint is considered "not filed or registered" and administratively closed without any record having been made against the subject officer.

33. Defendant Miller refused Dr. Singh's legitimate request. Defendant Miller told plaintiff that he could not provide the requested identification information because "it is against APD Policy". This constituted complete misrepresentation of Austin Police Department Policy because opposite is true – Austin Police Department Policy Manual Section 900.4.4 (2015). APD policy on identification required defendant Miller to provide his identification information along with name and phone number of immediate supervisor upon citizen's request including Dr. Singh. Officer Miller's conduct, according to APD ethics policy constituted dishonesty which is a ground for termination of employment. In refusing to provide said identification information Furthermore, defendant Miller's intention and purpose in withholding aforementioned information clearly was to interfere with collection and preservation of evidence that could be used against him in a future legal action, and to cover up his misconduct.

34. When officer Miller refused to provide his identification/business card claiming violation of APD policy and lying in the process, Dr. Singh attempted to give officer Miller the Sales Circular Dr. Singh had just picked up, and asked defendant Miller to write down the identification information on the sales circular – Dr. Singh has no other paper with him. But defendant Miller was in no mood to co-operate. He became extremely rude, belligerent and insulting towards Dr. Singh and replied – "I am not going to write anything". Plaintiff Dr. Singh felt that defendant Miller's conduct made no sense for a law enforcement officer because they were clearly in violation of plaintiff's due process rights under the constitution, and were undertaken to cover up police misconduct in an anticipation of future legal action.

35. When defendant Miller refused to provide the identification information in writing as stated above and refused to give the information even orally, plaintiff asked defendant Miller if he could borrow his pen and will make a note of his identification himself if APD policy did not allow him to write it down. In response, defendant Miller became incensed with rage and commanded Dr. Singh to leave the store at once or "I will take you to jail". Furthermore, defendant Miller also at this time asserted that he would have two witnesses who will testify for him – Dr. Singh believed defendant Miller was referring to officers John Doe I and John Doe II who were at the scene.

36. Plaintiff tried his very best to reason with defendant Miller that he would leave as soon as he had his identification, and some eye-witness contact information written down – Dr. Singh did not intend any confrontation with defendant Miller for fear of violence any more charges being levelled against him.

37. After defendant Miller refused to provide his identification/business card, and then refused to write down his identification information on paper supplied by Dr. Singh, and after defendant Miller refused Dr. Singh's request to let him borrow his pen (presumably APD supplied item), Dr. Singh finally told defendant Miller that he was going to buy a pen in the store, and turned inwards to buy a pen so that he could collect and preserve witness information and evidence. Dr. Singh was well aware that Walmart sold disposable BIC pens or similar writing instruments and where to find them in the store as he had purchased office supplies at the store before.

38. Defendant Miller physically blocked Dr. Singh's path and prevented him from going inside the store and make a purchase – a pen – in violation of his constitutionally protected rights to form and enforce contract.

39. Subsequently, defendant Miller turned extremely irate, began to threaten Dr. Singh with jail time if he did not leave the store right away. One of the purposes for defendant Miller's above

conduct was to cover up evidence of his misconduct as he became aware of the possible consequences of his acts. From his insistence on making Dr. Singh leave the scene of the incident even by unlawful means it was clear to Dr. Singh that Defendant Miller did not care if he was violating Austin Police Department policies or he was violating Dr. Singh's constitutional due process rights. Defendant Miller conduct constituted interference subversion of course of justice and or spoliation of evidence.

D: Retaliatory and malicious prosecution for exercise of constitutionally protected Free Speech Rights and Due Process Claim.

40. Dr. Singh felt embarrassed and deeply humiliated by defendant Miller's false accusation and body-search. And he felt powerless and frustrated because defendant officer Miller's conduct because Dr. Singh had been respectful to defendant Miller so far, and Dr. Singh was acting professionally and at the same time attempting to protect his lawful rights. Consequently, in an effort to protect his rights and protest defendant Miller's Dr. Singh averred – "I cannot believe this is happening! This is America. Is it a Police State?" Dr. Singh uttered no other words. Period. Under the circumstances those words were appropriate. Dr. Singh did not threaten defendant Miller or anyone, and made no gestures of any kind at all. Specifically, Dr. Singh did not use any profanity against defendant Miller or anyone – people who know Dr. Singh will attest to it.

41. In response, defendant Miller retaliated against Dr. Singh by grabbing him by his arms, and twisting them towards his back in a violent manner with unnecessary and excessive physical force and handcuffed his both hands behind his back. Next, defendant Miller acting in concert with defendant Ms. Mosely shoved/dragged Dr. Singh into a windowless detention room. Dr. Singh suffered severe injury to his right elbow joint – an injury Dr. Singh is still nursing and to this day.

He is also dealing with the pain in the said elbow joint that reminds him of his mistreatment by defendants Miller and Wal-Mart on a daily basis.

42. Inside the Walmart detention room, Dr. Singh was surrounded by five people – three Austin Police officers – defendant Miller, defendant John Doe I and officer John Doe II – all three in full Austin police uniform; and loss-prevention officer defendant Ms. Mosely- a white female, and a white male Walmart store management staff around forty-years of age with face covered with untrimmed facial hair. Dr. Singh complained of his treatment to Walmart management present in the detention room but received no response, and was ignored. Dr. Singh was kept in handcuffs, standing, with hands behind his back and in pain, while defendant Miller took his time investigating Dr. Singh and make an incident and arrest report as required by Austin Police Department protocol. This is when Dr. Singh heard defendant Miller report Dr. Singh as a Hispanic male – "I have a Hispanic male…". Defendant Miller's voice was crystal clear for Dr. Singh to comprehend what Defendant Miller had reported on the radio. Because Dr. Singh is not Hispanic, he corrected defendant Miller by telling him "I am not Hispanic" to which defendant Miller responded by saying "I have twenty years of experience".

43. Dr. Singh still in handcuffs, with his both hands behind his back, and in intense pain in his right elbow joint, defendant officer John Doe I began interrogating Dr. Singh presuming him to be an illegal be an alien from Mexico or South America as if officer John Doe I was a U.S. Immigration and Customs Enforcement (ICE) official. He started his interrogation of Dr. Singh without reading Dr. Singh his Miranda Rights. Defendant John Doe I began by asking what country Dr. Singh came from and why he came to Austin. When Dr. Singh protested the line of interrogation and asked Defendant John Doe I how it was relevant at that particular moment, defendant John Doe I rephrased his questioning by saying "where were you born? Were you born

in Mexico?" and continued interrogating. When plaintiff said no, defendant John Doe I named another country. Were you born in Colombia? Were you born in Guatemala? Were you born in Honduras? Were you born in El Salvador? And so on one by one. Dr. Singh replied by saying no to each country as defendant John Doe I named them since Dr. Singh was not born in any of those countries. Defendant officer John Doe I next moved to naming, one by one, counties from the contents of Asia. Defendant asked Dr. Singh if was born in China, Pakistan, Saudi Arabia and so on so forth one by one. Dr. Singh again responded by saying no to each country as defendant John Doe I named them since Dr. Singh was not born in any of the named countries. Subsequently, defendant John Doe I moved on to naming countries from the continent of Africa. Defendant John Doe I asked Dr. Singh if he was born in South Africa, Nigeria, Egypt and so on one by one. Again Dr. Singh said no to each county as defendant officer John Doe I named them. Next defendant John Doe I moved to Europe and asked if Dr. Singh was born in Russia, Poland, Germany, Italy, France, England one by one. Again Dr. Singh replied "no" to each country. Defendant John Doe I asked Dr. Singh if he was born in Australia New Zealand and again Dr. Singh responded by saying no since he was not born in any of those countries names. Eventually defendant John Doe I could not think of any other countries to name, and began repeating names of countries he had already mentioned. It took a long time for defendant John Doe I to name estimated over fifty countries. During the interrogation. Interestingly, defendant John Doe I failed to name the country Dr. Singh was actually born in. Additionally, Defendant John Doe I failed to ask if plaintiff Dr. Singh was a U.S. citizen – plaintiff was, and is a US citizen of over 30 years. Plaintiff again pointed out to defendant John Doe I that he is not a Hispanic and that he holds a Ph.D. in engineering from a highly reputable U.S. University so that officer John Doe I would stop interrogating and treating him like an illiterate, illegal Hispanic alien suspect.

44. At the end of aforementioned interrogation, Dr. Singh was given a citation by defendant Miller to sign. When Dr. Singh attempted to read the citation prior to signing he was rushed and made to sign without fully reading it. Subsequently plaintiff learned that he was cited for "Disorderly Conduct Language". The punishment for this alleged criminal act is 6-month in jail or $500 (Five-Hundred) in fine or both. The citation was a without any basis in fact and in retaliation for Dr. Singh protesting defendant Miller's acts and conducts mentioned earlier. When Dr. Singh reviewed the citation at home he discovered that defendant Miller had falsified the "Reason for Stop" and intentionally left some other fields in the citation blank. Such act of falsification of "official document" constitutes "dishonesty" by Austin Police Department. But dishonesty and falsification and in part of Austin Police culture – City' own audit supports this conclusion.

45. Dr. Singh's handcuff was removed by defendant Miller so that he could gain Dr. Singh's signature on the citation. Subsequently, Dr. Singh again asked for identification from the five aforementioned persons surrounding him in the detention room. He received a business card from Ms. Mosely. Police officers Miller and John Doe I and John Doe II replied in unison – falsely again – that "it was against Austin Police Department policy". The fifth person – a defendant Walmart's manager/staff refused to give his business card or otherwise identify himself without giving any reason.

46. When defendants Miller, John Doe I and officer John Doe II (not a defendant) refused Dr. Singh's request for identification/business card – again blatantly misrepresenting Austin Police Department policy as to officer's duty to provide identification upon request – Dr. Singh asked for some paper and a pen for the purpose of writing down the information himself. Defendant John Doe I supplied Dr. Singh with a sheet of paper and a pen but gave no identification information.

No defendants and other. However, none of the APD officers or Walmart management (a white male with face covered with untrimmed facial hair) provided their identification even verbally. Plaintiff did not notice name and badge number on defendant John Doe I uniform – he was in a black, collarless tee shirt and looked ominous to with all the APD issued weapons and communication gear on his chunky frame, and his demeanor and combative attitude.

47. In the detention room, Dr. Singh was in in close proximity of officer John Doe II – an African American male – and Dr. Singh could see his name and badge number on his uniform. As soon as Dr. Singh began writing down the name on officer John Doe II's uniform defendant Miller blocked the view intentionally by swiftly moving to position himself between plaintiff and officer John Doe II in a tight space – so tight that plaintiff could feel defendant Miller's uniform was in contact with Plaintiff's person. As a direct result of this hindrance and obstruction by defendant Miller, plaintiff could not secure John Doe II's identification information.

48. In the detention room, someone snatched the business card Ms. Moseley had provided to plaintiff upon his request. Plaintiff did not have identification information from witnesses to file a complaint with Austin Police Department.

49. Plaintiff could not secure any evidence regarding identities of the APD officers and Walmart management personnel, agents or employees who witnessed the incident. Plaintiff could not secure and preserve any video/audio or other evidence from neutral eye witnesses to the event as a result of officer Miller's intentional acts in disallowing, hindering and physically blocking plaintiff when he attempted to do so. Defendant Miller's aforementioned conduct amounts to unlawful interference with acts and disallowing and blocking plaintiff from securing and preserving evidence amounts to unlawful and willful interference with due process rights, subversion and perversion of course of justice and spoliation of evidence.

50. After a long time (approximately 30-35 minutes) plaintiff was escorted out of defendant Walmart's property by defendant officer John Doe I. While defendant John Doe I was escorting plaintiff Dr. Singh out, defendant John Doe I began a chant of "Ph.D. this way. Ph.D. this way!" at every step he took following closely behind plaintiff – estimated some 35-40 times. Plaintiff believes the purpose of the said chant was to make fun, insult, annoy and or precipitate an incident to manufacture a situation to justify use of force and cause bodily harm. APD official policy prohibits officers from insulting or making fun of citizens when officers make contact with them.

51. Defendant City of Austin/APD/Officer Miller caused a record of Dr. Singh's arrest to be created in willful manner, and published said arrest record on their web site as crime report for the Month of November 2015, branding Dr. Singh as a criminal, tarnishing his good name and reputation.

52. Based on the citation issued by officer Miller, City of Austin charged, albeit falsely, plaintiff with the crime of disorderly conduct – punishable by 6-month in jail and $500 (five-hundred dollars) in fine. City of Austin, charged Plaintiff of using "profanity that cause immediate breach of piece" when plaintiff did no such thing, and when Dr. Singh protested officer Miller's conduct and oppression with lawful speech – "I cannot believe this is happening! This is America. Is it a Police State?" Plaintiff believed, and still believes that such protestation against an oppressive police officer is constitutionally protected speech. Defendant Miller was fully equipped with APD audio/video recording equipment, and he was authorized by APD policies to record any and all such audio and video events and was even required to make a report of the incident while he was employed by Walmart as a security guard. Un-doctored audio and videos recordings are considered the best evidence even by Courts. Yet, according to City of Austin's court representation no such tape ever existed. This was not possible without defendant Miller and or

someone responsible for accepting and preserving police report tampered with at least the audio evidence.

53. While the City of Austin was prosecuting the charges of disorderly conduct in the Municipal Court, a Municipal Judge City issued an order granting plaintiff's discovery on certain audio and video recordings of the event of November 27, 2015, and the original of the citation signed by plaintiff on the same day. The City of Austin failed to produce the original of the citation for inspection. The City Attorney provided an audio file that was entirely different from what plaintiff had requested and the Court had ordered or it was altered. It was intended to create an appearance of compliance with the Court's order without actually complying with it – after representing first that any audio file even existed. Furthermore, Austin City Attorney refused to provide a copy of the surveillance video of the incident from the Walmart store – the best evidence of the incident – as the incident giving rise to this action took place under the surveillance monitor.

54. During the proceedings, Plaintiff also discovered that the citation in the Court file had been altered in material ways from what Plaintiff put his signature on at the time the defendant Miller wrote the ticket as to the reason for plaintiff's being stopped by defendant Miller. Additionally, plaintiff learned that Plaintiff also learned that the information about plaintiff's race classification was also had been altered after plaintiff has put his signature on the citation. Plaintiff believes that these alterations and suppression of evidence by defendant City of Austin and defendant Miller constitute spoliation of evidence.

55. On November 27, 2015 – the date this incident took place – Dr. Singh served notice on loss-prevention officer defendant Ms. Mosely to preserve the footage of the surveillance video of the incident starting from; (a) entry of plaintiff in the store; and footage of defendant Miller (b) time spent by plaintiff in the electronics department and the store's magazine section or any other

section of the store, showing any attempt to conceal or actual concealment of any merchandise under his shirt by plaintiff that formed the basis of allegation of the theft against plaintiff by defendant Miller; (c) footage of defendant Miller preventing plaintiff from leaving, alleging theft, commanding plaintiff to uncover parts of his person, handcuffing and forcibly pushing/dragging plaintiff into the detention room – occurring directly under the surveillance monitor. Plaintiff also served a verbal notice to preserve any and all audio/video evidence of recordings of plaintiff's interrogation by Defendant officer John Doe I inside the detention room for future legal proceedings.

56. Instead of complying with court ordered discovery, defendant City of Austin moved the Court for dismissal of the charges, and the charges against plaintiff were dismissed without trial. Plaintiff learned about the dismissal when he presented himself to the Court for a pre-scheduled hearing as the defendant City of Austin failed to notify plaintiff of the dismissal.

VI. CAUSES OF ACTION

FIRST CAUSE OF ACTION: UNREASONABLE SEIZURE/SEARCH/FALLS AREST

E. U.S.C § 1983 - Violation of the Fourth Amendment to the U.S. Constitution

57. Plaintiff repeats and re-alleges by reference paragraphs 12 through 56 as if fully set forth herein.

58. Plaintiff asserts that on November 26, 2015 – the day of Thanksgiving – defendant Ms. Moseley – a loss-prevention officer at Walmart store #3569 and or other employees, representatives or agents of defendant Walmart, and particularly Austin police officer defendant Miller, acting at all times relevant herein within the scope of their employment, falsely accused

him of shoplifting theft, seized and searched in his person without probable cause for the alleged crime and without justification and without warrant in violation of rights guaranteed under the Fourth Amendment to U.S. Constitution. The Fourth Amendment in pertinent parts provides the following:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

59. Defendant violated plaintiff's well established rights on November 26, 2016 when they seized plaintiff while he was attempting to leave defendant' Walmart store – and they ceased him without his consent. Plaintiff further asserts that the acts complained of above were done by done by defendant WALMART, working in concert with City of Austin Police Department and under color of state law for reasons including the following:

(a) Defendant officer Miller was and, is an Austin police officer and he was working as a security guard in full Austin Police uniform; was armed with city of Austin supplied weapon and communication gear, and employed pursuant an employment contract for "Law Enforcement Related Employment" (termed LERE under APD policy) between defendant WALMART and Austin Police Department and or Austin Police Association and or one or more of Austin police officers including defendant officer Miller and defendant officer John Doe I.

(b) Defendant WALMART has a policy of and practice of working in concert with local police and employs police officers as security guards at many of its stores in the City of Austin and elsewhere in the State of Texas, particularly at stores located in areas that is patronized by relatively larger proportions of minority persons compared to store locations in areas where non-minority shoppers are more predominant numbers.

(c) Defendant WALMART has a policy and practice of asserting reliance on Texas shopkeeper privilege statute in its dealings with customers when it accuses them of shoplifting theft and subjects them to detention, arrest and investigation similar to complained of in the instant case.

60. Plaintiff asserts that while the Texas shopkeeper's privilege statute permitted defendant to undertake certain investigatory action but only when it was justified and implemented in a uniform manner without unlawfully discriminating based on race, color, national origin among.

61. Plaintiff further asserts that defendant WALMART's has a policy and practice unfairly targeting minority shoppers for surveillance based on un-permissible race/color/ethnicity based profiling and plaintiff was a victim of said policy. Defendant WALMART targeted Dr. Singh for surveillance, simply based on his race/ethnicity and or his brown skin color. Defendant accused him of shoplifting theft simply based on his race/ethnicity and skin color and not on any objective and reasonable ground – at no time, while Dr. Singh was shopping anyone saw him either directly or indirectly through video surveillance actually concealing or attempting to conceal any item under his shirt. Yet he was accused of theft, detained and arrested, searched of his person despite his protest – a blatant violation of his clearly established constitutional rights any reasonable police officer should have known.

62. Plaintiff asserts defendant WALMART's managers, agents, representatives and employees named in this complaint acted in concert, or were deliberately indifferent to deprive plaintiff of his constitutional rights and defendants Wal-Mart Stores Inc., Wal-Mart Stores Texas LLC are liable for the conduct the conduct or omissions of store manager Alan Martindale, loss-prevention officer Ms. Moseley and police officers Miller and John Doe I under the theory of respondeat superior because at all times relevant, defendants officers Miller, John Doe I, and defendant Ms. Moseley were acting within the scope of their employment,

SECOND CAUSE OF ACTION: RETALIATORY PROSECUTION FOR EXERCISE OF FIRST AMENDMENT RIGHTS
- Municipal liability under U.S.C. § 1983

F. City of Austin and Austin Police Department Liability for suppressing constitutionally protected right of free speech in protest of police oppression and interference with and subversion of justice/spoliation of evidence/malicious and retaliatory prosecution

63. The allegations set forth in paragraphs 1 through 62 are hereby incorporated by reference, the same as if fully set forth verbatim for any and all purposes of this complaint. Furthermore, the claims brought under this section apply to defendant officer Miller, officer John Doe I, City of Austin, Austin Police Department and Ex-Chief of Austin Police Chief Art Acevedo.

64. Plaintiff Dr. Singh pleads that he had the right to be free from government abridgement of speech under the First Amendment to the U.S. Constitution at all relevant times during the incident on November 26, 2015 at Walmart store # 3569 giving rise to this action.

65. Plaintiff exercised above mentioned free speech rights when he criticized defendant Austin police officer Miller, in full Austin police uniform exercised his authority and powers given to him by city of Austin through granting and allowing employment with Austin Police Department. Plaintiff exercise his constitutionally guaranteed free speech rights when defendant officer Miller accused him the crime of shoplifting theft without probable cause and without justification and subsequently seizing, arresting and subjecting him to unlawful search of his person to embarrass and humiliate him.

66. When officer Miller failed to find alleged stolen merchandise Dr. Singh's person, officer Miller attempted to out Dr. Singh of the store with an intent to cover up his wrongful act. When Dr. Singh requested officer Miller for his identification, officer Miller refused to do so. Officer

Miller owed plaintiff Dr. Singh a duty to provide his identification information when Dr. Singh request aid information.

67. Defendant Miller next physically and otherwise obstructed plaintiff's entry to said Walmart store #3569 when plaintiff wanted to purchase a pen to record defendant identification and eye-witness contact and cell-phone recording information in order to lodge a complaint against officer Miller.

68. When defendant officer Miller unlawfully frustrated Dr. Singh's efforts to collect and preserve the evidence of the said incident Dr. Singh protested by saying – "I cannot believe it's happening! This is America. Is it a Police State?" Dr. Singh did not utter no other words. At no time Dr. Singh used any profanity or obscene gesture or became aggressive towards officer Miller.

69. Plaintiff said those words in response to defendant Miller's obvious, clear willful acts for the purpose of covering up his conduct to avoid legal repercussions. Such acts and conduct by defendant Miller, in particular, include: (a) hindering and or physically or otherwise blocking Plaintiff from attempting to: (a) secure contact information from neutral eye-witnesses to the incident; (b) secure and preserve cell phone recordings from neutral-eye witnesses at the scene; (c) document Defendant Millers conduct and the incident of aforementioned unjustifiable allegation of shoplifting and theft against Plaintiff and subsequent seizure and search of his person without justification, at the Wal-Mart store on November 26, 2015. Under the circumstances it was a reasonable use of free-speech rights.

70. Plaintiff alleges that defendant Miller retaliated by: (a) handcuffing and conducting a police investigation with intent to stack additional criminal charges while defendant John Doe I subjecting him to interrogation as to his country of birth and his reasons for being in Austin; presuming him to be an illegal Hispanic alien when he was neither and in fact was a lawful U.S.

citizen.; (b) citing plaintiff with a Disorderly Conduct (Language); and (c) inducing City of Austin Court official to charge plaintiff, wrongly for Disorderly Conduct falsely alleging plaintiff used profanity directed at defendant Miller despite the fact that plaintiff absolutely, positively, without any doubts what-so-ever used no profane words at all; and when only words uttered by plaintiff to protest defendant Miller's conduct and actions towards plaintiff was "I cannot believe this is happening! This is America. Is it a Police State?".

70. Defendant Miller, induced City of Austin Prosecutor to bring criminal charges against Plaintiff by misrepresenting the content of Plaintiff's constitutionally speech and without probable cause. But-for Defendant Miller's fraudulent inducement Plaintiff would not have been charged with the crime that carried a jail term of 6 months and $500.00 in fine.

71 Defendant contested the charges vigorously as they were completely false. Plaintiff moved for relevant discovery. When Prosecutors failed to find evidence to support the charge was dismissed by the municipal Court.

72. Aforementioned retaliatory actions against plaintiff was taken under color of state law as stated previously.

73 The Amendment right to criticize public officials is well-established, and was well-established on December 27, 2015 when the retaliation occurred.

74. City of Austin is liable to plaintiff for its officers because: (a) it failed to properly and train them as to free-speech and other constitutionally protect rights, (b) it failed to adequately supervise and discipline its officer despite repeated citizen complaint and (c) city's policy makers including Chief Acevedo who was the official responsible formulation and administration of Austin Police

Department policies and practices failed to remedy the situation as a result of their deliberate indifference. Dr. Singh's retaliatory prosecution was a direct and proximate cause of afore mentioned policies, practices and customs of deliberate indifference to rights of its citizens, especially minorities and city of Austin is liable to Dr. Singh.

75. Under certain circumstances an officer may claim qualified-immunity for their conduct. Clearly, under the circumstances of the present case those are not available to defendant officers, and or Austin Police Department.

THIRD CAUSE OF ACTION: VIOLATION OF PROPERTY RIGHTS UNDER U.S.C 1982

76 Plaintiff hereby adopts, incorporates, restates and re-alleges paragraphs 1 through 75 inclusive, with regard to all causes of action.

77. Plaintiff asserts and alleges that on November 26, 2015 defendant Miller violated plaintiff's property rights guaranteed to him under U.S.C § 1982 to make contract when defendant Miller blocked plaintiff from entering Walmart store mentioned in this complaint. 42 U.S.C. § provides that:

> All citizens of the United States shall have the same right, as is enjoyed by white citizens thereof to purchase personal property. (R.S. § 1978.)

78. Plaintiff alleges that on the aforementioned date plaintiff was at Walmart store #3569 in Austin and was ready willing and able to make a purchase. Specifically, plaintiff wanted to purchase a writing instrument or a pen. Plaintiff new that specific Walmart sold the kind of writing instrument plaintiff was ready to purchase. Plaintiff further states that he had sufficient funds to purchase a writing instrument or a pen that specific Walmart had available for sale at that particular time.

79. Defendant Miller, in employ of said Walmart store at the time as a security guard, in Austin police uniform, acting under color of state law blocked and disallowed and otherwise refused to permit entry into the store for reason not known to plaintiff.

80. Plaintiff is a member of a protected class under relevant U.S. Laws.

81. Defendant WALMART is responsible for defendant Millers acts under the doctrine of respondeat superior and liable to plaintiff Dr. Singh for abridgement of constitutionally guaranteed rights.

FOURTH CAUSE OF ACTION:
DENIAL OF RIGHTS UNDER EQUAL PROTECTION CLAUSE
U.S.C. 42 § 1983 – Under Fourteenth Amendment

82. Plaintiff hereby adopts, incorporates, restates and re-alleges paragraphs 1 through 75 inclusive, with regard to all causes of action.

83. The concept of equal protection and equality in the United States is as old as the country itself. In 1776, the founding fathers incorporated the idea of equality into the foundation of our country—the Declaration of Independence:

> We hold these truths to be self-evident, that all men are created equal,
> that they are endowed by their Creator with certain inalienable Rights,
> that among these are Life, Liberty and the pursuit of Happiness.

84. The Equal Protection Clause found in the United States Constitution is designed to memorialize the "equality" declared by our forefathers into law.

85. Defendants WALMART and city of Austin through employees, representatives and agents working in concert, especially defendant Mosely and defendant officer Miller have conspired to deny Dr. Singh right to equal treatment by their action performing acts of violation

in course of their official duties. City of Austin and Wal-Mart Stores Inc. and Wal-Mart Stores Texas LLC are responsible for the conduct of said defendants and are liable to Plaintiff Dr. Singh.

FIFTH CAUSE OF ACTION: INFLICTION OF EMOTIONAL DISTRESS

42 U.SC. § 1983

86. The allegations set forth in paragraphs 1 through 85 are hereby incorporated by reference, the same as if fully set forth verbatim for any and all purposes of this complaint.

87. Plaintiff Dr. Singh alleges that he has suffered severe emotional distress as a result of intentional and reckless acts of defendants Wal-Mart and city of Austin through the conduct of their employees, agents and or representative, especially defendant officer Miller, defendant John Doe I, and defendant Ms. Mosely when, working in concert they falsely accused plaintiff of shoplifting theft, detained and arrested him and put him in handcuffs on November 26, 2015.

88. In addition Dr. Singh suffered emotional distress from willful violation of his constitutional rights and retaliatory prosecution by defendants, especially officer Miller. Defendants are responsible for such acts under the doctrine of respondeat superior.

SIXTH CAUSE OF ACTION: DEFAMATIN OF CHARACTER

Under 42 U.S.C - § 1983/ Texas Sate Laws

87. The allegations set forth in paragraphs 1 through 85 are hereby incorporated by reference, the same as if fully set forth verbatim for any and all purposes of this complaint.

88. Dr. Singh alleges that defendants, particularly officer Miller and Ms. Mosely through their act in falsely accusing him of shoplifting theft, and subjecting him to body search in public view, and creating a record of arrest and publishing his name on a list of arrested criminal on city of

Austin web site, and propagating said information through other web sites acted willfully and maliciously to disparage and tarnish his good name in the community – social and professional.

89. As a result of defendants said acts Dr. Singh has suffered serious and substantial injuries to his reputation. Defendant Wal-Mart Stores Inc., Walmart Stores Texas LLC and City of Austin are responsible for willful, malicious and or reckless acts of their employees, representative or agents under the theory of respondeat superior.

VII. JOINT AND SEVERAL LIABILITY

90. Plaintiff claims that joint and several liability is appropriate because all defendant are liable for the same harm/s and to the same person – the Plaintiff and Defendant Wal-Mart is liable for acts and omissions of its employees including, Defendants Richard W Miller and John Doe 1 because Defendant Officers were employed pursuant to City of Austin/Austin Police Department Secondary Employment Policy.

VIII. DAMAGES

91. Plaintiff hereby adopts, incorporates, re-state and re-alleges paragraphs 1 through 90, inclusive with regard to all causes action.

92. As a result of Defendant's constitutional and statutory violations, Plaintiff Dr. Singh has suffered serious and substantial damages and injuries.

IX. ATTORNEY'S FEE AND COSTS

93. Pursuant to the Civil Rights Attorney's Fees Award Act, 42 U.S.C. § 1988 Plaintiff asserts the right to an award of attorney's fee and costs under the 42 U.S.C § 1983 pleadings if he prevails.

X. RELIEF REQUESTED

94. The preceding factual statements and allegations are incorporated by reference herein

95. For these reasons, Plaintiff Dr. Singh prays for judgement against Defendants, any and all of them for the following:

a. Actual damages;

b. Pre-judgement and post-judgement interest;

c. Statutory attorney's fees and expenses;

d. Punitive and exemplary damages against each defendant in an amount to be determined and allowed by the Court.

e. Cost of court; and

f. Such other and further relief as the Court deems just and equitable including appropriate.

XI. JURY DEMAND

96. Plaintiff respectfully demands trial by jury.

XII. PRAYER

97. WHEREFORE, Plaintiff Dr. Singh respectfully requests Defendant to be cited to appear and answer herein, and upon final trial hereof, the Court award the relief against defendants.

Plaintiff Dr. Singh further respectfully requests that he be afforded all due expediency within the discretion of this Honorable court to facilitate the preservation of evidence to demonstrate that

such unconscionable conduct will not be tolerated in a civilized society, and to ensure that justice may be served.

Dated Nov. 27th, 2017

Respectfully Submitted,

s/Ravindra Singh

RAVINDRA SINGH, PH.D.
Pro se

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IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF TEXAS

RAVINDRA SINGH, PH.D., Plaintiff,	§	
v.	§	CIVIL ACTION NO. 1:17-CV-1120
WAL-MART STORES, INC., WAL-MART STORES TEXAS, LLC, ALAN MARTINDALE, EVA MARIE MOSELEY; AND CITY OF AUSTIN, AUSTIN POLICE DEPARTMENT, EX-POLICE CHIEF ART ACEVEDO, OFFICER RICHARD W. MILLER (AP3538), OFFICER JOHN DOE 1, Defendants.	§	

DEFENDANT WAL-MART STORES TEXAS, LLC'S ORIGINAL ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, Wal-Mart Stores Texas, LLC, Defendant in the above entitled and numbered cause, and files this its Original Answer to Complainants' Original Complaint and in support thereof would respectfully represent and show unto the Court the following:

ANSWER

Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in the first unnumbered paragraph of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

I.

1. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 1. of Plaintiff's

Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

2. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 2. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

II.

3. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 3. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

4. Defendant admits the allegations contained in Paragraph 4. of Plaintiff's Original Petition, however, Defendant denies that service is proper at the address plead.

5. Defendant denies that its proper name is "Mal-Mart" and assumes this to be a typographical error and otherwise admits the allegations contained in Paragraph 5.

6. Defendant admits the allegations contained in Paragraph 6 of Plaintiff's Original Petition.

7. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 7. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

8. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 8. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

9. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 9. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

10. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 10. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

11. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 11. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

III.

12. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 12. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

13. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 13. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

IV.

14. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 14. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

V.

A. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph A. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

15. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 15. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

16. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 16. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

17. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 17. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

18. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 18. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

19. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 19. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

20. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 20. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

21. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 21. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

22. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 22. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

23. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 23. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

24. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 24. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

B. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph B. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

25. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 25. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

26. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 26. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

27. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 27. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

28. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 28. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

29. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 29. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

30. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 30. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

31. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 31. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

C. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph C. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

32. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 32. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

31. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 31. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

31. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 31. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

31. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 31. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

31. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 31. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

31. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 31. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

38. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 38. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

39. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 39. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

D. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph D. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

40. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 40. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

41. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 41. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

42. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 42. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

43. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 43. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

44. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 44. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

45. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 45. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

46. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 46. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

47. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 47. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

48. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 48. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

49. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 49. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

50. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 50. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

51. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 51. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

52. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 52. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

53. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 53. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

54. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 54. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

55. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 55. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

56. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 56. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

E. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph E. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

57. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 57. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

58. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 58. of Plaintiff's

Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

59. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 59. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

60. Defendant denies the allegations contained in Paragraph 60. of Plaintiff's Original Petition.

61. Defendant denies the allegations contained in Paragraph 61. of Plaintiff's Original Petition.

62. Defendant denies the allegations contained in Paragraph 62. of Plaintiff's Original Petition.

F. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph F. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

63. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 63. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

64. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 64. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

65. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 65. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

66. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 66. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

67. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 67. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

68. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 68. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

69. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 69. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

70. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 70. of Plaintiff's

Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

71. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 71. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

72. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 72. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

73. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 73. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

74. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 74. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

75. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 75. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

76. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 76. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

77. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 77. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

78. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 78. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

79. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 79. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

80. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 80. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

81. Defendant denies the allegations contained in Paragraph 62. of Plaintiff's Original Petition.

82. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 82. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

83. Defendant admits the allegations contained in Paragraph 83. of Plaintiff's Original Petition.

84. Defendant admits the allegations contained in Paragraph 84. of Plaintiff's Original Petition.

85. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 85. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

86. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 86. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

87. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 87. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

88. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 88. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

89. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 87[sic]. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

90. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 88[sic]. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

91. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 89[sic]. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

92. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 90[sic]. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

93. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 91[sic]. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

94. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 92[sic]. of Plaintiff's

Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

95. Defendant denies the allegations contained in Paragraph 93[sic]. of Plaintiff's Original Petition.

96. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 94[sic]. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

97. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 95[sic] as to all subparts. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

98. Paragraph 96[sic] requires no response.

99. Defendant denies the prayer in Plaintiff's Original Petition.

DEFENSES

1. Complainant is not entitled to recover from Defendant as Defendant has caused him no injury.

2. Defendant avers that Complainant's injuries and damages, if any, were solely and proximately caused or contributed to by the failure of Complainant to care for his own safety and by the negligence of said Complainant and were not caused by or through any fault or negligence on the part of Defendant, and, therefore, Complainant is not entitled to recover from Defendant.

3. Defendant avers that Complainant's injuries and damages, if any, were solely and proximately caused or contributed to by the acts and omissions of third parties over whom this Defendant had no control and were not caused by or through any fault or negligence on the part of Defendant, and, therefore, Complainant is not entitled to recover from Defendant.

4. Defendant would show the Complainant's allegations for medical expenses are limited to those expenses actually paid or incurred by the Complainant.

5. Defendant raises each and every affirmative defense required to be pled by applicable Rules of Civil Procedure and substantive law should said defenses become applicable as this action proceeds. Defendant specifically reserves the right to amend its answer and defenses with any and all defenses as discovery dictate.

WHEREFORE, PREMISES CONSIDERED, and fully answered, Defendant hereby demands judgment dismissing Complainant's Complaint or that upon final trial and hearing hereof that no recovery be had from Defendant, but that Defendant go hence without delay and recover its costs, and for further relief to which Defendant is justly entitled and will ever pray.

Respectfully submitted,

WALTERS, BALIDO & CRAIN, L.L.P.

BY: */s/ Brett H. Payne*

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ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

This is to certify that on this the 7th day of March, 2018, a true and correct copy of the foregoing has been forwarded to all counsel of record.

/s/ Brett H. Payne

BRETT H. PAYNE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RAVINDRA SINGH, PH.D.	§	
	§	
Plaintiff,	§	
	§	
v.	§	**CAUSE NO. 1:17-CV-1120-RP**
	§	
WAL-MART STORES INC., WAL-MART STORES TEXAS LLC, ALAN MARTINDALE, EVA MARIE MOSELEY, CITY OF AUSTIN, AUSTIN POLICE DEPARTMENT, EX-POLICE CHIEF ART ACEVEDO, OFFICER RICHARD W. MILLER, OFFICER JOHN DOE I,	§	
	§	
Defendants.	§	

DEFENDANT CITY OF AUSTIN, AUSTIN POLICE DEPARTMENT ART ACEVEDO AND RICHARD W. MILLER'S
MOTION TO DISMISS

Defendants City of Austin, Austin Police Department, Art Acevedo and Richard W. Miller respectfully submit this Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b) to dismiss the complaint filed by Ravindra Singh ("Singh") in its entirety.

I. INTRODUCTION

Ravindra Singh filed this lawsuit against, among others, the City of Austin, the Austin Police Department, Art Acevedo, and Richard W. Miller. The complaint asserts generalized claims for civil rights violations under 42 U.S.C. §§ 1981, 1983, 1985(b)(3) and rights under the

The fourth is an equal protection claim brought under 42 U.S.C. § 1983.

The fifth cause of action is an infliction of emotional distress claim under 42 U.S.C. § 1983.

2. Limitations period on causes of action 1-5. Suits for personal injury have a two-year limitations period. "[A] person must bring suit for … personal injury … not later than two years after the day the cause of action accrues." *Tex. Civ. Prac. & Rem. Code Ann. § 16.033(a).*

B. Limitations on Cause of Action VI

1. Cause of Action. Plaintiff's sixth cause of action is for defamation brought under 42 U.S.C. § 1983 and Texas state law.

2. Limitation period on defamation claims. Plaintiff's defamation claim is barred by limitations. In Texas, the limitations period for libel and slander claims is one year. *Tex. Civ. Prac. & Rem. Code Ann. § 16.002.* Plaintiff's defamation claim should be dismissed.

C. Other bars to Plaintiff's case.

1. Inability of the Austin Police Department to be Sued

The capacity of an entity to sue or be sued "shall be determined by the law of the state in which the district court is held." *Fed. R. Civ. P. 17(b).* In this case, Austin is a home rule municipality. The Texas Code grants all authority to organize a police force to the city itself, *see Tex. Local Gov't Code Ann. § 341.003*, and the Home Rule Charter of the City of Austin in turn reserved to the municipality itself the power to sue and to be sued. Home Rule Charter, City of Austin, Texas, Art. 1, § 3. The Charter nowhere grants the Austin Police Department the power to sue or be sued.

A Texas home rule city is organized not unlike a corporation. Like a corporation, it is a single legal entity independent of its officers. Also like a corporation, a Texas city is allowed to designate whether one of its own subdivisions can be sued as an independent entity. Absent this

authorization, Singh's suit no more can proceed against the Austin Police Department alone than it could against the accounting department of a corporation. *See Darby v. Pasadena Police Dep't, 939 F.2d 311, (5th Cir. 1991).* The Austin Police Department should be dismissed from this suit.

2. Plaintiff's claim against Art Acevedo

Plaintiff brings one claim against Art Acevedo, "retaliatory prosecution for exercise of First Amendment rights." The claim arises out of the allegation that the "city's policy makers including Chief Acevedo who was the official responsible formulation and administration of Austin Police Department policies and practices failed to remedy the situation as a result of their deliberate indifference." (Doc. 1, ¶ 74). Vicarious liability does not apply to Section 1983 claims. *Pierce v. Texas Department of Criminal Justice, Institutional Division,* 37 F.3d 1146, 1150 (5th Cir. 1994), *cert. denied,* 514 U.S. 1107, 115 S. Ct. 1957, 131 L.Ed.2d 849 (1995). Plaintiff does not claim that Art Acevedo was personally involved in his detention. Under Section 1983, supervisory officials are not liable for the actions of subordinates on any theory or vicarious liability; the doctrine of *respondeat superior* does not apply to such actions. Chief Acevedo cannot be held liable because he did not "remedy" the actions of a subordinate. This fails to state a claim and should be dismissed.

3. Plaintiff's state law claims are barred for failure use due diligence to serve Defendants.

Plaintiff's state law causes of action for the intentional infliction of emotional distress (Cause of Action 5) and defamation of character (Cause of Action 6) are state law claims. Plaintiff's state law claims are subject to the Texas state of limitations which require due diligence in the service of process. *See Paredes v. City of Odessa,* 128 F. Supp. 2d 1009, (W.D. Tex., 2000). Under Texas law, in order to bring suit on a state law claim within the two-year statute of limitations, the plaintiff must not only file suit within the limitations period but must also use due

diligence in serving the defendant with process if the defendant is served after the expiration of the limitations period. *Gant v. DeLeon,* 786 S.W.2d 259, 260 (Tex. 1990). If the plaintiff does not serve the defendant until after the limitations period has expired, the date of service will relate back to the date of filing, and the claim will not be barred by the statute of limitations, only if the plaintiff exercises due diligence in procuring service on the defendant. *Id. at 260.*

Plaintiff Singh's entire suit is barred by limitations. Additionally, the Texas state law claims are barred by plaintiff's failure to exercise due diligence in serving the defendants within the two-year limitations period. The lawsuit was filed on November 27, 2017. No request for service was made until February 21, 2018, nearly three months after the initial filing. Under Texas law, "the purpose behind a statute of limitations is not only to encourage a plaintiff to prosecute his claims within a period of time but, just as important, to advise the defendant of the claim against him in a timely fashion so that he may prepare his defense and preserve evidence before the lapse of time has rendered this process difficult, if not impossible. *Broom v. MacMaster,* 992 S.W.2d 659, 664 (Tex. App. – Dallas 1999, no writ).

4. State tort claims against Miller are barred by Tex. Civ. Prac. & Rem. Code 101.106(f)

All state tort claims against Miller for conduct occurring within the general scope of their employment must be brought against their government employer. *Tex. Civ. Prac. & Rem. Code 101.106(f),* which bars a tort suit against a governmental employee if a suit could be brought against the governmental unit. Subsection (f) indicates that "if a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended

pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed."

II. CONCLUSION

Dr. Singh's complaint against the City of Austin, the Austin Police Department, Art Acevedo and Richard W. Miller should be dismissed as a matter of law pursuant to Rule 12(b)(6) and Rule 9(b). Defendants City of Austin, the Austin Police Department, Art Acevedo and Richard W. Miller pray that the Court dismiss this action and for all other relief to which these Defendants may show themselves to be justly entitled.

Dated: March 15, 2018.

RESPECTFULLY SUBMITTED,

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State Bar No. 24084558
kicenhauer@gmail.com
ATTORNEYS FOR DEFENDANTS CITY OF AUSTIN, AUSTIN POLICE DEPARTMENT, ART ACEVEDO & RICHARD W. MILLER

CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2018, the foregoing was filed electronically with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

Dr. Ravindra Sigh, Ph.D.
Pro Se
excion_2000@yahoo.com
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Austin, Texas 78766
(512) 293-7636

ROBERT ICENHAUER-RAMIREZ

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RAVINDRA SINGH, PH.D.	§	
	§	
Plaintiff,	§	
	§	
v.	§	**CAUSE NO. 1:17-CV-1120-RP**
	§	
WAL-MART STORES INC., WAL-MART STORES TEXAS LLC, ALAN MARTINDALE, EVA MARIE MOSELEY, CITY OF AUSTIN, AUSTIN POLICE DEPARTMENT, EX-POLICE CHIEF ART ACEVEDO, OFFICER RICHARD W. MILLER, OFFICER JOHN DOE I,	§	
	§	
Defendants.	§	

DEFENDANT CITY OF AUSTIN, AUSTIN POLICE DEPARTMENT ART ACEVEDO AND RICHARD W. MILLER'S
MOTION TO DISMISS

Defendants City of Austin, Austin Police Department, Art Acevedo and Richard W. Miller respectfully submit this Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b) to dismiss the complaint filed by Ravindra Singh ("Singh") in its entirety.

I. INTRODUCTION

Ravindra Singh filed this lawsuit against, among others, the City of Austin, the Austin Police Department, Art Acevedo, and Richard W. Miller. The complaint asserts generalized claims for civil rights violations under 42 U.S.C. §§ 1981, 1983, 1985(b)(3) and rights under the

Constitution and laws of the State of Texas. He also brings suit against Wal-Mart Stores, Inc., Wal-Mart Stores Texas LLC, Alan Martindale, Eva Marie Moseley and John Doe I.[1]

The City of Austin, the Austin Police Department, Art Acevedo and Richard W. Miller seek dismissal of each claim asserted against them because the limitations period for filing the suit expired prior to the suit being filed. The City of Austin, seeks dismissal of each claim asserted against it on the basis of sovereign immunity. The Austin Police Department seeks dismissal of each claim asserted against it based on the Plaintiff's failure to state a cause of action because the Department lacks the capacity to be sued. Richard W. Miller seeks dismissal of each claim against him on the basis of qualified immunity. All of Plaintiff's causes of action arise out of his claim for a personal injury done to him.

A. Limitations on Causes of Action I-V

1. Causes of Action. The Complaint seeks damages for personal injuries which he claims arose out of the arrest of Plaintiff on November 26, 2015. Suit was filed on November 27, 2017. (Doc. 1). Plaintiff makes claims under various causes of action.

The first cause of action is for false arrest (Doc. 1, page 21) against Defendant Richard Miller under 42 U.S.C. § 1983.

The second cause of action is an alleged malicious prosecution for Plaintiff's "exercise of first amendment rights, brought against Miller, John Doe 1, the City of Austin, the Austin Police Department and Art Acevedo, and which he claims gives rise to "Municipal liability under 42 U.S.C. § 1983."

The third cause of action is an alleged violation of property rights under 42 U.S.C. § 1982 brought against Miller for not permitting Plaintiff to re-enter the Walmart to purchase a pen.

---

[1] Plaintiff sought service of John Doe I, an individual purported to be an Austin Police Officer, and has filed a return of service for a John Doe I. As of this time, however, Plaintiff has not identified John Doe I.

The fourth is an equal protection claim brought under 42 U.S.C. § 1983.

The fifth cause of action is an infliction of emotional distress claim under 42 U.S.C. § 1983.

2. Limitations period on causes of action 1-5. Suits for personal injury have a two-year limitations period. "[A] person must bring suit for … personal injury … not later than two years after the day the cause of action accrues." *Tex. Civ. Prac. & Rem. Code Ann. § 16.033(a).*

B. Limitations on Cause of Action VI

1. Cause of Action. Plaintiff's sixth cause of action is for defamation brought under 42 U.S.C. § 1983 and Texas state law.

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C. Other bars to Plaintiff's case.

1. Inability of the Austin Police Department to be Sued

The capacity of an entity to sue or be sued "shall be determined by the law of the state in which the district court is held." *Fed. R. Civ. P. 17(b).* In this case, Austin is a home rule municipality. The Texas Code grants all authority to organize a police force to the city itself, *see Tex. Local Gov't Code Ann. § 341.003*, and the Home Rule Charter of the City of Austin in turn reserved to the municipality itself the power to sue and to be sued. Home Rule Charter, City of Austin, Texas, Art. 1, § 3. The Charter nowhere grants the Austin Police Department the power to sue or be sued.

A Texas home rule city is organized not unlike a corporation. Like a corporation, it is a single legal entity independent of its officers. Also like a corporation, a Texas city is allowed to designate whether one of its own subdivisions can be sued as an independent entity. Absent this

authorization, Singh's suit no more can proceed against the Austin Police Department alone than it could against the accounting department of a corporation. *See Darby v. Pasadena Police Dep't, 939 F.2d 311, (5th Cir. 1991).* The Austin Police Department should be dismissed from this suit.

2. Plaintiff's claim against Art Acevedo

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3. Plaintiff's state law claims are barred for failure use due diligence to serve Defendants.

Plaintiff's state law causes of action for the intentional infliction of emotional distress (Cause of Action 5) and defamation of character (Cause of Action 6) are state law claims. Plaintiff's state law claims are subject to the Texas state of limitations which require due diligence in the service of process. *See Paredes v. City of Odessa,* 128 F. Supp. 2d 1009, (W.D. Tex., 2000). Under Texas law, in order to bring suit on a state law claim within the two-year statute of limitations, the plaintiff must not only file suit within the limitations period but must also use due

diligence in serving the defendant with process if the defendant is served after the expiration of the limitations period. *Gant v. DeLeon,* 786 S.W.2d 259, 260 (Tex. 1990). If the plaintiff does not serve the defendant until after the limitations period has expired, the date of service will relate back to the date of filing, and the claim will not be barred by the statute of limitations, only if the plaintiff exercises due diligence in procuring service on the defendant. *Id. at 260.*

Plaintiff Singh's entire suit is barred by limitations. Additionally, the Texas state law claims are barred by plaintiff's failure to exercise due diligence in serving the defendants within the two-year limitations period. The lawsuit was filed on November 27, 2017. No request for service was made until February 21, 2018, nearly three months after the initial filing. Under Texas law, "the purpose behind a statute of limitations is not only to encourage a plaintiff to prosecute his claims within a period of time but, just as important, to advise the defendant of the claim against him in a timely fashion so that he may prepare his defense and preserve evidence before the lapse of time has rendered this process difficult, if not impossible. *Broom v. MacMaster,* 992 S.W.2d 659, 664 (Tex. App. – Dallas 1999, no writ).

4. State tort claims against Miller are barred by Tex. Civ. Prac. & Rem. Code 101.106(f)

All state tort claims against Miller for conduct occurring within the general scope of their employment must be brought against their government employer. *Tex. Civ. Prac. & Rem. Code 101.106(f),* which bars a tort suit against a governmental employee if a suit could be brought against the governmental unit. Subsection (f) indicates that "if a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended

pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed."

II. CONCLUSION

Dr. Singh's complaint against the City of Austin, the Austin Police Department, Art Acevedo and Richard W. Miller should be dismissed as a matter of law pursuant to Rule 12(b)(6) and Rule 9(b). Defendants City of Austin, the Austin Police Department, Art Acevedo and Richard W. Miller pray that the Court dismiss this action and for all other relief to which these Defendants may show themselves to be justly entitled.

Dated: March 15, 2018.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2018, the foregoing was filed electronically with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

Dr. Ravindra Sigh, Ph.D.
Pro Se
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(512) 293-7636

ROBERT ICENHAUER-RAMIREZ

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RAVINDRA SINGH, PH.D.,	§	
Plaintiff,	§	
V.	§	
	§	
WAL-MART STORES INC., WAL-MART STORES TEXAS LLC, ALAN MARTINDALE, EVA MARIE MOSELEY, CITY OF AUSTIN, AUSTIN POLICE DEPARTMENT, EX-POLICE CHIEF ART ACEVEDO, OFFICER RICHARD W. MILLER, OFFICER JOHN DOE I, ,	§	1:17-CV-1120-RP
Defendants.	§	

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

TO THE HONORABLE ROBERT PITMAN
UNITED STATES DISTRICT JUDGE:

Before the court is Defendants City of Austin, Austin Police Department, Art Acevedo, and Richard W. Miller's Motion to Dismiss (Dkt. #18).[1] Although the motion was filed March 15, 2018, Plaintiff has not submitted a response to the motion.[2] Having considered the motion and pleadings, the court will recommend that the motion be **GRANTED**.

I. BACKGROUND

Plaintiff Ravindra Singh, Ph.D., alleges that while he was shopping at an Austin, Texas Wal-Mart store on November 25, 2015, Thanksgiving Day, he was detained and mistreated by a Wal-Mart security officer, Defendant Eva Marie Moseley, and an Austin police officer, Defendant Richard W. Miller. Dkt. #1, Compl., ¶2. He asserts that he was falsely accused of

[1] The motion has been referred to the undersigned for a Report and Recommendation by United States District Judge, Robert Pitman, pursuant to 28 U.S.C. § 636(b), Federal Rule of Civil Procedure 72, and Rule 1(d) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas.

[2] Plaintiff has been granted permission to utilize CM/ECF on March 8, 2018 (Dkt. #15) but has not yet registered to do so. Movants represent that this Motion was alternatively served on Plaintiff on March 15, 2018. Dkt. #19.

shoplifting by Mosely and Miller, subjected to search of his body for concealed merchandise, and that he felt severe pains and received severe injury when Miller handcuffed him behind his back. *Id.* He further asserts that an additional, unknown officer, John Doe I, wrongly inquired about his immigration status. Additionally, he argues that he was wrongfully charged with disorderly conduct "on fabricated and untrue grounds" and "maliciously prosecuted," a conclusion he draws from the fact that this charge was later dismissed by an Austin municipal judge. *Id.*

Singh asserts claims for (1) "Unreasonable Seizure/Search/Falls Arest" under "U.S.C. § 1983" for Violation of the Fourth Amendment to the U.S. Constitution; (2) "Retaliatory Prosecution for Exercise of First Amendment Rights – Municipal Liability under U.S.C. § 1983" against Defendants Miller, John Doe I, City of Austin, Austin Police Department and Ex-chief of Austin Police Chief Art Acevedo; (3) Violation of Property Rights Under U.S.C. § 1982 against Defendant Miller; (4) "Denial of Rights Under Equal Protection Clause" under 42 U.S.C. § 1983 against "WALMART and city of Austin through employees, representatives and agents working in concert" as well as Defendants Mosely and Miller; (5) Infliction of Emotional Distress under 42 U.S.C. § 1983; and (6) Defamation under 42 U.S.C. "§ 1983/Texas Sate Laws" against "defendants, particularly officer Miller and Ms. Mosely," arguing that "Wal-mart Stores Inc., Walmart Stores Texas LLC and City of Austin are responsible for willful, malicious and or reckless acts of their employees, representative or agents under the theory of respondeat superior. *Id.*, ¶¶ 57-89.

Defendants City of Austin, Austin Police Department, Art Acevedo, and Richard W. Miller (collectively, the "City of Austin Defendants") move to dismiss, arguing that his first five claims are barred by the two-year statute of limitations on suits for personal injury, TEX. CIV.

PRAC. & REM. CODE ANN. § 16.033(a); that his defamation claim is barred by the one-year statute of limitations period for libel and slander claims, TEX. CIV. PRAC. & REM. CODE ANN. § 16.002; that vicarious liability does not attach to Section 1983 claims and therefore Plaintiff's claims against Art Acevedo must be dismissed; Plaintiff's state law claims are barred for failure to use due diligence to serve Defendants; and finally Plaintiff's state tort claims against Defendant Miller in his individual capacity are barred by TEX. CIV. PRAC. & REM. CODE 101.106(f), barring tort suit against a government employee if a suit could be brought against the governmental unit. Dkt. #18. Plaintiff's suit was filed November 27, 2017, two years and one day after the alleged events of November 26, 2015. *See* Dkt. #1.

II. STANDARD OF REVIEW

Rule 12(b)(6) provides for dismissal of an action for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). When evaluating a Rule 12(b)(6) challenge, the complaint must be liberally construed in favor of the plaintiff and all facts pleaded therein must be taken as true. *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993); *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996). A motion to dismiss may be granted on a statute of limitations defense where it is evident from the pleadings that the action is time-barred, and the pleadings fail to raise some basis for tolling. *Taylor v. Bailey Tool Mfg. Co.*, 744 F.3d 944, 946 (5th Cir. 2014).

"A response to a dispositive motion shall be filed not later than 14 days after the filing of the motion. . . . If there is no response filed within the time period prescribed by this rule, the court may grant the motion as unopposed." Local Rule CV-7(e)(2).

III. ANALYSIS

Defendants' Motion to Dismiss (Dkt. #18) was filed March 15, 2018. Plaintiff has not responded to the Motion. Accordingly, the court may grant the motion as unopposed. L.R. CV-7(e)(2). Moreover, the undersigned has reviewed the motion, as well as the underlying pleadings, and finds the motion is well taken. Accordingly, the undersigned will recommend that the motion be granted.

IV. RECOMMENDATION

For the reasons stated above, the court **RECOMMENDS** Defendants' Motion to Dismiss (Dkt. #18) be **GRANTED** and that Plaintiff's claims against Defendants City of Austin, Austin Police Department, Art Acevedo, and Richard W. Miller be **DISMISSED WITH PREJUDICE**.

The undersigned notes that Plaintiff has yet to complete the CM/ECF registration process in response to the court's Order at Dkt. #15. Accordingly, the Clerk of Court is **ORDERED** to send a copy of this Report and Recommendation to Plaintiff by certified mail, Ravindra Singh, Ph.D., P.O. Box 10526, Austin, TX, 78766, and by email at the address on his Complaint.

V. OBJECTIONS

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battles v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140 (1985); *Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415 (5th Cir. 1996)(en banc).

SIGNED April 6, 2018.

MARK LANE
UNITED STATES MAGISTRATE JUDGE

FILED
2018 APR 20 PM 3:43
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY

FEDERAL DISTRICT COURT
FOR WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RAVINDRA SINGH, PH.D.	§	
	§	
Plaintiff,	§	Cause No.: 1:17-CV-1120-RP-ML
V.	§	JURY TRIAL DEMANDED
WAL-MART STORES INC,	§	
WAL-MART STORES TEXAS LLC,	§	
ALAN MARTINDALE	§	
EVA MARIE MOSELEY; and	§	
CITY OF AUSTIN,	§	
AUSTIN POLICE DEPARTMENT,	§	
EX-POLICE CHIEF ART ACEVEDO,	§	
OFFICER RICHARD W MILLER (AP3538),	§	
JOHN DOE 1,	§	
	§	
Defendants	§	

PLANTIFF'S OBJECTION TO REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

I. INTRODUCTION

Under 28 U.S.C. § 636(b)(1)(C) and Rule 72.3(b) of the Rules of this Court, Plaintiffs respectfully submit the following objections to certain of the Magistrate Judge's Report and Recommendation, issued on April6, 2018. Plaintiff object to the Report and Recommendation overall and its conclusion that Defendants' Motion for Dismissal should be granted except for the dismissal of Austin Police Department from the suit.

Objections to Magistrate Judge's Report and Recommendation ("R&R") of April 6, 2018

Under 28 U.S.C. § 636(b)(1)(C), as well as Rule 72.3(b) of the Rules of this Court, any party may serve and file objections to the proposed findings and recommendations of the Magistrate Judge.

Local Rule 72.3(b) in particular states that failure to file timely objections "shall constitute a waiver of subsequent review," absent a showing of good cause. The Rule further states that the objecting party "shall specifically identify the portions of the proposed findings, recommendations, or report to which objection is made and the basis for such objections." Under both § 636(b)(1)(C) and the Local Rule, this Court must make a de novo determination of those portions of the report to which objection is made. Plaintiffs thus submit these detailed objections to preserve matters for this Court's review as well and for subsequent review. As explained below, Plaintiffs' respectfully object to the following:

(1) that "plaintiff's first five claims are barred by the two-year statute of limitations for personal injury.

(2) that his defamation claim is barred by the one-year statute of limitations period for libel and slander claims under TEX CIV. PRACT. & REM CODE ANN. § 16.002;

(3) that the vicarious liability does not attach to section 1983 claims and therefore Plaintiff's claims against Art Acevedo must be dismissed;

(4) Plaintiff's state law claims are barred for failure to use due diligence to serve defendants, and finally

(5) Plaintiff's state tort claims against Defendant Miller in his individual capacity are barred by TEX. Chive PRACT. & REM. Code 101.106(f), barring tort suit against a government employee if a suit could be brought against the government unit.

(6) Plaintiff's suit was filed November 27, 2017, two years and one day after the events of November 26, 2015.

(7) certain omissions – no consideration afforded to plaintiff as to exactness of pleading requirement on account of being pro se, as is the established custom and practice in federal district courts.

II: GROUNDS FOR OBJECTION

A: Plaintiff objects to Magistrate Judge's Report and Recommendation in its entirety on the ground that defendant's motion was not served on plaintiff under the applicable Rule 5(b)(2)(E) and or the service was deficient. This rule required defendants written consent to accept service of the motion for dismissal of the action. Defendants failed to do so. There is no evidence on the record that the court waived this requirement. In the light of above, the Hon. Magistrate Judges Report and Recommendation, Doc. #20, signed on April 4, 2018 is void or voidable.

B: The Report and Recommendation was made without plaintiff being given an opportunity to contest defendants' grounds asserted for their entitlement of dismissal and caused plaintiff undue prejudice and constitutes a violation of plaintiff's procedural due process rights, and is ground for rendering said Report and Recommendation void.

C: Even assuming arguendo, that the said motion was served on plaintiff, and served in a non-deficient manner – which it was not – plaintiff objects to magistrate's report and recommendation in its entirety except for the dismissal of defendant Austin Police Department from the suit on for the following reasons and grounds.

(1) THE ACTION WAS FILED IN A TIMELY MANNER BECAUSDE CONTRARY TO DEFENDANTS ASSERTION PLAINTIFF'S CLAIMS I, II, III, IV AND V ARE NOT BARRED BY APPLICABLE STATUTE OF LIMITATIONS.
Defendants failed to compute the time period in a correct manner.

It is settled that no specified federal statute of limitations exists for section 1983 suits, federal courts borrow the forum state's general or residual personal injury limitations period. See Owens v. Okure, 488 U.S. 235, 109 S.Ct. 573, 582, 102 L.Ed.2d 594 (1989); Burrell v. Newsome, 883 F.2d 416, 418 (5th Cir.1989). In Texas, the applicable period is two years. Tex.Civ.Prac. & Rem. Code Ann. § 16.003(a) (Vernon 1986). There can be only one statute of limitations period for Section 1983 claim in any state and no more. So a section 1983 suit brought in Texas, for say tort of child abuse which has a statute of limitations of 15 years. Similarly, a defamation action brought under Section 1983 in Texas has a statute of limitations period of two-years and not one. Further, federal courts considering the timeliness of section 1983 actions apply the states tolling provisions to statutory limitations periods. Hardin v. Straub, 490 U.S. 536, 109 S. Ct. 1998, 2003, 104 L.Ed.2d 582 (1989); Jackson v. Johnson, 950 F.2d 263, 265 (5th Cir.1992).

Although state law controls the limitations period for section 1983 claims, federal law determines when a cause of action accrues. Brummett v. Camble, 946 F.2d 1178, 1184 (5th Cir.1991), petition for cert. filed, 60 U.S.L.W. 3689 —— U.S. ——, —— S. Ct. ——, —— L.Ed.2d —— (U.S. Mar. 19, 1992) (No. 91–1515). The federal standard provides that "the statute of limitations begins to run from the moment the plaintiff becomes aware that he has suffered an injury or has sufficient information to know that he has been injured." Helton v. Clements, 832 F.2d 332, 335 (5th Cir.1987).

There is no disagreement that the event giving rise to the present action occurred on – Thanksgiving day – November 26, 2015. Also, there is no disagreement that Plaintiff filed this action on Monday, November 27, 2017. There is no disagreement that a 2-year statute of limitations applies for Section §1983 action in Texas. However, defendants miscalculated when the two-year time period ends for the purpose of filing this action. It can be longer than two-calendar years because it must be computed as prescribed by Fed. R. Civ. Proc. Rule 6 – this rule must be applied when computing time period; this is not optional. There is no reason not to apply Rule 6 and defendants have not offered no reason why they did not apply it to compute the time-period because had they applied the rule correctly they would not have concluded that the action was filed one day after the statute of limitations ran out. Rule 6, in pertinent part provides:

> **"(a)Computing Time**: The following rules apply in computing any time period specified in these rules, in any local rule or court order; or in any that does not specify a method of computing time.
>
> (1) *Period Stated in Days or a Longer Unit.* When the period is stated in days or a longer unit of time:
>
> (A) exclude the day of the event that triggered the period;
>
> (B) count everyday including intermedia, Saturdays, Sundays, and legal holidays; and
>
> (C) include the last day of the period, but if that last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday."

In the instant case at bar, the incident giving rise to this action happened on November 26, 2015 – the day of Thanksgiving. Applying, the above quoted rule of computation, the limitation period started to run on November 27, 2015 – Rule 6(a)(1)(A). The last day of the 2This action was filed following Saturday and Sunday on Monday 27th of November 2017. Therefore, the action was filed in a timely per Rule 6(a)(1)(C).

The method prescribed under the Texas Rules of Civ. Proc. Rule 4 need not be applied because a Federal Rule exists. However, assuming Rule 4 were to be applied, it would yield identical conclusion – that plaintiff filed his suit in a timely manner. This is so because applicable Texas rule is patterned after the federal Rule 6 as noted below:

> "In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday."

From the foregoing it is clear that plaintiff brought this action in a timely manner when he filed the action with the clerk's office on November 27, 2017. Accordingly, the instant action is not time-barred. See attached calendar the months of November 2015 and 2017. Defendants and magistrate judge clearly miscalculated the time-period, and are in error. It was an error for the magistrate judge to find that claims I through V were filed untimely and it needs to be corrected.

(2) NO QUALIFIED IMMUNITY FOR DEFENDANT MILLER

It is settled law that government officials may be insulated from damage liability for constitutional violations while performing their official governmental duties.

"The qualified immunity doctrine insulates government officials from damages liability for constitutional violations unless they violate a clearly established constitutional right which they reasonably should have known." See Iqbal, 129 S. Ct. at 1948.

Plaintiff asserts that Miller is not entitled to qualified immunity protection as a matter of law as he claims because the purpose of qualified immunity is to protect the government from misconduct of its officers in performance of their governmental or official duties and not the misconduct committed during off-duty employment for personal gain and for the benefit of his off-duty employer. In the instant case defendants Miller violated plaintiff' rights guaranteed under US Constitution and US Law under color of state law, not in the course of their governmental functions but off-duty in employ of Walmart, for personal gain and for the benefit of their employer Walmart – they were being paid by Walmart for their services.

Neither the US Supreme Court, or the 5th Cir. have been presented with the issue of liability of off-duty police officer under Section §1983 for violation of constitutional rights of citizen while in employ of a private business. Consequently, case law is lacking for guidance and citation purposes. Instant action may be a case of first impression for this court. However, recently in Bracken V. Chung, US 9th Cir., No. 14 -16886 (Filed Aug. 23, 2017) on appeal from the US. Dist. Court for the Dist. of Hawaii provides guidance because it offers compelling factual similarities and involves similar principle of law. In that case officer Chung had been hired by a hotel as a special duty officer to provide security for a private event. Although Chung wore his police uniform, and the

Honolulu Police Department approved his employment at the hotel, the Department considered him off-duty while working there. Chung, wearing his police uniform, helped detain Bracken in order to issue an internal trespass warning and then failed to intercede when Bracken was assaulted by private security personnel. Bracken sued under 42 U.S.C. §1983, alleging Chung violated his rights under the Due Process Clause of the 14th Amendment by failing to intercede and stop the assault. District Court granted summary judgement on the basis of Chung's qualified immunity. Bracken appealed and on appeal the Court reversed the summary judgement holding that Chung was not entitled to qualified immunity. The Court said:

> "We hold, first that Chung may not assert qualified immunity, because he was not serving a public, governmental function while being paid by the hotel to provide private security. We also hold, on the merits, that a reasonable jury could find Chung exposed Bracken to harm he would not have otherwise faced...."

Defendant Miller violate well established laws of which a reasonable police officer should have been reasonably aware of – he claimed he had 20 years of experience as a police officer. Right to be free from unreasonable search and seizure, right to form and enforce contract, right to free speech in criticism of police misconduct, right to equal protection and treatment under the law and other violations of constitutionally protected rights were clearly established at the time of this incident. In addition, Miller told plaintiff at the time that he had 20-years of experience as a police officer. And his misconduct was willful and malicious. Clearly, the Miller cannot claim qualified immunity protection as a matter of law and he must answer for his misconduct and the case against him cannot be dismissed.

(3) NO PROTECTION TO ART ACEVEDO AND CITY OF AUSTIN FROM LIABILITY UNDER RESPONDEAT SUPERIOR PROTECTION

The purpose of protection from respondeat superior liability to protect the government and official policy makers from liability of misconduct of its employees under certain conditions while the misconduct occurs during the course and scope of official duty to protect the government itself from liability and thereby protects the tax payers. It does is not applicable when the employee is not conducting government function but is engaged in off-duty work for private gain and for the benefit of his off-duty employer. In the present case:

(1) defendant Miller working for a private employer – Walmart, under Austin Police Department consent and supervisory control. Moreover, they were for personal benefit and not performing governmental functions. Hence, immunity from "respondeat superior" liability does not apply.

(2) Austin Police Department follows a policy, with consent of the City of Austin that permits Austin Police Department to function in many ways like a "private staffing firm" in relation to off-duty employment of Austin police officers in "law-enforcement-related-employment" with private employers including Wal-Mart.

(3) City of Austin is liable for plaintiff's civil rights violation at the hands of Miller because said violations were caused directly by the failure of the City Administrators to exercise necessary and sufficient control over the Austin Police Department personnel and policies. In fact, the city has put in policy through its contract with the police union that effectively insures that many serious allegations of misconduct by police officers go uninvestigated, and are covered up by supervisors and Internal Affairs on a routine

basis. Data shows that when Internal Affairs investigates its own officers the investigation is seriously flawed to the detriment of citizens.

(4) City of Austin maintains a civilian Office of Police Monitor (OPM) charged with registering and investigating citizen's complaint of police misconduct. However, the City Administration (City Council and Mayor) have refused to give needed independent investigative authority and resources to conduct any substantive investigation as a result of the concessions they made to the Austin Police Union that represents Austin police officers. OPM has no subpoena power over police officers and APD Internal Affairs routinely withholds information of its investigation. OPM cannot investigate police misconduct and discipline officers who are found guilty. This court has declined to accept Office of Police Monitor report as evidence in at least one case before it as being unacceptable on the grounds of lack of independence in of the OPM office. The net result is Austin Police Depart has practices and customs so pervasive that it might be called its unofficial policy. Officers violates citizens constitutional rights, especially minority citizens like plaintiff without any fear of facing disciple. It does not have a training program that is not up to snuff to prepare police to deal with an informed citizenry. Its practices and customs relatively hiring, training, supervision, investigation of complaint by citizens against Austin police enforcement of needed and disciplining is not adequate. The city and APD chief Acevedo were well aware of this problem. They permitting a culture of deliberate indifference to rights of citizens including Plaintiff.

(4)MILLERS CLAIM THAT HE CAN NOT BE SUED IN PERSONAL CAPACITY BECAUSE HE IS PROTECTED BY TEXAS CIVIL PRACTICE ANDREMEDIES CODE Sec. 101.106(f) IS MISAPPLED AND NOT JUSTIFIED

Miller claimed that he could not be sued in his personal capacity because he is protected by TEXAS CIVIL PRACTICE ANDREMEDIES CODE Sec. 101.106(f). This section provides in full:

> "If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed."

From the above it is clear Tex. Civ. Practice & Rem. Code Sec 101.106(f)is inapplicable to the instant case at bar because defendant Miller was working off-duty as security guard for Walmart when he committed the violations complained of by plaintiff. Defendant Miller was clearly not working for the City of Austin; Miller was not performing any governmental function – Miller was not on City's clock. Instead Miller was working for his personal and his employer at the time of the incident, Walmart's benefit – defendant Miller was being paid by Walmart for his service at the time he violated Plaintiff's rights under color of state law. Of this, there is no dispute.

In addition, defendant Miller was working for Walmart with defendant City of Austin and defendant Art Acevedo's full permission when he violated plaintiffs constitutionally guaranteed rights. Miller was in full Austin Police uniform with APD badge, APD issued communications gear and weapons at the time of the incident. Miller asserted his authority on plaintiff by giving commands and orders, and expecting compliance or face punishment, as Austin Police Officer.

Absent police powers vested in Miller by the City of Austin Miller would not have committed most of the violations complaint of in this lawsuit – City of Austin was in fact an enabler that proximately resulted in violation of Plaintiff's rights.

Defendant Art Acevedo was the chief policymaker and Miller's chief supervisor on account of being Chief of Austin Police. It was his policy which permitted Miller to be employed at Walmart in full police uniform and gear. Pursuant to Austin Police Department policy Acevedo also had the supervisory control over Miller when he deprived plaintiff of his constitutionally guaranteed rights while working off-duty for his personal benefit; and for the benefit of his employer – Walmart. However, according to APD Policy Manual in effect at the time of the incident, defendant Acevedo as chief of police had the right to call Miller off from his job at Walmart at any time.

It is apparent from the policy and procedures instituted and maintained by Acevedo in official APD policy manual to permit Austin police officers to seek and engage in off-duty law enforcement related employment while maintaining control over them is akin to Police Chief running a Private Security business with City of Austin's consent and approval. Austin Police Department uses a rate schedule based on officer's rank and determines how much to charge third party employers like Walmart for officer's services. Plaintiff asserts that in conducting its business relative to off-duty employment of its police officers, City of Austin through its Police Department in fact functions as a contract-staffing firm. Therefore, it assumes liability for misconduct of its officers while engaged in off-duty employment. It is common knowledge in law enforcement circles including Austin Police Department and even City of Austin, that in many jurisdiction, municipal police officers and sheriff deputies work off-duty for private business through a staffing firm where the staffing firm is charged with the liability for the off-duty officer's misconduct while

at work at a private business through them. The same principle applies to instant case with respect to the liability of Acevedo and City of Austin for misconduct of defendant Miller committed while working off-duty for Walmart. More complete details will certainly emerge through discovery as the case progresses.

(5) NO EVIDENCE OR INSUFFICIENT EVIDENCE TO CONCLUDE THAT PLAINTIFF HAS NOT BEEN DILIGENT IN SERVING PROCESS

Plaintiff has tried to follow rules. He filed his claim timely and he served on defendants in a timely manner allowed by court rules. In fact, the pleading shows the APD officer refused to provide their identification even if they were required to do so by APD official policy. Subsequently, Plaintiff tried to discover their identify during his prosecution on fabricated as noted in Plaintiff's complaint. Plaintiff has just timely served Eva Moseley and Alan Martindale despite lack of their counsel of record in this case. Dismissal of plaintiff Section 1983 under such circumstances is not only unwarranted it does not promote the public policy behind the promulgation of Section 1983.

III. CONCLUSION

For reasons outlined above, and as required by 28 U.S.C. § 636(b)(1)(C) and Rule 72.3(b) of the Rules of this Court, Plaintiffs object to certain portions and aspects of the Magistrate Judge's Report & Recommendation. Plaintiffs object to the R&R IN ITS ENTIREY except that the Austin Police Department should be dismissed from the suit. Plaintiffs suit should not be dismissed. He should be granted an opportunity amend his complaint after needed discovery has taken place.

Plaintiffs will submit a proposed order along with their response to Plaintiff's objection to the R&R.

Respectfully Submitted,

Dated: Apr. 20, 2018

By: _____

RAVINDRA SINGH, PH.D.
Plaintiff, Pro Se

P.O. BOX 10526
Austin, TX 78766
excion_2000@yahoo.com
Tel: (512)293-7646

CERTIFICATE OF SERVICE

I, Ravindra Singh, certify that on this 20th Day of April 2018, I served by mailing a true and correct copy of foregoing document by US Postal service, first class mail, postage prepaid on the following:

Dated: April 20th, 2018

By: _____

RAVINDRA SINGH, PH.D.

Robert Icenhauer-Ramirez

1103 Nueces St.

Austin, TX 78701

Tel: (512) 477-7991
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IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF TEXAS

RAVINDRA SINGH, PH.D., Plaintiff,	§	
v.	§	CIVIL ACTION NO. 1:17-CV-1120
WAL-MART STORES, INC., WAL-MART STORES TEXAS, LLC, ALAN MARTINDALE, EVA MARIE MOSELEY; AND CITY OF AUSTIN, AUSTIN POLICE DEPARTMENT, EX-POLICE CHIEF ART ACEVEDO, OFFICER RICHARD W. MILLER (AP3538), OFFICER JOHN DOE 1, Defendants.	§	

DEFENDANT ALAN MARTINDALE'S ORIGINAL ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, Alan Martindale, Defendant in the above entitled and numbered cause, and files this its Original Answer to Complainants' Original Complaint and in support thereof would respectfully represent and show unto the Court the following:

ANSWER

Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in the first unnumbered paragraph of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

I.

1. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 1. of Plaintiff's

Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

2. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 2. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

II.

3. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 3. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

4. Defendant admits the allegations contained in Paragraph 4. of Plaintiff's Original Petition, however, Defendant denies that service is proper at the address plead.

5. Defendant denies that its proper name is "Mal-Mart" and assumes this to be a typographical error and otherwise admits the allegations contained in Paragraph 5.

6. Defendant admits the allegations contained in Paragraph 6 of Plaintiff's Original Petition.

7. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 7. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

8. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 8. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

9. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 9. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

10. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 10. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

11. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 11. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

III.

12. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 12. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

13. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 13. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

IV.

14. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 14. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

V.

A. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph A. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

15. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 15. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

16. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 16. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

17. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 17. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

18. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 18. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

19. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 19. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

20. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 20. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

21. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 21. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

22. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 22. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

23. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 23. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

24. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 24. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

B. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph B. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

25. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 25. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

26. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 26. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

27. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 27. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

28. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 28. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

29. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 29. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

30. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 30. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

31. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 31. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

C. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph C. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

32. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 32. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

31. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 31. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

31. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 31. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

31. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 31. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

31. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 31. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

31. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 31. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

38. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 38. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

39. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 39. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

D. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph D. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

40. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 40. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

41. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 41. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

42. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 42. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

43. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 43. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

44. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 44. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

45. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 45. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

46. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 46. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

47. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 47. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

48. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 48. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

49. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 49. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

50. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 50. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

51. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 51. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

52. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 52. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

53. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 53. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

54. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 54. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

55. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 55. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

56. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 56. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

E. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph E. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

57. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 57. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

58. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 58. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

59. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 59. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

60. Defendant denies the allegations contained in Paragraph 60. of Plaintiff's Original Petition.

61. Defendant denies the allegations contained in Paragraph 61. of Plaintiff's Original Petition.

62. Defendant denies the allegations contained in Paragraph 62. of Plaintiff's Original Petition.

F. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph F. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

63. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 63. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

64. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 64. of Plaintiff's

Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

65. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 65. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

66. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 66. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

67. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 67. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

68. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 68. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

69. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 69. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

70. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 70. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

71. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 71. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

72. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 72. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

73. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 73. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

74. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 74. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

75. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 75. of Plaintiff's

Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

76. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 76. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

77. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 77. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

78. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 78. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

79. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 79. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

80. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 80. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

81. Defendant denies the allegations contained in Paragraph 62. of Plaintiff's Original Petition.

82. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 82. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

83. Defendant admits the allegations contained in Paragraph 83. of Plaintiff's Original Petition.

84. Defendant admits the allegations contained in Paragraph 84. of Plaintiff's Original Petition.

85. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 85. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

86. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 86. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

87. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 87. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

88. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 88. of Plaintiff's

Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

89. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 87[sic]. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

90. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 88[sic]. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

91. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 89[sic]. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

92. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 90[sic]. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

93. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 91[sic]. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

94. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 92[sic]. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

95. Defendant denies the allegations contained in Paragraph 93[sic]. of Plaintiff's Original Petition.

96. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 94[sic]. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

97. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 95[sic] as to all subparts. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

98. Paragraph 96[sic] requires no response.

99. Defendant denies the prayer in Plaintiff's Original Petition.

DEFENSES

1. Complainant is not entitled to recover from Defendant as Defendant has caused him no injury.

2. Defendant avers that Complainant's injuries and damages, if any, were solely and proximately caused or contributed to by the failure of Complainant to care for his own safety and

by the negligence of said Complainant and were not caused by or through any fault or negligence on the part of Defendant, and, therefore, Complainant is not entitled to recover from Defendant.

3. Defendant avers that Complainant's injuries and damages, if any, were solely and proximately caused or contributed to by the acts and omissions of third parties over whom this Defendant had no control and were not caused by or through any fault or negligence on the part of Defendant, and, therefore, Complainant is not entitled to recover from Defendant.

4. Defendant would show the Complainant's allegations for medical expenses are limited to those expenses actually paid or incurred by the Complainant.

5. Defendant asserts that Plaintiff's cause of action is barred by the statute of limitations.

6. Defendant raises each and every affirmative defense required to be pled by applicable Rules of Civil Procedure and substantive law should said defenses become applicable as this action proceeds. Defendant specifically reserves the right to amend its answer and defenses with any and all defenses as discovery dictate.

WHEREFORE, PREMISES CONSIDERED, and fully answered, Defendant hereby demands judgment dismissing Complainant's Complaint or that upon final trial and hearing hereof that no recovery be had from Defendant, but that Defendant go hence without delay and recover its costs, and for further relief to which Defendant is justly entitled and will ever pray.

Respectfully submitted,

WALTERS, BALIDO & CRAIN, L.L.P.

BY: */s/ Brett H. Payne*
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9020 N. Capital of Texas Hwy
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Austin, Texas 78759
Tel: 512-472-9000
Fax: 512-472-9002
Email: paynevfax@wbclawfirm.com

ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

This is to certify that on this the 25th day of April 2018, a true and correct copy of the foregoing has been forwarded to all counsel of record.

/s/ Brett H. Payne

BRETT H. PAYNE

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF TEXAS

RAVINDRA SINGH, PH.D., Plaintiff,	§	
v.	§	CIVIL ACTION NO. 1:17-CV-1120
WAL-MART STORES, INC., WAL-MART STORES TEXAS, LLC, ALAN MARTINDALE, EVA MARIE MOSELEY; AND CITY OF AUSTIN, AUSTIN POLICE DEPARTMENT, EX-POLICE CHIEF ART ACEVEDO, OFFICER RICHARD W. MILLER (AP3538), OFFICER JOHN DOE 1, Defendants.	§	

DEFENDANT EVA MARIE MOSELEY'S ORIGINAL ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, Eva Marie Moseley, Defendant in the above entitled and numbered cause, and files this its Original Answer to Complainants' Original Complaint and in support thereof would respectfully represent and show unto the Court the following:

ANSWER

Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in the first unnumbered paragraph of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

I.

1. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 1. of Plaintiff's

Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

2. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 2. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

II.

3. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 3. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

4. Defendant admits the allegations contained in Paragraph 4. of Plaintiff's Original Petition, however, Defendant denies that service is proper at the address plead.

5. Defendant denies that its proper name is "Mal-Mart" and assumes this to be a typographical error and otherwise admits the allegations contained in Paragraph 5.

6. Defendant admits the allegations contained in Paragraph 6 of Plaintiff's Original Petition.

7. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 7. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

8. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 8. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

9. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 9. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

10. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 10. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

11. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 11. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

III.

12. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 12. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

13. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 13. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

IV.

14. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 14. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

V.

A. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph A. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

15. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 15. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

16. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 16. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

17. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 17. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

18. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 18. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

19. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 19. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

20. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 20. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

21. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 21. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

22. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 22. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

23. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 23. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

24. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 24. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

B. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph B. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

25. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 25. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

26. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 26. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

27. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 27. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

28. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 28. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

29. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 29. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

30. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 30. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

31. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 31. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

C. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph C. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

32. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 32. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

31. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 31. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

31. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 31. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

31. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 31. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

31. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 31. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

31. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 31. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

38. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 38. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

39. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 39. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

D. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph D. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

40. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 40. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

41. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 41. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

42. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 42. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

43. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 43. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

44. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 44. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

45. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 45. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

46. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 46. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

47. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 47. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

48. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 48. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

49. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 49. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

50. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 50. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

51. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 51. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

52. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 52. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

53. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 53. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

54. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 54. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

55. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 55. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

56. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 56. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

E. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph E. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

57. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations contained in Paragraph 57. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same.

58. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 58. of Plaintiff's

Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

59. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 59. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

60. Defendant denies the allegations contained in Paragraph 60. of Plaintiff's Original Petition.

61. Defendant denies the allegations contained in Paragraph 61. of Plaintiff's Original Petition.

62. Defendant denies the allegations contained in Paragraph 62. of Plaintiff's Original Petition.

F. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph F. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

63. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 63. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

64. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 64. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

65. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 65. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

66. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 66. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

67. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 67. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

68. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 68. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

69. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 69. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

70. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 70. of Plaintiff's

Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

71. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 71. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

72. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 72. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

73. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 73. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

74. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 74. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

75. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 75. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

76. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 76. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

77. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 77. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

78. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 78. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

79. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 79. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

80. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 80. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

81. Defendant denies the allegations contained in Paragraph 62. of Plaintiff's Original Petition.

82. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 82. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

83. Defendant admits the allegations contained in Paragraph 83. of Plaintiff's Original Petition.

84. Defendant admits the allegations contained in Paragraph 84. of Plaintiff's Original Petition.

85. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 85. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

86. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 86. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

87. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 87. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

88. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 88. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

89. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 87[sic]. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

90. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 88[sic]. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

91. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 89[sic]. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

92. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 90[sic]. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

93. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 91[sic]. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

94. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 92[sic]. of Plaintiff's

Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

95. Defendant denies the allegations contained in Paragraph 93[sic]. of Plaintiff's Original Petition.

96. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 94[sic]. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

97. Defendant is without knowledge or information sufficient to form a belief as to the truth of Complainants' allegations against other Defendants contained in Paragraph 95[sic] as to all subparts. of Plaintiff's Original Petition; therefore, Defendant makes no response to those allegations or, in the alternative, denies same. As to those allegations against this party, Defendant denies same.

98. Paragraph 96[sic] requires no response.

99. Defendant denies the prayer in Plaintiff's Original Petition.

DEFENSES

1. Complainant is not entitled to recover from Defendant as Defendant has caused him no injury.

2. Defendant avers that Complainant's injuries and damages, if any, were solely and proximately caused or contributed to by the failure of Complainant to care for his own safety and by the negligence of said Complainant and were not caused by or through any fault or negligence on the part of Defendant, and, therefore, Complainant is not entitled to recover from Defendant.

3. Defendant avers that Complainant's injuries and damages, if any, were solely and proximately caused or contributed to by the acts and omissions of third parties over whom this Defendant had no control and were not caused by or through any fault or negligence on the part of Defendant, and, therefore, Complainant is not entitled to recover from Defendant.

4. Defendant would show the Complainant's allegations for medical expenses are limited to those expenses actually paid or incurred by the Complainant.

5. Defendant asserts that Plaintiff's cause of action is barred by the statute of limitations.

6. Defendant raises each and every affirmative defense required to be pled by applicable Rules of Civil Procedure and substantive law should said defenses become applicable as this action proceeds. Defendant specifically reserves the right to amend its answer and defenses with any and all defenses as discovery dictate.

WHEREFORE, PREMISES CONSIDERED, and fully answered, Defendant hereby demands judgment dismissing Complainant's Complaint or that upon final trial and hearing hereof that no recovery be had from Defendant, but that Defendant go hence without delay and recover its costs, and for further relief to which Defendant is justly entitled and will ever pray.

Respectfully submitted,

WALTERS, BALIDO & CRAIN, L.L.P.

BY: */s/ Brett H. Payne*
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ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

This is to certify that on this the 25th day of April 2018, a true and correct copy of the foregoing has been forwarded to all counsel of record.

/s/ Brett H. Payne

BRETT H. PAYNE

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF TEXAS

RAVINDRA SINGH, PH.D., Plaintiff,	§	
v.	§	CIVIL ACTION NO. 1:17-CV-1120
WAL-MART STORES, INC., WAL-MART STORES TEXAS, LLC, ALAN MARTINDALE, EVA MARIE MOSELEY; AND CITY OF AUSTIN, AUSTIN POLICE DEPARTMENT, EX-POLICE CHIEF ART ACEVEDO, OFFICER RICHARD W. MILLER (AP3538), OFFICER JOHN DOE 1, Defendants.	§	

DEFENDANT WAL-MART STORES TEXAS, LLC, INCORRECTLY NAMED AS WAL-MART STORES INC., ALAN MARTIN, AND EVA MARIE MOSELEY'S MOTION TO ADOPT AND JOIN CITY OF AUSTIN, AUSTIN POLICE DEPARTMENT, ART ACEVEDO, AND RICHARD W. MILLER'S MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, Wal-Mart Stores Texas, LLC, Incorrectly named as Wal-Mart Stores, Inc. Alan Martin, and Eva Marie Moseley (referred to herein as Wal-Mart Defendants), Defendants in the above entitled and numbered cause, and files this their Motion to Adopt and Join City of Austin, Austin Police Department, Art Acevedo, and Richard Miller's Motion to Dismiss and in support thereof would respectfully represent and show unto the Court the following:

I

Ravindra Singh filed this lawsuit against the Wal-Mart Defendants stemming from an incident that occurred on November 26, 2015. Singh alleges various civil rights violations under 42 U.S.C. §§ 1981, 1983, 1985(b)(3) and right under the Constitution and laws of the State of Texas.

He also brings suit against the City of Austin, Austin Police Department, Art Acevedo, Richard Miller, and Officer John Doe 1 (referred to herein as Austin Defendants).

The Wal-Mart Defendants seek to join in the Austin Defendants' Motion to Dismiss as the factual basis and legal reasons regarding the statute of limitations are the same as those set forth in the Austin Defendant's Motion. Wal-Mart Defendants adopt in its entirety and hereby join the Austin Defendant's Motion to Dismiss, and hereby adopt all arguments, grounds, and evidence presented in support of the Austin Defendant's motion as if fully incorporated herein.

Further, the Wal-Mart Defendants would show that on April 6, 2018, US Magistrate Judge, Mark Lane, issued a Report and Recommendation to this court that recommended the granting of the Austin Defendant's Motion to Dismiss on the grounds set for in the motion. This Report and Recommendation is attached hereto as Exhibit 1 for the court's convenience. The Wal-Mart Defendants would show that their grounds for seeking dismissal on statute of limitations are identical to the Austin Defendant's and would request that this court include the Wal-Mart Defendant's dismissal in the Report and Recommendation. Defendants further request that, based on the Report and Recommendation, an order of dismissal be issued on Plaintiff's suit against them on the grounds that Defendants are entitled to dismissal on all of Plaintiff's claims because they are barred by limitations pursuant to the arguments detailed in the Austin Defendant's Motion to Dismiss.

WHEREFORE, PREMISES CONSIDERED, Wal-Mart Defendants pray that this Honorable Court take into consideration the legal arguments, factual grounds, and evidence submitted by the Austin Defendants and the US Magistrate Judge and issue an ordering dismissing Plaintiff's claims against all Defendants and for further relief to which Defendants are justly entitled and will ever pray.

Respectfully submitted,

WALTERS, BALIDO & CRAIN, L.L.P.

BY: */s/ Brett H. Payne*
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Email: paynevfax@wbclawfirm.com

ATTORNEY FOR DEFENDANTS

CERTIFICATE OF SERVICE

This is to certify that on this the 2nd day of May, 2018, a true and correct copy of the foregoing has been forwarded to all counsel of record.

/s/ Brett H. Payne

BRETT H. PAYNE

FILED
18 MAY 10 PM 2:00
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY
DEPUTY CLERK

FEDERAL DISTRICT COURT
FOR WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RAVINDRA SINGH, PH.D.	§	
	§	
Plaintiff,	§	Cause No.: 1:17-CV-1120-RP-ML
V.	§	JURY TRIAL DEMANDED
WAL-MART STORES INC,	§	
WAL-MART STORES TEXAS LLC,	§	
ALAN MARTINDALE	§	
EVA MARIE MOSELEY; and	§	
CITY OF AUSTIN,	§	
AUSTIN POLICE DEPARTMENT,	§	
EX-POLICE CHIEF ART ACEVEDO,	§	
OFFICER RICHARD W MILLER (AP3538)	§	
JOHN DOE 1,	§	
	§	
Defendants	§	

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS CITY OF AUSTIN, AUSTIN POLICE DEPARTMENT, ART ACEVEDO AND RICHARD W. MILLER'S MOTION TO DISMISS

Plaintiff, Dr. Singh respectfully submit this response in opposition to defendants' City of Austin, Austin Police Department, Art Acevedo and Richard W. Miller Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b) in its entirety.

I. INTRODUCTION

Dr. Singh files instant lawsuit for violation of civil rights against the City of Austin, Austin Police Department, Art Acevedo, Richard W. Miler and John Doe I, and Wal-Mart Stores Inc., Wal-Mart Stores Texas LLC, Alan Martindale and Eva Marie Moseley under U.S. Constitution and U.S. Laws. asserting claims under 42 U.S.C. §§ 1981, 1983, 1985(b)(3). Contrary to defendants' claim that the suit was filed on day after the two-years statute of limitations period for § 1983 in the state

of Texas ran, the suit filed on Monday November 2017 was timely as prescribed by Fed. Rules of Civ. Proc. Rule 6(a) for computation of time-period. Defendants' assertion that it was filed one day too late is clearly in error.

Plaintiff's claims against defendant City of Austin, Art Acevedo and Richard W. Miller are properly asserted and defendant's assertion to the contrary is in error. Contrary to Defendants' assertion City of Austin is not entitles sovereign immunity and Richard W. Miller is not entitled to qualified immunity as to any claim asserted against him. Additionally, defendants' assertion that the instant action should be dismissed for lack of diligence in service is unwarranted. Plaintiff does agree, however, that Austin Police Department may not be an independent entity for the purpose of 42 U.S.C.§ 1983 suit and accordingly it may be dismissed from it.

II. DISCUSSION

Defendants seek dismissal of the entire suit alleging, albeit, erroneously that the suit was filed one day after the statute of limitations ran. Specifically, defendants assert the following as their basis for seeking dismissal: (1) plaintiff's first five claims are barred by the two-year statute of limitations for personal injury because it was filed on Monday, November 27, 2017, two years and one day after the events of November 26, 2015; (2) that defamation claim is barred by a one-year statute of limitations period for libel and slander claims under Texas tort code; (3) claims against Art Acevedo must be dismissed because vicarious liability does not attach to 42 U.S.C. §1983 claims; (4) Plaintiff's state law claims are barred for failure to use due diligence to effect service on defendants, and finally (5) Plaintiff's state tort claims against defendant Miller in his individual

capacity are barred by TEX. Civ. PRACT. & REM. Code 101.106(f), barring tort suit against a government employee if a suit could be brought against the government unit. Additionally, defendant City of Austin claims that it is immune from any liability because it is protected by sovereign immunity.

In opposition to defendants assertions, plaintiff avers that: (1) plaintiff's suit was filed within the two-year statute of limitations as computed by Fed. Rules of Civ. Proc. Rule 6 and therefore not time-barred; (2) the defamation claim under 42 U.S.C. § 1983 has two-year statute of limitation and not one year claimed – and because the violation is ongoing as the publication has not ceased – plaintiff's defamation claim is not time-barred; (3) claim against Art Acevedo is valid on the basis of supervisory liability and under the theory of deliberate indifference among others; (4) there is lack of evidence or lack of sufficient evidence justifying dismissal of claims for civil rights violations under U.S. constitution and US law on the basis of lack of due diligence in effecting service of process when plaintiff effected service within the time permitted by Fed. R. Civ. Proc. Rule 4 (m); (5) claims against defendant Miller in his individual capacity is not barred by qualified immunity – because (a) qualified immunity does not protect his acts of impermissible constitutional violation when the conduct complained of occurred while working off-duty for private gain and benefit of his off-duty employer Walmart; and not during the performance official governmental duties for public benefit based on case law, see *Bracken v. Chung, 9th Cir. No. 14-16886, Filed August 23, 2017*; and (b) Miller knowingly violated clearly established law of which a reasonable person in his position would have been or should have been aware of that what he was doing was against the law; and (6) ample case law exists to confirm that claims against City of Austin are not precluded based on alleged sovereign immunity ground.

Plaintiff, however, does agree that claims against Austin Police Department may not be viable because it is not an independent entity.

(1). CONTRARY TO DEFENDANTS' ASSERTIONS, THIS SUIT WAS FILED WITHIN THE TWO-YEAR STATUTE OF LIMITATION AS COMPUTED UNDER FED. R. CIV. PROC. RULE 6. THEREFORE, CLAIMS I, II, III, IV AND V ARE NOT TIME-BARRED AND MUST NOT BE DISMISSED.

Defendants failed to compute the time-period in a correct manner as provided in Rule 6(b)

It is settled that no specified federal statute of limitations exists for section 1983 suits, federal courts borrow the forum state's general or residual personal injury limitations period. It is also settled that there can only be one statute of limitations period for Section 1983 claim in any given which may differ from state to state. *See Owens v. Okure, 488 U.S. 235, 109 S.Ct. 573, 582, 102 L.Ed.2d 594 (1989); Burrell v. Newsome, 883 F.2d 416, 418 (5th Cir.1989).* In Texas, the applicable period is two years. *Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a) (Vernon 1986).* For this reason, a 42 U.S.C. § 1983 suit brought in Texas, for say tort of child abuse is just two years despite the statute of limitations for such a tort under *Tex. Civ. Prac. & Rem. Code Ann. § 16.003* is 15 years. See *Mary King-White; A.W. v. Humble Independent Scholl Dis. et. al., see 5th Cir. 2015 (14-20778).* Because there can be only one limitation period for any given state including the state of Texas, applying the logic of *White* case, the defamation claim asserted herein under 42 U.S.C. §1983 would also have a statute of limitations period of two-years, and not one as the defendants assert. Furthermore, federal courts considering the timeliness of section 1983 actions apply the states tolling provisions to statutory limitations periods. *Hardin v. Straub, 490 U.S. 536, 109 S. Ct. 1998, 2003, 104 L.Ed.2d 582 (1989); Jackson v. Johnson, 950 F.2d 263, 265 (5th Cir.1992).*

Although state law controls the limitations period for section 1983 claims, federal law determines when a cause of action accrues. *Brummett v. Camble, 946 F.2d 1178, 1184 (5th Cir.1991), petition*

for cert. filed, 60 U.S.L.W. 3689 — U.S. ——, — S. Ct. ——, — L.Ed.2d —— (U.S. Mar. 19, 1992) (No. 91–1515). The federal standard provides that "the statute of limitations begins to run from the moment the plaintiff becomes aware that he has suffered an injury or has sufficient information to know that he has been injured." *Helton v. Clements, 832 F.2d 332, 335 (5th Cir.1987).*

In the instant case, there is no disagreement that the event giving rise to the present action occurred on – Thanksgiving day – November 26, 2015. Also, there is no disagreement that plaintiff filed this action on Monday, November 27, 2017. There is no disagreement that a two-year statute of limitations applies for Section §1983 action in Texas. However, parties disagree on whether a suit filed on Monday, November 27, 2017 is timely. The defendants contend that this suit was filed one day after the statute of limitations ran and thus it would have been timely if filed on November 26, 2017 which fell on a Sunday. Plaintiff responds that the suit filed on Monday, November 27, 2017 was timely filed for the purposes of statute of limitation. This is so, because Fed. R. Civ. Proc. Rule 6 (a)(1)(C) provides that when the last day of the period to comply falls on a Saturday, Sunday, and legal holiday, the period continues to run until the end of next day that is not a Saturday, Sunday or a legal holiday. Rule 6(a), in pertinent part provides:

> **(a) "Computing Time**: The following rules apply in computing any time period specified in these rules, in any local rule or court order; or in any that does not specify a method of computing time.
>
> (1) *Period Stated in Days or a Longer Unit*. When the period is stated in days or a longer unit of time:
> (A) exclude the day of the event that triggered the period;
>
> (B) count everyday including intermediate, Saturdays, Sundays, and legal holidays; and
> *(C) then include last day of the period, but if that last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday." (emphasis added)*

The two-year statute of limitations adopted for 42 U.S.C. § 1983 from Texas tort code does not specify a method of computing time. Therefore, this suit filed on Monday, November 27, 2017 when the last day to file according to defendants fell on Sunday, November 26, 2017 must be considered filed in a timely manner for the purposes of statute limitations. Federal Rule 6(a) is the controlling rule. It must be followed. Defendants have provided no reason why it should not be followed. Assuming, arguendo, that the Tex. Rules. of Civ. Proc. for computing time-period should be applied, result would be the same – i.e. the suit was timely filed – because Tex. Rules of Civ. Proc. Rule 4 provides for computation of time in an exactly similar manner as Fed. Rule 6. The Tex. R. Civ. Proc. Rule 4 in pertinent part provides the following:

> "In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday…"

From the foregoing it is clear that instant suit filed on Monday, November 2017 was filed in a timely manner for statute of limitations purposes, and therefore claims I – V asserted in this suit are not time-barred and must not be dismissed on the ground of statute of limitations. Defendants clearly, miscalculated when the two-year time period ended by not applying either the federal rule or the Texas rule for computing-time period in a correct manner by failing to correctly follow the prescribed method of computation by both the federal rule and Texas rule. Note that the 5th Cir. has reached similarly conflicting opinions in the past and the erroneous conclusion should not be propagated when rules are so clear.

(2) DEFENDANT MILLER IS NOT ENTITLED TO QUALIFIED IMMUNITY FOR ACTIONS HE TOOK WHILE HIRED AND PAID BY HIS OFF-DUTY EMPLOYER WALMART TO PROVIDE PRIVATE SECURITY FOR THE BENEFIT OF WALMART.

"Public officials acting within the scope of their official duties are shielded from civil liability by the qualified immunity doctrine." Kipps v. Caillier, 197 F.3d 765, 768 (5th Cir. 1999). Qualified immunity protects government officers in the performance of their public, governmental functions. It does so not to benefit the agent of government, but to safeguard government itself., thereby to protect the public at large. *Wyatt v. Cole, 504 U.S. 158, 165 (1992).* The defendants have the initial burden to show that a discretionary function was performed, thus opening the door for a qualified immunity defense. *See Griffin Indus., Inc. v. Irvin, 496 F.3d 1189, 1199 (11 th Cir. 2007.*

Neither the US Supreme Court, nor the 5th Cir. have been presented with the issue of liability of off-duty police officer under Section §1983 for violation of constitutional rights of citizen while in employ of a private business. Consequently, case law is lacking for guidance and citation purposes. Instant action may be a case of first impression for this court. However, recently in *Bracken V. Chung, US 9th Cir., No. 14 -16886 (Filed Aug. 23, 2017)* on appeal from the US. Dist. Court for the Dist. of Hawaii considered this issue. This case may provide guidance because it offers compelling factual similarities and involves similar principle of law. In that case officer Chung had been hired by a hotel as a special duty officer to provide security for a private event. Although Chung wore his police uniform, and the Honolulu Police Department approved his employment at the hotel, the Department considered him off-duty while working there. Chung, wearing his police uniform, helped detain Bracken in order to issue an internal trespass warning and then failed to intercede when Bracken was assaulted by private security personnel. Bracken sued under 42 U.S.C. §1983, alleging Chung violated his rights under the Due Process Clause of

the 14th Amendment by failing to intercede and stop the assault. District Court granted summary judgement on the basis of Chung's qualified immunity. Bracken appealed, and on appeal the Court reversed the summary judgement holding that Chung was not entitled to qualified immunity. The Court said:

> "We hold, first that Chung may not assert qualified immunity, because he was not serving a public, governmental function while being paid by the hotel to provide private security. We also hold, on the merits, that a reasonable jury could find Chung exposed Bracken to harm he would not have otherwise faced...."

Like Chung, defendant Miller in the present case worked off-duty. in full Austin police uniform. Miller violated plaintiff's constitutional rights while off-duty in employ of Walmart, for personal gain and for the benefit of his employer Walmart – he was being paid by Walmart for his services. Miller wore his full Austin Police uniform, even though he was off-duty, and he used the badge of authority it conveyed to falsely accuse plaintiff of theft, unlawfully seized plaintiff and subjected him to search of his person in full public view when plaintiff committed no crime – plaintiff was as innocent as one can be. Defendant Miller used the badge of authority to intimidate plaintiff and threatened to put him in jail after refusing plaintiff's reasonable request for his identification. Not only defendant Miller refused plaintiff's request for identification, he willfully misrepresented Austin Police Department policy by telling plaintiff that he could not provide requested identification because it was against Austin Police Department policy to do so – Austin Police Department policy required Miller to provide full identification on request by a citizen including the plaintiff. Defendant Miller used the badge of authority to prevent and physically block plaintiff when plaintiff attempted to document the incident by collecting contact information from the eye witnesses. Furthermore, defendant Miller physically blocked plaintiff and prevented him from reentering the Walmart to buy a pen so that he could document the incident after defendant Miller

had refused plaintiff's request to borrow a pen from him for the purpose of documenting the incident. When plaintiff protested defendant Miller conduct by exercising his first amendment rights by saying "I cannot believe this is happening. This is America. Is it a police state?, defendant Miller violently assaulted plaintiff twisting his arms to his back and put him in handcuff using excessive force and causing plaintiff bodily injury and inflicting pain in plaintiff right elbow – pain plaintiff still suffers from every single hour.

Defendant Miller knew what he was doing was unlawful. Yet he did not care and instead tampered with evidence by refusing and preventing plaintiff from documenting the incident and securing witness contact information and cell phone video of the incident. Miller was so adamant in making sure plaintiff had no access to witnesses who saw what happened and who could truthfully testify when and if called upon to do so because he knew that what he did was unlawful. Furthermore, defendant Miller wrote a citation charging plaintiff with the crime of disorderly conduct on fabricated and untrue charges and conspired with Eva Moseley – a Walmart security officer to maliciously prosecute plaintiff. The charged were dismissed by a municipal judge on prosecutor's motion for lack of evidence.

Miller violated well established laws of which a reasonable police officer should have been reasonably aware of – he claimed he had 20 years of experience as a police officer. The right to be free from unreasonable search and seizure; right to form and enforce contract; right to free speech in criticism of police misconduct; right to equal protection and equal treatment under the law and other violations of constitutionally protected rights were clearly established at the time of this incident. Moreover, defendant Miller's misconduct was willful and malicious. First, Miller falsely and unlawfully accused plaintiff of crime of theft from Walmart; second, Miller seized plaintiff

without justification and reasonable cause without a warrant; third, Miller subjected plaintiff to search of his person in open public view; fourth, Miller refused to provide his identification and refused plaintiff's request for his business card; fifth, Miller physically obstructed and prevented plaintiff from documenting the incident and securing contact information from third party neutral witnesses ; sixth, Miller threatened plaintiff to arrest and put in jail unless plaintiff immediately left the incident cite and without collecting and securing neutral witness information including cell phone videos; seventh, blocked plaintiff and prevented plaintiff to reenter Walmart so that he could purchase a pen to document the incident after Miller had refused to let him borrow a pen; eighth, violently arrested and handcuffed plaintiff using excessive force and causing plaintiff injury and physical pain when he exercised his constitutionally guaranteed right to criticize Miller's conduct by verbally saying "I cannot believe this is happening! This is America. Is it a police state?" when no exigent conditions were present justifying excessive force used on plaintiff; ninth, maliciously prosecuting plaintiff of crime of disorderly conduct on fabricated and untrue charges that prosecutor found no evidence to support and a municipal court dismissed the charges against plaintiff.

For all the foregoing reasons, defendant Miller is not entitled to qualified immunity. He must not be dismissed from the case and must be made to answer charges for his misconduct before the court and a jury.

(3) DEFENDANT MILLER IS NOT IMMUNE FROM SUIT IN HIS PERSONAL CAPACITY FOR HIS MISCONDUCT WHILE WORKING OFF-DUTY AND TEXAS REMEDIES CODE INVOKED IS INAPPICABLE.

Plaintiff responds by asserting that defendant Miller has no immunity from personal suit for two reasons:

(A) **The provision relied on by defendant does not apply because claim against him is based on his misconduct while employed off-duty for a private employer and not within his official scope of employment**.

Tex. Civ. Pract. Rem. Code 101.106(f) in full, provides:

> "If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed." Tex. Civ. Pract. Rem. Code 101.106(f)

From the above it is clear Tex. Civ. Practice & Rem. Code Sec 101.106(f) is clearly inapplicable to the instant case at bar because defendant Miller was working off-duty as security guard for Walmart when he committed the violations complained of by plaintiff. Defendant Miller was clearly not working for the City of Austin; Miller was not performing any governmental function – Miller was not on City's clock. Instead Miller was working for his personal and his employer at the time of the incident, Walmart's benefit – defendant Miller was being paid by Walmart for his service at the time he violated Plaintiff's rights under color of state law. Of this, there is no dispute.

(2)**Case law Supports that defendant Miller can be properly sued in his personal capacity**.

Case law clearly indicates that defendant Miller can be sued in his individual capacity, see Carlos Chacon v. City of Austin, Austin Police Officer Eric Copeland and Russel Rose, US Court for the Western Dist. of Texas, Austin Div., Case No. A-12-CA-226-SS; Buehler v. City of Austin, Austin Police Dept., Chief Art Acevedo, Officers Patrick Oborski, Justin Rose, W.D. Tex. Austin 2015, W.D. Of Texas, Austin; also see Alexander v. City of Round Rock. No. 16-50839 (5th Cir' 2017). (Officers Marciano Garza, Gregg Brunson; Tracy Staggs et al sued in both individual and official capacities).

In all the above cases defendants were sued in their individual capacities (as well as official capacities). From the foregoing it is evident that defendant Miller can be properly sued in his individual capacity and he should not be dismissed from the suit in his individual capacity.

(4) NO PROTECTION FOR CHIEF ART ACEVEDO FROM LIABILITY UNDER RESPONDEAT SUPERIOR THEORY

The purpose of protection from respondeat superior liability to protect the government and official policymakers from liability for misconduct of its employees under certain conditions while the misconduct occurs during the course and scope of official duty to protect the government itself from liability and thereby protects the tax public. It is inapplicable when the employee is not conducting official government function but is engaged in off-duty employment for private gain and for the benefit of his off-duty employer. In the present case as explained earlier:

(a) Defendant Miller was working for a private employer – Walmart, with City of Austin and Austin Police Department consent in full Austin police patrol uniform. Pursuant to Austin Police policy, defendant Miller was under Austin Police Department Chief Art Acevedo's ultimate supervisory control. Miller was being paid by Walmart for his services Moreover, Miller was not performing governmental functions. Hence, immunity from "respondeat superior" liability for Millers misconduct does not apply.

(b) Austin Police Department follows a policy, with consent of the City of Austin that permits Austin Police Department to function in many ways like a "private staffing firm" in relation to off-duty employment of Austin police officers in "law-enforcement-related-employment" with private employers including Wal-Mart. Accordingly, City of Austin and Austin Police Department are liable for defendant Miller's misconduct while working off-duty in a similar manner as a provider of private security personnel,

for example Securitas North America, Allied Universal, US Security Associates among others.

(c) City of Austin is liable for plaintiff's civil rights violation at the hands of Miller because said violations were caused directly: (a) in furtherance Austin Police Department practices and customs; (b) by the failure of the City to properly and adequately train, supervise and discipline its officers with respect to use of force in arrest and civil right matters of citizens – particularly minority citizens like plaintiff. City of Austin is well aware of the unofficial policies, practices and customs that prevails in Austin Police Department, that causes civil rights violations of its citizens and suffer from excessive and constitutionally impermissible against citizens especially minorities including the plaintiff in this case, but turns a blind eye to the problem and thereby condones, contributes and perpetuates civil rights violations, especially of minority citizens including the plaintiff. Media reports only the most egregious cases like shooting death of unarmed teenager and violent arrest of black female school teacher. But most all incident of excessive and improper use of force goes unreported. In fact, Austin Police does not even keep record of all impermissible force used against its citizens – minority and non-minority – despite U.S. Department of Justice advice to do so.

(d) In fact, the city has put in policies through its contract with the police union that effectively insures that many serious allegations of misconduct by police officers go uninvestigated, and are covered up by supervisors and Internal Affairs on a routine basis. Data shows that when Internal Affairs investigates its own officers the investigation is seriously flawed to the detriment of citizens.

(e) City of Austin maintains a civilian Office of Police Monitor (OPM) charged with registering and investigating citizen's complaint of police misconduct. However, the City Administration (City Council and Mayor) have refused to give needed independent investigative authority and resources to conduct any substantive investigation as a result of the concessions they made to the Austin Police Union that represents Austin police officers. OPM has no subpoena power over police officers and APD Internal Affairs routinely withholds information of its investigation. OPM cannot investigate police misconduct and discipline officers who are found guilty. This court has declined to accept Office of Police Monitor report as evidence in at least one case before it as being unacceptable on the grounds of lack of independence in of the OPM office. The net result is Austin Police Depart has practices and customs so pervasive that it might be called its unofficial policy. Officers violates citizen's constitutional rights, especially minority citizens like plaintiff without any fear of facing disciple. It does not have a training program that is not up to snuff to prepare police to deal with an informed citizenry. Its practices and customs relatively hiring, training, supervision, investigation of complaint by citizens against Austin police enforcement of needed and disciplining is not adequate. The city and APD chief Acevedo were well aware of this problem. They permitting a culture of deliberate indifference to rights of citizens including Plaintiff.

In addition, defendant Miller was working for Walmart with defendant City of Austin and defendant Art Acevedo's full knowledge and permission and pursuant to Austin Police Department official policy when he violated plaintiffs constitutionally guaranteed rights. Miller was in full Austin Police uniform with APD badge, APD issued communications gear and weapons at the

time of the incident. Miller asserted his authority on plaintiff by giving commands and orders, and expecting compliance or face punishment, as Austin Police Officer. Absent police powers vested in Miller by the City of Austin Miller would not have committed most of the violations complaint of in this lawsuit – City of Austin was in fact an enabler that proximately caused the violation of plaintiff's rights.

Art Acevedo was the chief policymaker and Miller's chief supervisor on account of being Chief of Austin Police. It was his policy which permitted Miller to be employed at Walmart in full police uniform and gear. Pursuant to Austin Police Department policy Acevedo also had the supervisory control over Miller when he deprived plaintiff of his constitutionally guaranteed rights while working off-duty for his personal benefit; and for the benefit of his employer – Walmart. However, according to APD Policy Manual in effect at the time of the incident, defendant Acevedo as chief of police had the right to call Miller off from his job at Walmart at any time.

It is apparent from the policy and procedures instituted and maintained by Acevedo in official APD policy manual to permit Austin police officers to seek and engage in off-duty law enforcement related employment while maintaining control over them is akin to Police Chief running a Private Security business with City of Austin's consent and approval. Austin Police Department uses a rate schedule based on officer's rank and determines how much to charge third party employers like Walmart for officer's services. Plaintiff asserts that in conducting its business relative to off-duty employment of its police officers, City of Austin through its Police Department in fact functions as a contract-staffing firm. Therefore, it assumes liability for misconduct of its officers while engaged in off-duty employment. It is common knowledge in law enforcement circles including Austin Police Department and even City of Austin, that in many jurisdiction, municipal police officers and sheriff deputies work off-duty for private business through a staffing

firm where the staffing firm is charged with the liability for the off-duty officer's misconduct while at work at a private business through them. The same principle applies to instant case with respect to the liability of Acevedo and City of Austin for misconduct of defendant Miller committed while working off-duty for Walmart. This aspect of Austin Police Department Off-Duty employment policies and practices cannot be fully ascertained prior to discovery.

It is well settled that a qualified immunity defense "protects the official both from liability as well as from the ordinary burdens of litigation, including far-ranging discovery." Workman v. Jordan, 958 F.2d 332, 335 (10th Cir. 1992) (citing Harlow v. Fitzgerald, 457 U.S. 800, 817-18 (1982)). The Supreme Court has repeatedly emphasized the importance of resolving the issue of qualified immunity early on in the litigation. Scott v. Harris, 550 U.S. 372, 376 n.2 (2007) (citing Hunter v. Bryant, 502 U.S. 224, 227 (1991) (per curiam)). The defense of qualified immunity does not create immunity from all discovery, but only from "broad-reaching discovery," and it recognized that "limited discovery may sometimes be necessary before the district court can resolve a motion for summary judgment based on qualified immunity." In *Alice L. v. Dusek, 492 F.3d 563 (5th Cir. 2007)* the Fifth Circuit allowed limited discovery prior to ruling on the issue of qualified immunity. In the light of above, plaintiff urges the court to allow limited discovery into Austin The Supreme Court reversed and ruled that granting a qualified or good faith immunity to a *municipality* was not compatible with Section 1983's fundamental purpose of remedying violations of federal rights.

Police Department off-duty general employment policies and practices and specific details of how it was applied in the context of Walmart and defendant Miller.

(5) CITY OF AUSTIN LIABLE FOR MISCONDUCT OF DEFENDANT MILLER AND NOT SHIELDED FROM LIABILITY

It is settled that a municipality many be liable for civil rights violation by its employees under certain conditions. Plaintiff in *Owen v. City of Independence* claimed, as plaintiff in the instant case that municipality was liable for damages flowing from violations caused through the execution of its policies or custom. *Owen v. City of Independence*, 445 U.S. 622 (1980). Municipality was held liable.

Plaintiff in City of Canton v. Harris, 489 U.S. 378, 390 (1989) claimed city's inadequate training, as plaintiff asserts in the present case, was cause of his violation of his rights. The Supreme Court explained that inadequate training could give rise to liability if:

> "[i]n light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policy-makers can reasonably be said to have been deliberately indifferent to the need."

The Court held that under these circumstances, "the failure to provide proper training may fairly be said to represent a policy for which the city is responsible.

Case law does not support that a city is in Texas such as Austin is shield as claimed:

(1) Law suit allowed to proceed against the city of Austin recently: see Buehler v. city of Austin et al.; Chacon v. City of Austin; King v. City of Austin. All these cases were allowed to proceed against the city in Federal Dist. Court in Austin on some of the same claims as asserted by Plaintiff in the present case.

In Texas, under the common law, a governmental entity has no immunity when performing a proprietary function, but retains immunity in the exercise of governmental functions. —[G]enerally speaking, a municipality's proprietary functions are those conducted in its private capacity, for the benefit only of those within its corporate limits, and not as an arm of the

government,' while its governmental functions are in the performance of purely governmental matters solely for the public benefit.' *Tooke, 197 S.W.3d at 343 (footnotes omitted) (quoting Dilley v. City of Houston, 148 Tex. 191, 222 S.W.2d 992, 993 (1949)).*

Under the Texas Tort Claims Act, the Legislature expanded a municipality's liability under the Act to include governmental functions as well as proprietary. The Tort Claims Act defines a proprietary function as one —that a municipality may, in its discretion, perform in the interest of the inhabitants of the municipality. Tex. Civ. Prac. & Rem. Code Ann. § 101.0215(b).

Governmental functions are —those functions that are enjoined on a municipality by law and are given it by the state as part of the state's sovereignty, to be exercised by the municipality in the interest of the general public. Id. § 101.0215(a). In the Tort Claims Act, the Legislature has set forth non-exhaustive lists of proprietary and governmental functions. Id. For example, governmental functions include: police and fire protection; street construction, design, and maintenance; hospitals; sanitary and storm sewers; and parks. Id. Proprietary functions include —operation and maintenance of a public utility and —amusements owned and operated by the municipality. Id. § 101.0215(b).

It is evident from the foregoing the City of Austin is not shielded from liability and it must not be dismissed from this suit.

(6) NO EVIDENCE OR INSUFFICIENT EVIDENCE TO CONCLUDE THAT PLAINTIFF HAS NOT BEEN DILIGENT IN SERVING PROCESS AND CAUSED UNDUE PREJUDICE TO DEFENDANTS.

Defendants have been on notice – both express and constructive – that suit against them will be filed. Defendant also fully expected a lawsuit and they were well aware of statute of limitation.

Any claim of faded memory on part of witnesses in light of video and audio evidence, written incident and arrest report is just not genuine.

Plaintiff has tried to follow rules. He filed his claim timely and he served on defendants in a timely and effected service on defendants within the time permitted by court rules. Plaintiff also notes that subsequent to filing the case with the court clerk plaintiff had been diligently making effort to effect service. He personally visited local US. Marshall's office at least three times in order to arrange service of process based on reviewing information on US Marshall's Web site. Plaintiff was advised that he needed to secure courts permission for the US Marshals to serve on defendants even if plaintiff was ready and willing to pay any reasonable fee for the service. Based on this advice, plaintiff made a motion with the court granting permission to the US Marshall service to serve on the plaintiff. Plaintiff was not sitting idle as the motion was pending, he hired a private process server who served on defendants in a timely manner as allowed by court rules even though plaintiff incurred increased cost for rush service before the court could rule on the motion.

Defendant's claim concerning plaintiff's failure to identify defendant John Doe I is disingenuous because as the pleading shows Austin Police Department office John Doe I refused to provide his identification at the time of the incident despite plaintiff's express request and – it should be added – in violation of Austin Police Department policy.

Dismissal of plaintiff Section 1983 under such circumstances is not only unwarranted, it is against the public policy behind the promulgation of 42 U.S.C § 1983.

III. CONCLUSION

For reasons discussed above it is clear that the suit was filed with the two-year statute of limitation per applicable federal, as well as Texas rules of civil procedures required; that defendant Miller is not entitled not entitled to qualified immunity because violations occurred during the course of his employment with private employer for private employer's benefit and not during the course of official employment in performance of governmental duties; that defendant miller is not immune from suit in his personal capacity, and that city of Austin is not immune because of sovereign immunity and Chief Acevedo is liable for the conduct of defendant Miller under the specific circumstances of this case.

IV. RELIEF REQUESTED

WHEREFORE, for all those reasons included above plaintiff requests that the Hon. Court grant plaintiff relief as follows:

1. Deny defendant's motion to dismiss;
2. Grant plaintiff discovery limited to Austin Police Department off-duty employment practices generally, and specifically as applied to Walmart and defendant Miller;
3. Grant plaintiff an opportunity to amend his complaint to clarify and supplement his pleading for a full and just vindication of his constitutional rights under U.S. Constitution and law;
4. Grant further relief as may be proper.

Dated: May 10, 2018

Respectfully Submitted,

By: _____

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CERTIFICATE OF SERVICE

I, Ravindra Singh, certify that on this 10th Day of May2018, I served by mailing a true and correct copy of foregoing document by US Postal service, first class mail, postage prepaid on the following:

Dated: May 10th, 2018

By: _____

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RAVINDRA SINGH, PH.D	§	
	§	
Plaintiff	§	
	§	
v.	§	CAUSE NO. 1:17-CV-1120-RP
	§	
WAL-MART STORES INC., WAL-MART STORES TEXAS LLC, ALAN MARTINDALE, EVA MARIE MOSELEY, CITY OF AUSTIN, AUSTIN POLICE DEPARTMENT, EX-POLICE CHIEF ART ACEVEDO, OFFICER RICHARD W. MILLER, OFFICER JOHN DOE I	§	
	§	
Defendants	§	

DEFENDANTS CITY OF AUSTIN, AUSTIN POLICE DEPARTMENT ART ACEVEDO AND RICHARD W. MILLER'S REPLY TO PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Defendants City of Austin, Austin Police Department, Art Acevedo and Richard W. Miller respectfully submit this Reply to Plaintiff's Response in Opposition to Defendants Motion to Dismiss filed by Plaintiff Ravindra Singh ("Singh").

I. INTRODUCTION

Ravindra Singh filed this lawsuit on November 27, 2017 against, among others, the City of Austin, the Austin Police Department, Art Acevedo, and Richard W. Miller for claims arising out of an incident on November 26, 2015. (Doc. 1). On March 15, 2018, Defendants City of Austin, Austin Police Department, Art Acevedo, and Richard W. Miller (the "City Defendants") filed a Motion to Dismiss. (Doc. 18). Plaintiff Singh failed to submit a timely response to City Defendants' Motion to Dismiss. On April 6, 2018, the Honorable Mark Lane, United States

Magistrate Judge, issued a Report and Recommendation of the United States Magistrate Judge recommending that the City Defendants' Motion to Dismiss be granted and that Singh's claims against City Defendants be dismissed with prejudice. (Doc. 20). On April 20, 2018, Singh filed Plaintiff's Objection to Report and Recommendation of the United States Magistrate Judge and Plaintiff's Motion for Leave to File Delayed Opposition to Defendants City of Austin, Austin Police Department, Art Acevedo and Richard Miller's Motion for Dismissal. (Doc. 25, Doc. 26). On April 26, 2018, the Honorable Mark Lane issued an Order vacating the earlier Report and Recommendation, granting Singh's Motion for Leave to File a Delayed Opposition (Doc. 31). On May 10, 2018, Singh filed his Response in Opposition to Defendants City of Austin, Austin Police Department, Art Acevedo and Richard W. Miller's Motion to Dismiss (Doc. 33).

A. Argument

1. City Defendants reassert their position that that Singh's first five claims are barred by the two-year statute of limitations on suits for personal injury claims under TEX. CIV, PRAC. & REM. CODE ANN. § 16.033(a). (Doc. 18). Singh's defamation claim is barred by the one-year statute of limitations period for libel and slander claims, TEX CIV. PRAC. & REM. CODE ANN. § 16.002. (Doc. 18).

In his Response, Singh concedes that "there is no disagreement that the event giving rise to the present action occurred on – Thanksgiving day- November 26, 2015," and "that plaintiff filed this action on Monday, November 27, 2017." (Doc. 33). Singh also concedes that "there is no disagreement that a two-year statute of limitations applies for Section §1983 action in Texas." However, Singh incorrectly argues that the Federal Rules of Civil Procedure, specifically Rule 6, governs the computation of time allowed to file claims involving a statute of limitations. Rule 6 applies to "any time period specified in these rules," FRCP, Rule 6(a), and does not contemplate

application to the statute of limitations, nor does it attempt to govern how time is computed for claims which have a statute of limitation, which even Plaintiff concedes are set by state statute, not federal rules. Singh's first five claims should be dismissed.

2. City Defendants reassert their position that the Austin Police Department does not have the power to sue or be sued. (Doc. 18). "APD is not a legal entity separate from the City of Austin and is not capable of being sued." *Williams v. City of Austin*, 2017 U.S. Dist. LEXIS 106694, *10, 2017 WL 2963513. Singh has admitted this and has acknowledged that the Austin Police Department should be dismissed from this suit. (Doc. 33).

3. City Defendants reassert their claim that vicarious liability does not apply to Section 1983 claims and therefore Singh's claims against Art Acevedo must be dismissed. (Doc. 18).

Plaintiff Singh's argues that Defendant Miller was "under Austin Police Department Chief Art Acevedo's ultimate supervisory control," and therefore Art Acevedo is not immune from "respondeat superior liability for Millers misconduct." (Doc. 33). Clearly established case law states that "vicarious liability does not apply to § 1983 claims." *Pierce v. Texas Dep't of Criminal Justice, Institutional Div.* 37 F.3d 1146, 1150, (5th Cir. 1994), *cert.* denied, 514 U.S. 1107, 115 S. Ct. 1957, 131 L.Ed.2d 849 (1995); *Monell v. Department of Social Servs.*, 436 I.S. 658, 694, 98 S. Ct. 2018, 2037, 56 L. Ed. 2d 611 (1978).

4. In addition to Plaintiff's failure to file the lawsuit within the statutory time frame permitted, City Defendants reassert their claim that Plaintiff's state law claims are barred for failure to use due diligence to serve Defendants. (Doc. 18). Singh alleges that he timely effected service on defendants within the time permitted by court rules despite making no request for service until February 21, 2018, nearly three months after the initial filing. Diligence was not used.

5. City Defendants reassert their claim that Singh's state tort claims against Defendant Miller in his individual capacity are barred by TEX. CIV. PRAC. & REM. Code 101.106(f), barring tort suit against a governmental employee if a suit could be brought against the governmental unit. (Doc. 18).

Plaintiff Singh asserts that TEX. CIV. PRAC. & REM. Code 101.106(f) is not applicable to the present case because Defendant Miller was working for Wal-Mart at the time of the incident. (Doc. 33). Plaintiff Singh erroneously cites *Bracken v. Okura*, 869 F.3d 771 (Court of Appeals, 9th Circuit) 2017 in support of his claim. The Court in *Bracken* explicitly states, "we do not decide whether qualified immunity might be available to an off-duty officer who steps back into a police officer role, for example, to prevent a crime from occurring. That is a different case for a different time." *Id.* at 778, see footnote 6. In this case Defendant Miller, was an employee of a governmental unit, namely the Austin Police Department, and Defendant Miller's conduct, apprehending Plaintiff Singh in order to prevent a crime from occurring, was within the general scope of his employment and therefore the present lawsuit could have been brought against the governmental unit, resulting in the suit being considered to be against Defendant Miller in his official capacity only. *See* TEX CIV. PRAC. & REM. Code 101.106(f).

II. CONCLUSION

Plaintiff Singh's complaint against the City of Austin, the Austin Police Department, Art Acevedo and Richard W. Miller should be dismissed as a matter of law pursuant to Rule 12(b)(6) and Rule 9(b). Defendants City of Austin, the Austin Police Department, Art Acevedo and Richard W. Miller pray that the Court dismiss this action and for all other relief to which these Defendants may show themselves to be justly entitled.

Dated: May 15, 2018

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2018, the foregoing was mailed via Certified Mail:

Ravindra Singh, Ph.D.
P.O. Box 10526
Austin, Texas 78766

Certified Mail
Return Receipt Requested

ROBERT ICENHAUER-RAMIREZ

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CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY AD
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RAVINDRA SINGH, PH.D.	§	
Plaintiff,	§	
V.	§	
	§	
WAL-MART STORES INC	§	1:17-CV-1120-RP-ML
WAL-MART STORES TEXAS LLC	§	
ALAN MARTINDALE	§	
EVA MARIE MOSELEY	§	
CITY OF AUSTIN	§	
AUSTIN POLICE DEPARTMENT	§	
EX-POLICE CHIEF ART ACEVEDO	§	
OFFICER RICHARD W MILLER	§	
OFFICER JOHN DOE I	§	
Defendants.	§	
	§	

PLAINTIFF'S OBJECTIONS TO
UNITED STATES MAGISTRATE JUDGE'S REPORT AND RECOMMENDATIONS

TO THE HONORABLE COURT:

Plaintiff respectfully submits, under FED R. CIV. PROC. 72(b)3 and other applicable rules of this court. the following objections to certain portions of the Magistrate Judges Report and Recommendations (R & R) issued January 3rd and postmarked January 4th, 2019. Plaintiff objects to the report and recommendations and its conclusion that City of Austin Defendants' (except John Doe I) motion for dismissal as to claims for Intentional Infliction of Emotional Distress (IIED Claim V) and Defamation (Claim VI) should be granted. Plaintiff strongly objects to magistrate's recommendation that these two claims should be dismissed with prejudice as to all defendants including Walmart defendants. The sole basis for this conclusion and recommendation is the determination is that for the purposes of applicable statutes of limitations Plaintiff's claims filed on Monday, November 27, 2017 is untimely. Specifically, the magistrate determined that it was filed one day after the applicable two-year statute ran.

Plaintiff agrees that two-year statute of limitations apply to the claim for IIED asserted. However, Plaintiff does not agree with the magistrate's determination that under Texas rules, the statute of limitations on the claim for IIED ran on Sunday, November 26, 2017; that claim was untimely filed on Monday, November 27, 2017 one day after the statute of limitations ran; and that it should be dismissed with prejudice. Plaintiff asserts that the statute of limitations under Texas rule dis not run on Sunday, November 26, 2017 and the claim filed on Monday, November 27, 2017 was timely for statute of limitations purposes under applicable Texas rules. Plaintiff further asserts that even if the statute ran on Sunday, November 26, 2017, his claims filed on Monday, November 27, 2017 was not untimely because he was precluded under Texas court rule from filing his claim on Sunday, November 26, 2017. Texas court rule forbids initiation of civil suit on a Sunday:

RULE 6. SUITS COMMENCED ON SUNDAY

> **"No civil suit shall be commenced** nor process issued or served **on Sunday,** except in cases of injunction, attachment, garnishment, sequestration, or distress proceedings; provided that citation by publication published on Sunday shall be valid." [Emphasis added]

TEX. R. CIV. P. 6.

In the even the Court finds that above Texas rule is not applicable, Federal rule as applied to other claims in the matter would find this claim for IIED to have been timely filed.

Plaintiff disagrees with magistrate's characterization of claim for defamation (Claim VI) as a state when plaintiff expressly asserted said claim under 42 USC § 1983 and Texas state law claim (See Plaintiff's Original Petition, Pages 29 - 30, Para. 87 - 89). Plaintiff objects to magistrate's recommendation that the claim for defamation should be dismissed with prejudice as to all defendants including Walmart defendants on the basis of Texas statute of limitation – one year – where the claim was simultaneously asserted also under Section 1983. Plaintiff should be given opportunity to cure his pleading by amendment instead of dismissed the with prejudice.

Plaintiff's claim for IIED should be dismissed based on unsettled federal 5th Cir. case law where TEXAS GOVERNMENT CODE and TEX. R. CIV. PROC. requires that time period be computed using certain prescribed procedures or methods. Upon applying these procedures to the computation procedures and methods to compute the last date on or before which this suit needed to be timely filed is in conflict with Magistrate's determination based on prior case decisions and without the application of the prescribed procedures and methods. Computational method clearly indicates that Plaintiff's claim filed on November 27, 2017 was within two-years of the day after the claim accrued on Thanksgiving Day November 26, 2015 as required, and therefore was timely filed. Contrary to Magistrate's determination, it was not one day late. Plaintiff asserts that one-year statute of limitations does not bar his claim for defamation for two reasons: (a) there is no evidence on the record to support that defamatory publication on the Internet has ceased. Plaintiff asserts that the publication is ongoing – as a party moving for dismissal of the defamation claim it is their burden to prove to the contrary. It is uncontroverted that they have produces no evidence in this regard to be entitled dismissal of the claim. Taking plaintiff's contentions as true as required by rules, Magistrate's recommendation that the claim be dismissed with prejudice as to all Defendants including Walmart defendants is unjustified. Defendants' motion for dismissal should be denied.

I. INTRODUCTION

Ravindra Singh, Ph.D., Plaintiff, appearing before the Hon. Court pro se, files this Plaintiff's Objections, to Report and Recommendation (R & R) of United States Magistrate Judge, Hon. Mark Lane. Plaintiff asserts that he is entitled to liberal construction of this response in objection to the said R & R on account of his pro se status following long standing federal law and practice for the same. Plaintiff further asserts that he is not trained in the science of law. As a result, this response in objection to the above mentioned R & R may not be as artfully rendered as prepared by an attorney. However, plaintiff assures the Court that the contentions made herein are supported by in-depth research of applicable statutory or

government codes, rules of civil procedure – both federal and Texas – as they relate to computation of time for relevant statute of limitations purposes as well as the viability of plaintiff's defamation claim. The constitutional injury to reputation under certain conditions is actionable under stigma plus doctrine – a principle recognized in both U.S. Supreme Court and U.S. 5th Cir. jurisdictions. Plaintiff should not be denied an opportunity to present his defamation claim (VI) at his early stage in the proceeding on account of Texas one-year statute of limitations. Relevant statute of limitation for defamation/reputational injury claim under U.S. 14th amendment, therefore, like claims I – IV found timely by Hon. Court should also be covered by two-year statute of limitations, and must not be dismissed with prejudice as to any defendants including Walmart. From the footnote (4) at page 5, it is evident the Court has treated as if Plaintiff intended to bring this claim only under Texas laws, and not under Section 1983. This is not the case. Plaintiff intended to bring this claim under violation of both US laws and constitution as well as violation of Texas constitution and laws. Perhaps more clarity is required which can be provided by amending the complaint a request for which has already been included in Plaintiff's response to Defendants motion to dismiss as a part of the relief he sought by way of aforementioned response. Plaintiff is now more cognizant than ever of the need to retain an attorney to prosecute this case on his behalf, and is working towards that goal. Until that materializes, Plaintiff requests the Court to give him an opportunity to provide clarifications to any of his claims or contentions by asking for allowing supplementary filing. Plaintiff understands that the court's inherent power permits it to properly do so even in circumstances where general rules of procedure and practice may not so clearly provide. Further, Plaintiff understands that the purpose of this response in objection to the R&R is to preserve issues for future review if necessary; and to help the Court reach correct decision at this early but critical stage in the litigation process. He respectfully files this objection to the R & R in that vein.

II. FACTUAL BACKGROUND

Plaintiff, Dr. Singh filed instant lawsuit for violation of his constitutionally protected rights against the City of Austin, Austin Police Department, Art Acevedo, Richard W. Miler and John Doe I, and Wal-Mart Stores Inc., Wal-Mart Stores Texas LLC, Alan Martindale and Eva Marie Moseley primarily under U.S. Constitution and U.S. Laws asserting claims under 42 U.S.C. §§ 1981, 1983, 1985(b)(3). Claims asserted are: I. Unreasonable Seizure/Search/Falls Arrest under the 4th amendment; II. Retaliatory Prosecution for Exercise of 1st Amendment Rights – Municipal Liability Under 42 USC Sec. 1983; III. Violation of Property Rights Under 42 USC Sec.1982; IV. Denial of Rights Under Equal Protection Clause; V. Infliction of Emotional Distress Under 42 USC Sec 1983 and VI. Defamation of Character Under 42 USC Sec 1983/Texas state Laws.

The violations occurred when plaintiff was shopping at an Austin, Texas Wal-Mart store on November 26, 2015, Thanksgiving Day. Plaintiff was falsely accused of shoplifting, detained, subjected to body search in plain public view for concealed stolen merchandise by Defendant Richard W. Miller – an Austin police officer moonlighting as an off-duty security guard and accompanied by another Austin police officer (John Doe II – not a Defendant), also working as an off-duty security guard, and a Wal-Mart security officer Defendant Eva Marie Moseley.

The body search revealed no merchandise on Plaintiff's person or any place associated with him at all. Despite this revelation, Defendants Miller and Mosely offered no apologies to plaintiff for the humiliation caused – they never said they were sorry or it was a mistake. Instead, Defendant Miller justified his misconduct by accusing plaintiff of having a "big stomach". "You have a big stomach", he said. Plaintiff, in no shape or form sported a "big stomach" to justify being accused of concealing Wal-Mart merchandise on his person or otherwise engage in any shoplifting or

unlawful activity. In fact, Plaintiff is, and was at all time, relevant in this action a skinny man with a small stomach. His stomach measured merely about thirty inches around. In comparison, an overwhelming, an estimated more than eighty percent of the adult shoppers present in the said Wal-Mart store in fact sported much larger stomachs than Plaintiff[1] who were not questioned and, or subjected to body search. No Wal-Mart – employee or management staff on duty at the time of the humiliating event – ever said they made a mistake or were sorry for their conduct. In fact, no one has offered a word of apology or shown any regret to-date – over four full years since the humiliating event.

Defendants City of Austin, Austin Police Department, Art Acevedo and Richard W. Miller moved the Court for dismissal of all claims against them. They assert, although erroneously, that the suit filed on Monday, November 27, 2017 is untimely because it was filed two calendar year and one day after the cause of action accrued, and not within two years as required by TEX. CIV. PRAC. & REM. CODE 16.003 – relevant code in this matter – and therefore should be dismissed as to them. Defendants' mischaracterized claim for defamation as being only a state claim in an effort to apply much shorter – one-year – statute of limitations even though Plaintiff has expressly asserted this claim under both Sec 1983 and Texas laws, see Original Petition, Para 87 – 89, pages 26 - 30. Defendants' characterized the claim for IIED brought under sec. 1983, Para 86 – 89 on page 29 as a state law claim and sought its dismissal on similar untimeliness ground as well – i.e. filed two calendar year and one day after the claim accrued, and was therefore one day too late.

[1] Estimate based on Food and Drug Administration – a federal government agency responsible for U.S. public health issues involving food and drugs – data for obesity of US adult population for the year 2015; and assuming obesity rate in Austin is similar to average U.S. population as a whole.

Plaintiff responded by agreeing that the Texas two-year general personal injury statute of limitations applied to all six claims asserted in the suit including those for IIED and defamation. All six claims asserted in this suit - filed on Monday, November 27, 2017 – was timely, and should not be dismissed. Plaintiff relied on FED. R. CIV. P. 6(a) in support of his contention. Magistrate Judge, Hon. Mark Lane in R & R. expressly characterized plaintiff's first four claims I – IV as Section 1983 claims, and after rigorous scrutiny found them to be timely, and recommended that Defendant's motion for dismissal as to those four section 1983 claims (Claims I – IV) should be denied. R & R at Page 12. However, Judge Lane concluded erroneously, that the claims for IIED (Claim V) and defamation (Claim VI) were untimely filed because Fed. Rule 6(a) did not apply to them as they both were state law claims, and recommended that Defendants' motion to dismiss as to them should be granted. R & R at Page 12. Judge Lane further recommended that claims for IIED (Claim V) and defamation (Claim VI) should be dismissed with prejudice as to all defendants – including Walmart defendants who did not even move the Court for their dismissal or otherwise sought their dismissal. R & R at page 12.

III. OBJECTIONS IDENTIFIED

Plaintiff understands that rules of procedure require him to file his objections to the R & R, if any and clearly identify those portions thereof, he objects to. Pursuant to said requirement plaintiff notes the following:

(1) "Plaintiff Ravindra Singh, Ph.D., alleges that "while he was shopping at an Austin, Texas Wal-Mart store on November 25, 2015, Thanksgiving Day"". R & R at page 1

Basis for Objection:

The date included in this paragraph incorrectly states that incident happened on November 25, 2015 when in fact it happened on November 26, 2015, Thanksgiving day Thursday. See Original Petition, Pag2, Para 2.

The R & R, at Page 5, correctly notes plaintiff's assertion that "event giving rise to the present action occurred on . . . November 26, 2015".

This is critical error material to the magistrate judge's analysis of the entire statute of limitation issue involved. Magistrate should be advised to reexamine is report and recommendation to ensure that a withdrawal of this report and substitution with a new report and recommendation is not warranted.

(2) "Plaintiff's suit was filed two years and one day after" the alleged events of November 26, 2015. R & R at Page 3.

Basis for Objection:

The above sentence is prone to confusion because it occurs in multiple places within the R & R in the context of two-year statute of limitations specified by TEX CIV PROC & REM CODE 16.003 which requires that case be filed no later than two years after the day the claim accrued. In the present case the claim accrued on the same day the event happened – i.e. November 26, 2015. To avoid the probability of confusion, and better context plaintiff requests that it be replaced with the following wherever it occurs in the report:

Plaintiff request that it be replaced with the following: Plaintiff's suit was filed on November 27, 2017 exactly two-years after the day after the alleged events of November 26, 2015. This language is not only factually accurate it also conveys additional relevant information that the suit was timely filed.

(3) "[c]ourts apply the state statute governing the most analogous cause of action". *Braden v. Texas A & M Univ. Sys., 636 F.2d. 90, 92 (5th Cir. 1981).* at page 4. [emphasis added]

Basis for Objection:

After US Supreme Court decided *Owen v. Okure*, some eight years later, Braden is no longer considered good law by Courts. In Owen, US Supreme Court clarified its decision in *Wilson* v. *Garcia,* 471 U. S. 261 (1985). In *Wilson* the Court issued its

pronouncement that "courts entertaining claims brought under 42 U. S. C. § 1983 should borrow the state statute of limitations for personal injury action. However, it realized that many claims brought under § 1983 have no precise state-law analog. The Court resolved this issue by modifying its directive issued in *Wilson*. The *Wilson* Court said:

> "Given that so many claims brought under § 1983 have no precise state-law analog, applying the statute of limitations for the limited category of intentional torts would be inconsistent with § 1983's broad scope.[11] We accordingly hold that **where 250*250 state law provides multiple statutes of limitations for personal injury actions, courts considering § 1983 claims should borrow the general or residual statute for personal injury actions**." [emphasis added].

Owen v. Okure, 588 US 235 (1989)

Following *Owen,* now a Court need not spend resources trying to figure out what the most analogous tort is in a particular facts of the case presented to it under the state. A Court need only to apply the state's either the general or the residual statutes of limitations for personal injury of the forum state without adjudicating this issue and avoid unnecessary litigation. A state can have no more but just one statute of limitations for Section 1983 purposes. Accordingly, for Section 1983 purposes in Texas statute of limitations is two years while in the state of New York it is three years.

(4) "His defamation claim is governed by a one-year limitations period. See id. §16.002 (suits for libel and slander must be brought no later than one year after the day cause of action accrues)." R & R at Page 5.

Basis for Objection:

Plaintiff objects to above quoted portion of the R & R because his defamation claim was simultaneously asserted under federal asserted under Section 1983, as here has two-year statute of limitations. Plaintiff's complaint shows that he asserted this claim under both US and Texas ("Section 1983/Texas") constitutions and laws. See Original petition, Para 87 -89, Pages 29 -30. Therefore, this claim should not be dismissed either with, or without prejudice merely on account of one-year statute of limitations under Texas law.

(5) "Here, state law provides that a person must bring suit for personal injury "no later than two years after the day the cause of action accrues". TEX. CIV. PRAC. & REM. CODE § 16.003(a). Texas courts strictly construe this provision and "have uniformly held that a complaint filed the day after the same calendar day two years after the action accrued is one day too late." *Price v. City of San Antonio, 431 F.3d 890, 892-93 (5th Cir. 2005).*"" R & R Page 6

Basis for Objection:

Plaintiff very strongly objects to above portion of the R & R because under Texas law and rules of procedure the claim filed on Monday November 27, 2017 was timely and not one day too late, and the magistrate Judge's recommendation must be rejected as unwarranted despite the fact, which he agrees to, that TEX. CIV. PRAC. & REM CODE Section 16.003 governs the statute of limitations period applicable in the instant case. However, aforementioned code provides no method for computation of time, and that (b) it is subject to Texas Code Construction Act, Chapter 311, Government Code. Chapter 311 provides the method to be applied in computing time. Sec. 1.002 of TEX. CIV. PRAC. & REM CODE provides the following in full:

> Sec. 1.002. CONSTRUCTION OF CODE. The Code Construction Act (Chapter 311, Government Code) applies to the construction of each provision in this code, except as otherwise expressly

provided by this code. Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., ch. 167, Sec. 3.02, eff. Sept. 1, 1987.

(a) "state law provides that a person must bring suit for personal injury "not later than two years after the day the cause of action accrues". TEX. CIV. PRAC. & REM CODE Section 16.003. But here the court must determine whether Rule 6(a) extends Plaintiff's deadline to file his section 1983 claim in Federal Court on Monday, November 27, 2017 when the underlying state law would provide that a related state law claim had to be brought not later than Sunday, November 26, 2017." R & R page 6 – 7 (assume it is 7 the next two pages are for some unexplained reasons are not numbered. Renumbering starts at page 9)

Basis for Objection:

Plaintiff objects to the above quoted paragraph. There is no reason to consider timeliness of related state law claim in considering timeliness of any related claim brought under state law – federal claims are exclusive domain of federal rules. Similarly, when a federal court accepts jurisdiction of state claim, it is obligated to apply state rules on state questions. In the event no state no state law exists then the federal court may make an Erie guess – of this there can be no dispute. In the instant case, however, state rules exist. Specifically, TEX. R. CIV. P. 4 parallels Fed Rule 6(a) and yields identical result. TEX. CIV. PRAC. &REM. CODE and TEX GOVT CODE Sec. 311 that help compute the time period for statute of limitations in question.

Plaintiff objects to the portion. US 5th Circuit has consistently applied state law to state law claims after it acquires jurisdiction because of transfer of a cases pending in a state court when other parties are joined on diversity grounds – frequently occurs in insurance cases because the Insurance companies conduct business in multiple states while locating their Headquarter in one state. when a federal court accepts jurisdiction over a state law claim, federal court is obligated court timeliness of federal claim is Court must apply proper method of computation of time as required by Texas Government Code. Although above statement is true, it is not complete under the Code Construction Act, Chapter 311. The true, and complete statement should read as follows:

- **law provides that a person must bring suit for personal injury no later than state two years after the day the cause of action accrues unless the last day of the period is a Saturday, Sunday or a public holiday the period is extended to include the next day that is not a Saturday, Sunday, or legal holiday.**

IV. ARGUMENTS

A.

THE COURT MUST NOT DISMISS THE CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS FILED ON MONDAY NOVEMBER 27, 2015 ON THE GROUND OF LATE FILING BY A DAY BECAUSE HE WAS PRECLUDED BY FROM FILING ON SUNDAY. ALTERNATIVELY, THE CLAIM IS TIMELY UNDERAL FEDERAL RULE

Here the Magistrate, on Defendants' urging determined that claim for IIED was a state law claim and when Plaintiff filed the suit on Monday November 27, 2017, Plaintiff did so one day after applicable two-year statute of limitations ran on Sunday 26, 2017. It means that Plaintiff should have filed the same on Sunday, November 26, 2017 because that was the last day under governing TEX. CIV. PRAC. & REM CODE §16.003. Problem is, it was an impossible task. Plaintiff was precluded by long standing state policy from doing so. Texas citizens cannot sue each other on a Sunday. It has been a long-held policy of the state to preclude initiating of a civil lawsuit, including plaintiff's lawsuit herein on Sunday. State's policy has been enshrined in Texas Court rules:

RULE 6. SUITS COMMENCED ON SUNDAY

> **"No civil suit shall be commenced** nor process issued or served **on Sunday,** except in cases of injunction, attachment, garnishment, sequestration, or distress proceedings; provided that citation by publication published on Sunday shall be valid." [Emphasis added]

TEX. R. CIV. P. 6.

It is clear from the foregoing Plaintiff's IIED should not be dismissed even if he filed his claim one day over the two-year period statutorily allowed.

There are additional grounds not counseling its dismissal. It is Plaintiff's contention that when Texas state rule requires an act to be performed within a mandated time period, and provides specific method or process for computing the day on or before that act must be performed to conclusively determine that deadline that specific method or process must be applied for the computation of time. Here, statute of limitation mandates that a plaintiff forfeits his rights file his personal injury claim if he does not do so within two years after the day the cause of action accrues:

Sec. 16.003 (a). TWO-YEAR LIMITATIONS PERIOD.

(a) Except as provided by Sections 16.010, 16.0031, and 16.0045, a person must bring suit for trespass for injury to the estate or to the property of another, conversion of personal property, taking or detaining the personal property of another, personal injury, forcible entry and detainer, and forcible detainer not later than two years after the day the cause of action accrues. [Emphasis added]

(b) A person must bring suit not later than two years after the day the cause of action accrues in an action for injury resulting in death. The cause of action accrues on the death of the injured person.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1995, 74th Leg., ch. 739, Sec. 2, eff. June 15, 1995; Acts 1997, 75th Leg., ch. 26, Sec. 2, eff. May 1, 1997. Amended by: Acts 2005, 79th Leg., Ch. 97 (S.B. 15), Sec. 3, eff. September 1, 2005.

CIVIL PRACTICE AND REMEDIES CODE
Statute text rendered on: 1/11/2019

TEX CIV P & REM CODE §16.003 does not provide any method of computing the two-year time period it prescribes. That method is provided in TEX GOVT CODE SEC 311.014 which says the following:

> Sec. 311.014. COMPUTATION OF TIME. (a) In computing a period of days, the first day is excluded and the last day is included.
>
> (b) If the last day of any period is a Saturday, Sunday, or legal holiday, the period is extended to include the next day that is not a Saturday, Sunday, or legal holiday.

> (c) If a number of months is to be computed by counting the months from a particular day, the period ends on the same numerical day in the concluding month as the day of the month from which the computation is begun, unless there are not that many days in the concluding month, in which case the period ends on the last day of that month.
>
> Acts 1985, 69th Leg., ch. 479, Sec. 1, eff. Sept. 1, 1985.

Sec. 311.005 (12) provides that **"Year" means 12 consecutive months.**

With above rules in hand, one may compute the two-year deadline as follows:

Step 1: Determine date on which the claim accrued: Thanksgiving Day, Thursday November 26, 2015. It is undisputed.

Step 2: Determine the start date: It is the day after accrual day: It is November 27, 2015

Step 3: Count 24 months using Rule 22.014(c). The rule: one-month period ends on the same numerical day in the concluding month as the day of the month from which the computation is begun, unless there are not that many days in the concluding month, in which case the period ends on last day of that month.

It is the same calendar date as the starting date: i.e. November 27, 2017. Hence, the two-year period starting the day after the cause of action accrued on November 26, 2015(i.e. November 27, 2015) November 27, 2017 and ends on the same day. There is no dispute that Plaintiff filed his suit on Monday, November 2017.

Furthermore, like Federal Rule 6(a), Texas state TEX R CIV P 4 is applicable here. Applying, TEX R CIV P 4 also conclusively demonstrates that the claims were filed within two years after the day the cause of action when the suit was filed on Monday, November 27, 2017.

RULE 4. COMPUTATION OF TIME

> **In computing any period of time prescribed** or allowed by these rules, by order of court, **or by any applicable statute, the day of the act, event,** or default after which the designated period of time begins to run **is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday.** Saturdays, Sundays, and legal holidays shall not be counted for any purpose in any time period of five days or less in these rules, except that Saturdays, Sundays, and legal holidays shall be counted for purpose of the three-day periods in Rules 21 and 21a, extending other periods by three days when service is made by mail. [Emphasis added]

It is neither wise nor necessary to use sweeping statements sometimes included in case law because often procedures are misapplied. For example, in criminal cases, and even *Price V. City of San Antonio,* the case relied upon by magistrate judge does cite to some criminal cases and reaches wrong conclusion and, hence the confusion.

The method prescribed above is applicable to civil cases only where the day of claim accrual is disregarded. The Rule expressly says "two years after the day" and not beginning from the accrual day. Compared to this, in computing time in criminal cases the day of accrual is included and the last day is excluded. The reason for this is that in criminal case the person found guilty needs to be taken to the jail right after the sentence is pronounced by the Court. See *Nesbit v. State of Texas, 227 S.W.3d 64 (2007) Court of Criminal Appeals, Texas* and other cases cited therein. Case law is confusing and unsettled and Plaintiff's IIED claim should not be dismissed.

B.

PLAINTIFF'S CLAIM FOR DEFAMATION SHOULD NOT BE DISMISSED WITH PREJUDICE ON ACCOUNT OF TEXAS ONE YEAR STATUTE OF LIMITATIONS BECAUSE IT IS SIMULTANEOUSLY ASSERTED UNDER FEDERAL LAW.

Plaintiff's original petition shows that the claim was asserted under both federal and Texas law simultaneously. Plaintiff's Original Petition pages 29 -30, Para. 87 – 89. Even if Texas portion of the claim is untimely because of one-year Texas statute of limitations the entire claim cannot be dismissed with or without prejudice. Plaintiff should be given an opportunity to amend the complaint.

First, Plaintiff has a viable federal claim for injury to his reputation. Stigma plus doctrine is applicable here. It is not a free-standing claim.

Second, the defamatory statements regarding Plaintiff were published by defendant on the Internet and the resulting violation is continuing in nature. Defendants have provided no evidence to the contrary. Applicable federal rule requires that at this stage of the proceeding plaintiff's contentions must be taken as true and all inference made in his favor. For these reasons and more, defamation claim should not be dismissed at this time.

C.

REASONS WHY CLAIMS AGAINST JOHN DOE I SHOULD NOT BE DISMISSED.

Magistrate judge recommended that Plaintiff should be asked to explain why he has not been able to identify John Doe defendant – a City of Austin Police officer. In response Plaintiff asserts that

Plaintiff has made reasonable effort in this regard since the event occurred. Plaintiff expressly asked Austin Police officers including John Doe I for their identity and he refused. Next, during the criminal proceeding in the Municipal Court Plaintiff attempted to identify John Doe I's identity and was unsuccessful. Plaintiff was told by the residing municipal judge that he could not order the City to disclose his identity because he was neither a party to the case nor listed as a witness. It is Plaintiff's contention, defendant Miller, intentionally did not list John Doe I as a witness in order to conceal his identity on purpose. Additionally, Walmart refused to provide his identity either. Plaintiff was asked to call corporate office and given a 800 phone number that when called linked to customer service information. It is clear, that Plaintiff has not been indifferent to this issue.

Plaintiff continues his effort and must wait until he is allowed discovery by the Court. Plaintiff, understands that once the issue of immunity is raised before the Court he is not permitted by rules to move the Court for discovery. Plaintiff asserts that he is not trained in the field of law and under the circumstances Defendant John Doe I should not be dismissed from the suit.

V. CONCLUSION

From the foregoing it is clear that this action filed on Monday, November 27, 2017 was filed within two years after the day of accrual under Texas Rules and procedure. Magistrate judge's conclusion that the last day for filing timely fell on Sunday, November 26, 2015 is in error. Even if it was not an error, TEX R CIV P. 6 does not allow a civil case to be filed on a Sunday. In the event this Court finds that that that rule is not applicable in the Federal District Court and Federal Rules of Civil Procedure controls, these claims are timely under Rule 6(a), and these claims are timely and should not be dismissed as to any defendants including Walmart.

Plaintiff's claim for defamation should similarly not be dismissed on account of Texas one-year statute of limitation when the claim is also asserted under federal law. This pleading is easily cured by amending the complaint to assert the claim only under federal law and not including Texas law. This claim has viability because it is not a free-standing claim among other things.

Plaintiff has made efforts to uncover defendant JOHN DOE I's identity both prior to filing this and also afterwards. His efforts have not been successful for defendant City of Austin and Walmart's refusal cooperate in this matter. Defendant John Doe I was on notice that a legal action might be taken against him. Evidence directly implicating him to certain conduct should have been preserved on video and audio because he was fully equipped to do so. Additionally, similar video and audio evidence should have been preserved by Walmart because it was notice of a possible lawsuit and even expected to be sued. Under these circumstances John Doe I cannot reasonably claim unfair prejudice.

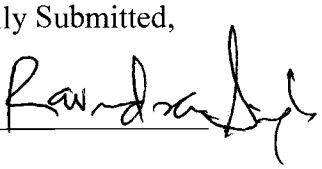
VI. RELIEF REQUESTED

WHEREFORE, for all those reasons included above plaintiff requests that the Hon. Court grant plaintiff relief as follows:

1. Deny defendant's motion to dismiss in full and take any further action as required in view of Plaintiff's objection to the magistrate's report and recommendations.
2. Grant plaintiff leave to conduct discovery on expedited basis in order to uncover identity of defendant John Doe I.
3. Grant plaintiff an opportunity to amend his complaint to clarify and supplement his pleading for a full and just vindication of his constitutional rights under U.S. Constitution and law;
4. Grant further relief as may be proper.

Dated: January 18, 2019

Respectfully Submitted,

By: 

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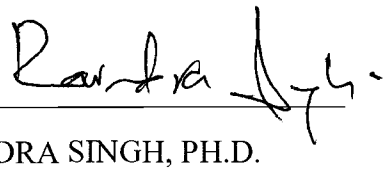
CERTIFICATE OF SERVICE

I, Ravindra Singh, certify that on this 18th Day of January 2019, I served by mailing a true and correct copy of foregoing document by US Postal service, first class mail, postage prepaid on the following:

Dated: Jan 18th, 2019

By: 

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RAVINDRA SINGH, Plaintiff, v. WAL-MART STORES, INC.; WAL-MART STORES, LLC; ALAN MARTINDALE; EVA MARIE MOSELEY; CITY OF AUSTIN; AUSTIN POLICE DEPARTMENT; ART ACEVEDO; RICHARD W. MILLER; and JOHN DOE I; Defendants.	§ § § § § § § § § § § § §	1:17-CV-1120-RP

ORDER

Before the Court is the report and recommendation of United States Magistrate Judge Mark Lane concerning the motion to dismiss filed by Defendants City of Austin ("the City"), Austin Police Department ("APD"), Art Acevedo ("Acevedo"), and Richard Miller ("Miller") (collectively, the "City Defendants"), (Dkt. 18). (R. & R., Dkt. 37). In his report and recommendation, Judge Lane recommends that the Court grant the motion in part. (*Id.* at 12). Only Plaintiff Ravindra Singh ("Singh") timely filed objections to the report and recommendation. (Objs., Dkt. 40). Having considered Singh's objections, the record, and the relevant law, the Court finds that his objections should be sustained in part and overruled in part, that the report and recommendation should be adopted in part, and that the motion to dismiss should be granted in part and denied in part.

I. BACKGROUND

Singh was shopping at an Austin Wal-Mart on November 26, 2015, when he was stopped by a Wal-Mart loss prevention officer (Eva Marie Moseley) and an APD officer (Miller). (Compl., Dkt. 1, at 2). Suspecting Singh of shoplifting, Moseley and Miller allegedly detained, searched, and arrested Singh. (*Id.* at 3). Singh alleges that he was injured when Miller roughly handcuffed him. (*Id.*).

Another unidentified APD officer (John Doe I) questioned Singh at length about his U.S. citizenship. (*Id.*). Singh was arrested for and charged with[1] disorderly conduct; he alleges that the charges were brought maliciously on false grounds. (*Id.*). An Austin municipal judge later dismissed the charges against Singh. (*Id.*).

Proceeding *pro se*, Singh now sues Wal-Mart,[2] Moseley, and the City Defendants on a series of claims: (1) against all defendants, a violation of 42 U.S.C. § 1983 ("Section 1983") for depriving Singh of his right under the Fourth Amendment to the United States Constitution to be free from unreasonable search and seizure; (2) against the City Defendants, a violation of Section 1983 for chilling his speech through retaliatory prosecution; (3) against Defendants Miller and Wal-Mart, a violation of 42 U.S.C. § 1982; (4) against all defendants, a violation of Section 1983 for depriving him of his right to equal protection of the laws under the Fourteenth Amendment; (5) against all defendants except Acevedo, a violation of Section 1983 for intentional infliction of emotional distress ("IIED"); and (6) against all defendants, a violation of Section 1983 for defamation. (Compl. Dkt. 1, at 21–30). Wal-Mart has not filed a motion to dismiss. The City Defendants, meanwhile, moved to dismiss all of the claims against them. (Dkt. 18).

In his report and recommendation, Judge Lane recommends granting the City Defendants' motion in part and denying it in part. (R. & R., Dkt. 37, at 11–12). Specifically, he recommends dismissing: (a) all of Singh's claims against APD and Acevedo with prejudice; (b) Singh's Section 1983 claims against Miller and John Doe I without prejudice; and (c) Singh's IIED and defamation claims with prejudice. (*Id.* at 12). Meanwhile, Judge Lane also recommends denying the City Defendants' motion as to Singh's Section 1983 claims against Miller and the City. (*Id.*). The City

[1] Singh alleges that Austin police charged him with disorderly conduct, (Compl., Dkt. 1, at 3), but police do not bring criminal charges—prosecutors do.

[2] Singh names Wal-Mart Stores, Inc. and Wal-Mart Stores Texas, LLC as defendants. (Compl., Dkt. 1, at 3). The Court will refer to those defendants collectively here as "Wal-Mart."

Defendants did not file objections to the report and recommendation. Singh timely objected only to the parts of Judge Lane's report and recommendation pertaining to his IIED and defamation claims.

II. LEGAL STANDARD

A. Federal Magistrates Act

A party may serve and file specific, written objections to a magistrate judge's findings and recommendations within fourteen days after being served with a copy of the report and recommendation and, in doing so, secure *de novo* review by the district court. 28 U.S.C. § 636(b)(1)(C). When no objections are timely filed, a district court can review the magistrate's report and recommendation for clear error. *See* Fed. R. Civ. P. 72 advisory committee's note ("When no timely objection is filed, the [district] court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.").

B. Federal Rule of Civil Procedure 12(b)(6)

Pursuant to Rule 12(b)(6), a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In deciding a motion to dismiss, the Court "accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (citation and internal quotation marks omitted). "To survive a Rule 12(b)(6) motion to dismiss, a complaint 'does not need detailed factual allegations,' but must provide the plaintiff's grounds for entitlement to relief—including factual allegations that when assumed to be true 'raise a right to relief above the speculative level.'" *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). That is, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570); *see also In re Katrina Canal Breaches Litig.*, 495 F.3d at 205 ("Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations

in the complaint are true (even if doubtful in fact).") (citation and internal quotation marks omitted). However, "[t]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. Moreover, a court is only required to draw reasonable inferences in the plaintiff's favor. *Id.*

III. DISCUSSION

Because Singh timely objected to the parts of the report and recommendation pertaining to his IIED and defamation claims, the Court reviews those parts of report and recommendation *de novo*. Because no party objected to the remainder of the report and recommendation, the Court reviews those portions for clear error. Having reviewed the entire report and recommendation under the applicable standard of review, the Court will largely (but not fully) adopt it as its own order. Accordingly, Singh's objections are sustained in part and overruled in part on the following grounds.

A. IIED

Judge Lane recommended that Singh's IIED claim be dismissed based on the two-year statute of limitations that applies to IIED claims in Texas. (R. &. R., Dkt. 37, at 6 (citing Tex. Civ. Prac. & Rem. Code § 16.003(a))).[3] This Court is bound by the Fifth Circuit's holding that Texas Civil Practice & Remedies Code § 16.003, which sets the limitations period for IIED claims, "requires a claim to be brought no later than the same calendar day two years following the accrual of the cause of action." *Price v. City of San Antonio, Tex.*, 431 F.3d 890, 893 (5th Cir. 2005). Applying *Price*, Judge Lane found that Singh's IIED claim accrued on November 26, 2015, and that he was one day late when he filed that claim on November 27, 2017. (*Id.* at 6).

[3] Judge Lane correctly observes that Section 1983 does not create a remedy for violations of state law, and so Singh's IIED claim must be liberally construed to seek relief under Texas law. (R. & R., Dkt. 37, at 5 n.4); *see also Gonzalez v. Cortez*, 347 F. App'x 117, 118 (5th Cir. 2009) (stating that a plaintiff "may not recover under § 1983 for emotional distress absent a violation of his constitutional rights").

Singh objects that even if he did file a day late, his IIED claim should not be dismissed because he was prohibited from filing this action on Sunday, November 26, 2017 (the last day within the limitations period) by the Texas Rules of Civil Procedure. (Objs., Dkt. 40, at 12 (citing Tex. R. Civ. P. 6 ("No civil suit shall be commenced . . . on Sunday"))). Although Singh cites no authority to support his position, he is in fact correct that when a limitations period ends on a Sunday, Texas law—by statute—extends the period for filing suit to include the next day that county offices are open for business. Tex. Civ. Prac. & Rem. Code § 16.072; *see also Galindo v. Snoddy*, 415 S.W.3d 905, 911 (Tex. App.—Texarkana 2013, no pet.) (holding that it was error to grant summary judgment against a plaintiff whose limitations period ended on a Saturday and who filed suit the following Monday). That statutory rule applies here: the limitations period for his IIED claim ended on a Sunday and he filed suit the next day. (*See* R. & R., Dkt. 37, at 3).[4] He therefore filed his IIED claim within the limitations period. *Galindo*, 415 S.W.3d at 911.

The limitations period was the only basis for recommending dismissal of Singh's IIED claim, (R. & R., Dkt. 37, at 5), and the only grounds for dismissal proffered by the City Defendants, (Mot. Dismiss, Dkt. 18, at 4–5). The Court will not adopt Judge Lane's recommendation to dismiss Singh's IIED claim against the City Defendants. The City Defendants' motion to dismiss Singh's IIED claim is denied with respect to the City. His IIED claim against Miller and APD is dismissed for failure to state a claim on other grounds.[5]

B. Defamation

Judge Lane recommended that Singh's defamation claim be dismissed based on the one-year statute of limitations that applies to defamation claims under Texas law. (R. &. R., Dkt. 37, at 5

[4] The rule articulated in *Price* is inapplicable here; in *Price*, the limitations period ended on a Friday. 431 F.3d at 893.

[5] Based on Singh's agreement, Judge Lane recommended dismissing all of Singh's claims against APD. (R. & R., Dkt. 37, at 4). Meanwhile, because Singh asserts his IIED claim against both the City and its employee (Miller), and the City has moved for dismissal of the claim against Miller under Texas Civil Practice & Remedies Code § 101.106, (Mot. Dismiss, Dkt. 18, at 5), the IIED claim against Miller must be dismissed. Tex. Civ. Prac. & Rem. Code § 101.106(e).

(citing Tex. Civ. Prac. & Rem. Code § 16.002(a))). Judge Lane found that Singh's defamation claim accrued on November 26, 2015, and that he was one year and one day late when he filed that claim on November 27, 2017. (*Id.*).

Singh objects on two grounds. First, he argues that his claim did not accrue on November 26, 2015, and is in fact still re-accruing every day that the damaging information remains published online. (Objs., Dkt. 40, at 16). That is not the case. Defamation claims "generally accrue when the allegedly defamatory matter is published or circulated." *Glassdoor, Inc. v. Andra Group, LP*, 2019 WL 321934 at *3 (Tex. Jan. 25, 2019). When a defamation claim arises out of a mass publication, Texas courts apply the "single publication rule" to identify the claim's accrual date. *Id.* at *4. The single publication rule applies to information published online. *Id.*; *see also Nationwide Bi-Weekly Admin., Inc. v. Belo Corp.*, 512 F.3d 137, 144–46 (5th Cir. 2007); *Mayfield v. Fullhart*, 444 S.W.3d 222, 230 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). Under that rule, "a cause of action accrues on the last day of the mass distribution of the printed matter containing the defamatory statement, which is when the publisher of the statement has made the libelous matter available to his intended audience." *Glassdoor*, 2019 WL 321934 at *4 (citation and internal quotation marks omitted). Singh's defamation claim accrued on a single date and is not re-accruing continuously. The identity of that single date depends upon the facts plausibly alleged in Singh's complaint.

Singh's defamation claim arises out of: (a) Miller and Moseley publicly accusing him of shoplifting, which occurred on November 26, 2015; and (b) the appearance of his name on a City of Austin webpage listing arrested persons. (Compl., Dkt. 1, at 29–30). Applying the single-publication rule, Singh's defamation claim accrued as late as the day that the City published his name on its webpage. *See Mayfield*, 444 S.W.3d at 230 (holding that a libel claim accrued on the date that the defendant posted the damaging information on its website). Singh does not allege that date on which his name was published on the City's website. (*See id.*). However, the Court finds it implausible that

the City first published Singh's name on a webpage naming arrestees more than a year after Singh was arrested. *See Iqbal*, 556 U.S. at 678 (holding that a court must draw only reasonable inferences in the plaintiff's favor when evaluation a motion to dismiss and that it must draw on its judicial experience and common sense). Accordingly, the Court finds that the City first published Singh's name online more than one year before he filed his defamation claim, rendering his claim time-barred under Texas law. Tex. Civ. Prac. & Rem. Code § 16.002(a).

This brings the Court to Singh's second objection. Singh argues that his defamation claim is subject not to the one-year limitations period under state law but to the two-year limitations period that applies to Section 1983 claims in Texas. (Objs., Dkt. 40, at 9–10, 12). It is true that Singh alleges that the City Defendants are liable under Section 1983 for defaming him. (Compl., Dkt. 1, at 29–30). And, under certain circumstances, defamation is actionable under Section 1983. *Marrero v. City of Hialeah*, 625 F.2d 499, 515 (5th Cir. 1980). The Court agrees with Judge Lane's finding that Singh filed his complaint within the limitations period for Section 1983 claims, (R. & R., Dkt. 37, at 9), and so although Singh's state-law defamation claim is time-barred, his Section 1983 claim for defamation is not.

But while asserting his defamation claim under Section 1983 solves Singh's time-bar problem, it encounters a separate problem that renders his pleading of the claim deficient. Section 1983 creates a remedy only for "violations of federal statutory and constitutional rights." *Woodard v. Andrus*, 419 F.3d 348, 353 (5th Cir. 2005). "To bring an action within the purview of section 1983, a claimant must first identify a protected life, liberty, or property interest, and then prove that government action resulted in a deprivation of that interest." *San Jacinto Sav. & Loan v. Kacal*, 928 F.2d 697, 700 (5th Cir. 1991). Defamation, by itself, does not create Section 1983 liability because "reputation alone, apart from some more tangible interests such as employment, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." *Paul v.*

Davis, 424 U.S. 693, 701 (1976). To state a Section 1983 claim based on a defamatory publication, therefore, a claimant must "show a stigma plus an infringement of some other interest." *Kacal*, 928 F.2d at 701. To establish the "infringement" portion the "stigma plus" test, "a claimant must establish that the state sought to remove or significantly alter a life, liberty, or property interest recognized and protected by state law or guaranteed by one of the provisions of the Bill of Rights that has been 'incorporated.'" *Id.* at 701–02 (citing *Paul*, 424 U.S. at 710–11).

Singh asserts, without explanation or support, that his pleading satisfies the stigma-plus test. The Court disagrees. In his complaint, Singh alleges that Defendants "tarnish[ed] his good name in the community" and that he "suffered serious and substantial injuries to his reputation." (Compl., Dkt. 1, at 30; *see also id.* at 19). These allegations "merely implicate [Singh's] reputation and are insufficient to establish a cause of action under § 1983." *Thomas v. Kippermann*, 846 F.2d 1009, 1010 (5th Cir. 1988) (affirming dismissal of a defamation claim brought under Section 1983 when the plaintiff alleged that false information on posters "destroyed his life, pride, respect, family's happiness, and endangered his life"); *see also Geter v. Fortenberry*, 849 F.2d 1550, 1557 (5th Cir. 1988) (holding that a defamation claim under Section 1983 was subject to summary judgment because the plaintiff did not suffer an injury in additional to reputational damage, such as loss of employment). Singh's defamation claim under Section 1983, although timely filed, fails to state a plausible claim for relief because he alleges only reputational harm. Although the Court does not adopt the report and recommendation's reason for dismissing Singh's defamation claim, it agrees that the claim must be dismissed.[6]

C. John Doe I

Judge Lane found that Singh's claims against the unidentified APD officer ("John Doe I") were likely time-barred and recommended that the Court order Singh to show cause for why that

[6] Like Singh's IIED claim, his defamation claim against Miller must also be dismissed because of the City's motion. Tex. Civ. Prac. & Rem. Code § 101.106(e).

officer should not be dismissed. (R. & R., Dkt. 37, at 9). In his objections, Singh argues that he has tried to learn John Doe I's identity but has not succeeded and asks that he be allowed to name him as a defendant once he can learn his identity in discovery. (Objs., Dkt. 40, at 17). But the relevant limitations periods are now long past; all of Singh's claim against John Doe I are time-barred. Moreover, any amendment to change John Doe I's identification would not relate back to the filing of his original complaint. *See Winzer v. Kaufman County*, 2019 WL 654594, at *4 (5th Cir. Feb. 18, 2019) (barring the plaintiff from substituting named defendants for John Doe defendants under Federal Rule of Civil Procedure 15(c) because that provision only allows for relation back to correct a mistake concerning a party's identity, not the failure to identify a defendant); *Jacobsen v. Osborne*, 133 F.3d 315, 321–22 (5th Cir. 1998). A court may *sua sponte* dismiss on its own Rule 12(b)(6) motion for failure to state a claim as long as the plaintiff has notice and an opportunity to respond. *Carroll v. Fort James Corp.*, 470 F.3d 1171, 1177 (5th Cir. 2006). Judge Lane's report and recommendation gave Singh notice and an opportunity to respond, of which he availed himself. The Court finds that Singh's claims against John Doe I must be dismissed with prejudice based on the applicable statutes of limitations.

D. Leave to Amend

In his objections, Singh asks for leave to amend his complaint so that he may cure the deficiencies identified in the report and recommendation. (Objs., Dkt. 40, at 16, 18). In general, a "court should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). "[T]he language of this rule evinces a bias in favor of granting leave to amend." *Legate v. Livingston*, 822 F.3d 207, 211 (5th Cir. 2016) (quoting *Lyn–Lea Travel Corp. v. Am. Airlines, Inc.*, 283 F.3d 282, 286 (5th Cir. 2002)). Leave to amend a pleading should generally be granted in the absence of "1) undue delay, 2) bad faith or dilatory motive, 3) repeated failure to cure deficiencies by previous amendments, 4) undue prejudice to the opposing party, and 5) futility of the amendment." *Smith v. EMC Corp.*, 393

F.3d 590, 595 (5th Cir. 2004) (citing *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 864 (5th Cir. 2003)). "Futility is determined under Rule 12(b)(6) standards, meaning an amendment is considered futile if it would fail to state a claim upon which relief could be granted." *Legate*, 822 F.3d at 211. "[A] district court need not grant a futile leave to amend." *Id.*

It would be futile to permit Singh to amend his state-law tort claims against Miller, since amendment cannot cure the City's election under Texas Civil Practice & Remedies Code § 101.106. It would likewise be futile to permit Singh to amend his defamation claim (to the extent he asserts it solely under Texas law) and all of his claims against John Doe I, as those claims are time-barred. However, amendment of Singh's Section 1983 claim for defamation may not be futile; he is permitted to amend his complaint as to that claim.

IV. CONCLUSION

For the reasons given above, **IT IS ORDERED** that the report and recommendation of United States Magistrate Judge Mark Lane, (Dkt. 37), is **ADOPTED IN PART**. The Court does not adopt Judge Lane's recommendation to dismiss Singh's IIED claim or his analysis of that claim, nor does it adopt the reason for dismissing Singh's Section 1983 defamation claim, but otherwise adopts all other parts of the report and recommendation as the Court's own order.

IT IS FURTHER ORDERED that the City Defendants' motion to dismiss, (Dkt. 18), is **GRANTED IN PART AND DENIED IN PART.** Specifically:

- Singh's claims against APD are dismissed with prejudice.
- Singh's claims against Acevedo are dismissed with prejudice.
- Singh's claims against John Doe I are dismissed with prejudice.
- Singh's Section 1983 claim for defamation against the City and Miller is dismissed without prejudice. His defamation claim against each of the City Defendants is dismissed with prejudice to the extent it arises solely under Texas law.

- Singh's IIED claim against Miller is dismissed with prejudice.
- The City Defendants' motion is denied with respect to:
    - Singh's Section 1983 claims against the City based on violations of the United States Constitution.
    - Singh's Section 1983 claims against Miller in his individual capacity based on violations of the United States Constitution.
    - Singh's IIED claim against the City.

IT IS FINALLY ORDERED that Singh may amend his complaint with respect to his defamation claim, so long as he does so before whatever deadline the Court sets to amend pleadings in its scheduling order.

SIGNED on March 25, 2019.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

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CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RAVINDRA SINGH, PH.D.	§	
Plaintiff,	§	
V.	§	
	§	
WAL-MART STORES INC	§	1:17-CV-1120-RP-ML
WAL-MART STORES TEXAS LLC	§	
ALAN MARTINDALE	§	
EVA MARIE MOSELEY	§	
CITY OF AUSTIN	§	
AUSTIN POLICE DEPARTMENT	§	
EX-POLICE CHIEF ART ACEVEDO	§	
OFFICER RICHARD W MILLER	§	
OFFICER JOHN DOE I	§	
Defendants.	§	
	§	

PLAINTIFF'S SUPPLEMENTAL OBJECTIONS TO
UNITED STATES MAGISTRATE JUDGE'S REPORT AND RECOMMENDATIONS

TO THE HON. COURT:

Plaintiff, Ravindra Singh, Ph.D. ("Plaintiff" or "Dr. Singh") files this Plaintiff's Supplemental Objections to US Magistrate Judge's Report and Recommendations (R & R) in the above styled and numbered cause and says as follows:

I. INTRODUCTION

Plaintiff timely filed his Objection to Hon. Magistrate Judges Report and Recommendations to Defendant's Motion to Dismiss exercising due diligence. However, after a review of the Austin municipal court record, Plaintiff has discovered that the incident giving rise to this action occurred on November 27, 2015 and not a day earlier on November 26, 2015. City of Austin attorney's office, in support of their case against this Plaintiff, produced a document entitled

Austin Police Department, General Offense Hardcopy (DOC Abusive Language), GO #2015-3310021. This report clearly and unequivocally states that Plaintiff was arrested by defendant Robert W Miller at Walmart and charged with the crime of disorderly conduct (albeit a fabricated charge), on Friday, November 27, 2015, see attached Exhibit – A pages 1-2, irrelevant parts omitted). This fact directly goes to the merits of Defendant's contention that Plaintiff's action filed on Monday, November 27, 2017 was filed one day after the statute of limitations ran on Sunday, November 26, 2015 because the incident giving rise to this action occurred on November 26, 2015. (Magistrate's R&R, Page 1, erroneously noted that the incident occurred on November 25, 2015.). In light of above, Plaintiff requests the Hon. Court to consider this additional fact, and enter an order denying Defendants' motion on the ground of untimeliness.

Plaintiff would not oppose the entry of an Order granting Defendants time for their reply as the Court deems appropriate, or, alternatively, to file a supplemental memorandum that addresses only the matters set forth in this Plaintiff's Supplemental Objection.

II. ARGUMENT

A. Additional Unequivocal Fact Shows that the Action Filed on Monday November 27, 2017 was Timely and Not One day after the Applicable Two Year Statute of Limitations Expired.

Defendants' City of Austin, Austin Police Department, Art Acevedo and Robert W Miller have moved the Court for dismissal of the action against them in its entirety, contending that the action filed on Monday, November 27, 2017 is one day after the two-year statute of limitations expired on Sunday November 26, 2017. They base their contention assuming the misconduct complained of in this action occurred on November 26, 2015 – Plaintiff's original complaint is not clear and consistent in this regard – at two instances it notes that the incident occurred on

November 27, and other instances it erroneously indicates that the incident occurred on November 26, 2015.

From the Austin police report – based on report filed by Defendant Richard W Miller himself whose conduct in large part is the basis of this complaint – it is clear that the misconduct complained of herein, occurred on Friday, November 27, 2015 and not Thursday, November 26, 2015 as Defendants assumed. Therefore, Defendant's contention of untimely filing is moot and on this ground the motion for dismissal should be denied..

In addition, the Court should take notice that the extensive legal analysis included in Hon. Magistrate's R&R makes no reference to the applicable local court rule for computing period. The applicable local rule is CV-6. It mandates that in computing time period Rule CV-6 shall be applied: It says in full:

> **"In computing any time period in any civil case, the provisions of Federal Rule of Civil Procedure 6, as amended, shall be applied."** (Emphasis added).

CV-6 LOC. COURT RULES OF THE US DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS Effective April 26, 2012

Applying these rules it is clear that the action filed on Monday, November 27, 2017 was timely for statute of limitations purposes. Defendants' motion on the ground of untimeliness should be denied.

B. The Court Should Impose Proper Sanctions on Defendants Under Fed. R Civ. P. 11

Federal Rule of Civil Procedure 11 provides that a district court may sanction attorneys or parties who submit pleadings for an improper purpose or that contain frivolous arguments or

arguments that have no evidentiary support. Rule 11(c) authorizes the Court to sanction a party on its own motion for violation of Rule 11 which in relevant part provides:

> **(a) Signature.** Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.
>
> **(b) Representations to the Court.** By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,
>
> 1. It is **not being presented for any improper purpose**, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
> 2. The claims, defenses, and other legal contentions therein are **warranted by existing law or by a nonfrivolous argument** for the extension, modification, or reversal of existing law or the establishment of new law;
> 3. The allegations and other factual contentions **have evidentiary support** or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
> 4. The denials of factual contentions are **warranted on the evidence** or, if specifically so identified, are reasonably based on a lack of information or belief.
>
> **(c) Sanctions.** If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation. Sanctions are initiated:
>
> 1. **By Motion.** A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be

served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

2. **On Court's Initiative.** On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.
3. **(3) Order.** When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

FED. RULE CIV. PROC. 11

Here, it is clear that Defendants moved the Court, raising arguments – i.e. untimeliness and immunity – without evidentiary support for their contention that the action was filed untimely and that defendants were immune from lawsuit. In so contending, Defendants showed lack of due diligence and improper purpose – to take advantage of Plaintiff's self-represented status and litigation by ambush. Even a cursory review of applicable court rules and relevant case laws could have shown that the arguments of untimeliness and dismissal on immunity grounds were not warranted. Clearly sanctions are appropriate here. Defendants, represented by eminently qualified attorney should have known how time-period is to be computed under Federal, and Texas Rules of Civ. Procedures, especially Texas rule against initiation of a civil action on a Sunday.

C. The Court Should Impose Sanctions on Defense Counsel Under Inherent Powers for Failure of Candor to the Court and violation of R 3.3 of Professional Code of Conduct

Rule 3.3 sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding, as here, has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the Court. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the Court to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Here, counsel for defendants knew or should have known that the incident complained of occurred on November 27, 2015 – counsel had access to that information and in exercise of due diligence should have known that despite Plaintiff's suggestion that the misconduct complained of in this action occurred on November 26, 2015 was in error. However, instead of pointing that error to the Court, as required by his oath, he concealed it and knowingly took unfair advantage of it by moving for dismissal, contending the suit was filed one day after the statute expired. As an officer of the court, in so moving the Court, counsel, imminently qualified and experienced otherwise, failed in his duty of candor he owed to the Court, and has therefore earned a sanction because such conduct is an affront to the dignity of the Court and legal system itself.

D. Suit Against Austin Police Department Should not be dismissed to the extent it is running a "Staffing or Staffing-like Firm within the department for the benefit of its officers" not a governmental function for the benefit of citizens of City of Austin.

Police Departments are organized to provide certain protective and law enforcement services for the benefit of the citizens and in that capacity they may not be sued. However, when a police department, runs a temporary staffing service or functions like a temporary staffing service by entering into contract with third party businesses like defendant Walmart solely for the benefit of its officers and not for general public, they should be sued like any business providing temporary staffing services for the misconduct of its officers off-duty. Courts have not been presented with this issue and in this regard it may be a case of first impression for this Court. Accordingly, no case law exists to Plaintiff's knowledge for guidance, However, the problems is a serious one; it breeds corruption in the police force and results in nexus between Police Department here and businesses like Walmart who benefit from such associations. It is unfortunately detrimental to the rights of people – including this Plaintiff. Austin police officers are free to obtain a part-time or temporary job with third party businesses like any other citizen as long as there is no conflict of interest and the bear the burden of their off-duty misconduct should they ever be found to be involved in one – citizens of Austin should not be required to bear the burden of off-duty misconduct by Austin Police Department operating a staffing or staffing-like operation from hidden under traditional police function. Consequently, Austin Police should not be dismissed from this action. There is some confusion in Hon. Magistrate's R&R as to whether plaintiff consented to dismissal of Austin Police Department from the action – he has not, in this regard

III. CONCLUSION

The supplemental facts and objections presented herein, provides further and conclusive evidence that the action filed on Monday, November 27, 2017 is timely, and not one day after two-year statute of limitations expired. Contrary to defendants' contentions, it should not be dismissed on untimeliness ground and the motion should be denied. Defendants are not entitled to qualified immunity because the misconduct complained of in this action occurred outside their official duties and while in employ of defendant Walmart. See Bracken v. Chung, US 9th Cir., No. 14 – 16886 (Filed Aug 23, 2017). Plaintiff has cited proper case law in his earlier response.

John Doe defendant should not be dismissed. Plaintiff should be given an opportunity for limited discovery to identify Doe I and Doe II (not a named defendant) and plaintiff is separately moving the court for an order for that purpose. Plaintiff has separately move the Court for leave to conduct discovery, limited to the purpose of identifying John Doe I and II identities and correcting the date in the complaint.

IV. RELIEF REQUESTED

Plaintiff respectfully requests that the Court grant following relief:

1. Enter an Order to supplement the record to include this Supplemental Objection to magistrate judge's report and recommendations for proper consideration. Alternatively, enter an Order granting plaintiff leave to file a Supplemental Objection to magistrate's report and recommendation.
2. Enter an order deeming the date of the incident to read November 27, 2015 instead of November 26, 2015 in all filings with the court; alternatively

3. Grant Plaintiff, the right to amend the date of the misconduct giving rise to this action to November 27, 2015 from November 26, 2015 as currently indicated in Plaintiff's complaint and his Objections to US Magistrate Judge's Report and Recommendations filed earlier. Alternatively, in view of plaintiff's limited request to correct the date of the event enter an order indicating that the dates are deemed amended without the need for filing an amended complaint at this time – plaintiff reserves his right to seek leave to amend his complaint after discovery.
4. Grant Plaintiff, right to conduct limited discovery to uncover defendant John Doe I and John Doe II (not a defendant) true identities in order for the complaint to be amended to show defendant's true identity – in view of courts general preference to avoid frequent amendment, plaintiff urges the court to fashion a remedy so that amendment of the date and substitution of John Doe I defendant with actual name may be accomplished simultaneously in the First Amended Petition.
5. Grant such other and further relief to which this Court finds the Plaintiff otherwise entitled.

Dated: March 29th, 2019

Respectfully Submitted,

By: _____

RAVINDRA SINGH, PH.D.
Plaintiff, Pro Se

P.O. BOX 10526
Austin, TX 78766
excion_2000@yahoo.com
Tel: (512)293-7646

CERTIFICATE OF SERVICE

I, Ravindra Singh, certify that on this 27th Day of March 2019, I served by mailing a true and correct copy of foregoing document by US Postal service, first class mail, postage prepaid on the following:

Robert Icenhauer-Ramirez

1103 Nueces St.
Austin, TX 78701

Tel: (512) 477-7991
Fax: (512) 477-3580

Brett Payne
WBC Lawfirm
Great Hills Corporate Center
9020 North Capital of Texas Hwy
Bldg. II, Ste. 225
Austin, TX 78759
Tel: (512) 472-9000
Fax: (512) 472-9002

Dated: March 29th, 2019

By: _____

RAVINDRA SINGH, PH.D.
Plaintiff, Pro Se

VERIFICATION OF EXHIBIT

I, Ravindra Singh, Ph.D., under penalty of perjury verify that Exhibit – A is a true and correct copy of Pages 1-2 (one and two) of the Offense and Arrest Report provided by City of Austin, Attorney's Office in support of its prosecution of a false Disorderly Conduct charge against Plaintiff in the City of Austin Municipal Court at Walmart store at issue in this action.

Executed on March 29th. 2019.

Signed: _____

RAVINDRA SINGH, PH.D.
Plaintiff

AUSTIN POLICE DEPARTMENT
GENERAL OFFENSE HARDCOPY
(DOC ABUSIVE LANGUAGE)
GO# 2015-3310021

EXHIBIT — A

AUSTIN POLICE DEPARTMENT

GENERAL OFFENSE HARDCOPY

(2401-0 DOC ABUSIVE LANGUAGE)

GO# 2015-3310021
NOT APPROVED

Related Event(s)

1. CP 2015-3310021

Related Person(s)

1. ARRESTED # 1 - SINGH, RAVINDRA

CASE SPECIFIC INFORMATION

Sex	MALE
Race	WHITE
Date Of Birth	OCT-26-1950
Address	PO BOX 41784
Municipality	AUSTIN
State	TEXAS
ZIP Code	78701
CELL PHONE	(512) 293-7646

PERSON PARTICULARS

Ethnicity	NOT-HISPANIC OR LATINO
Height	5'07
Eye Color	BROWN

MASTER NAME INDEX REFERENCE

Name	SINGH , RAVINDRA
Sex	MALE
Race	WHITE
Date Of Birth	OCT-26-1950
Ethnicity	NOT-HISPANIC OR LATINO
Address	501 E 8TH ST
Municipality	AUSTIN
State	TEXAS
ZIP Code	78701

PHONE NUMBERS

HOME	(512) 293-7646
CELL PHONE	(512) 293-7646

AUSTIN POLICE DEPARTMENT

GENERAL OFFENSE HARDCOPY

(2401-0 DOC ABUSIVE LANGUAGE)

GO# 2015-3310021
NOT APPROVED

General Offense Information

Operational Status	FIELD RELEASE CITATION
Reported On	NOV-27-2015 (FRI.) 13
Occurred On	NOV-27-2015 (FRI.) 13
Report Submitted By	AP3538 - MILLER, RICHARD W
Org Unit	MOTORS SOUTH 2 HWY ENFORCEMENT
Address	12900 N IH 35 SVRD SB
Municipality	AUSTIN
County	TRAVIS COUNTY
	District ED **Beat** 4 **Grid** 193
Premise Code	401
Bias	NONE (NO BIAS)
Family Violence	NO

Offenses (Completed/Attempted)

Offense #	1 2401-0 DOC ABUSIVE LANGUAGE - COMPLETED
Location	STREETS / HWY / ROAD / ALLEY
Suspected Of Using	N/A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RAVINDRA SINGH,	§	
	§	
Plaintiff	§	
	§	
v.	§	**CAUSE NO. 1:17-CV-1120-RP**
	§	
WAL-MART STORES, INC.;	§	
WAL-MART STORES, TEXAS, LLC;	§	
ALAN MARTINDALE; RICHARD W.	§	
MILLER; EVA MARIE MOSELEY;	§	
and the CITY OF AUSTIN,	§	
	§	
Defendants	§	

DEFENDANT RICHARD W. MILLER'S ANSWER AND AFFIRMATIVE DEFENSES AND THE CITY OF AUSTIN'S ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFF'S COMPLAINT

TO THE HONORABLE UNITED STATES DISTRICT JUDGE ROBERT PITMAN:

Defendant Richard W. Miller, (hereafter, "Defendant Miller" or "Miller"), and the City of Austin, (hereafter, "Defendant City of Austin" or "the City") or (hereafter "Defendants" if both are referenced "Defendants,") by and through their attorney of record in the above-referenced case, Robert Icenhauer-Ramirez, respectfully file this Answer and Affirmative Defenses to Plaintiffs' Complaint (Doc.1).

ANSWER

Pursuant to FRCP 8(b), Defendants respond to each of the specific averments in Plaintiff's Complaint as set forth below. To the extent that Defendants do not address a specific averment made by Plaintiff, the Defendants expressly deny that averment.

I. NATURE OF THE CASE

1. Paragraph 1 contains no factual allegations and requires no response. To the extent that Paragraph 1 contains allegations alleging violations of the rights of Plaintiff, Defendants deny.

2. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations contained in paragraph 2 of Plaintiff's Complaint; therefore denied.

II. PARTIES

3. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations contained in paragraph 3 of Plaintiff's Complaint, but based on information and belief, admits.

4. Wal-Mart Stores, Inc. has entered an appearance in this case; no response is necessary.

5. Wal-Mart Stores, Texas, LLC has entered an appearance in this case; no response is necessary.

6. Defendants admit.

7. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations contained in paragraph 7 of Plaintiff's Complaint; therefore, denied.

8. Defendants admit that the City of Austin is a Municipal Corporation organized under the laws of the State of Texas and provides police services; otherwise denied.

9. Defendants admit.

10. Defendant John Doe I has been dismissed from the lawsuit [Doc. 41]; no response is necessary.

11. Defendant Art Acevedo has been dismissed from the lawsuit [Doc. 41]; no response is necessary.

III. JURISDICTION

12. Paragraph 12 contains no factual allegations and requires no response.

13. Paragraph 13 contains no factual allegations and requires no response.

IV. VENUE

14. Defendants admit.

V. FACTUAL BACKGROUND

A. Defendants deny.

15. Defendants admit that plaintiff was at a Walmart store in November 2015; otherwise, Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations contained in paragraph 15 of Plaintiff's Complaint; therefore denied.

16. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations contained in paragraph 16 of Plaintiff's Complaint; therefore denied.

17. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations contained in paragraph 17 of Plaintiff's Complaint; therefore denied.

18. Defendants admit that Officer Richard Miller was present at the Walmart at the time referenced in this paragraph; Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations contained in paragraph 18 of Plaintiff's Complaint; therefore denied.

19. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations contained in paragraph 19 of Plaintiff's Complaint; therefore denied.

20. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations contained in paragraph 20 of Plaintiff's Complaint; therefore denied.

21. Defendants admit that Plaintiff was stopped as he attempted to leave the Walmart; otherwise deny.

22. Defendants admit that Miller was in uniform; otherwise, deny.

23. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations contained in paragraph 23 of Plaintiff's Complaint; therefore denied.

24. Defendants admit that Plaintiff was stopped as he attempted to leave the store; otherwise deny.

B. Denied as phrased.

25. Denied as phrased.

26. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations contained in paragraph 26 of Plaintiff's Complaint; therefore denied.

27. Denied.

28. Denied.

29. Denied.

30. Denied.

31. Denied.

C. Denied.

32. Denied.

33. Denied

34. Denied.

35. Denied.

36. Denied.

37. Denied.

38. Denied as phrased.

39. Denied.

D. Denied.

40. Denied.

41. Denied.

42. Defendants admit that Plaintiff was detained and cited for Disorderly Conduct; otherwise, deny as phrased.

43. Denied.

44. Defendants admit that Plaintiff was cited for Disorderly Conduct; otherwise, denied.

45. Denied.

46. Denied.

47. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations contained in paragraph 47 of Plaintiff's Complaint; therefore denied.

48. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations contained in paragraph 48 of Plaintiff's Complaint; therefore denied.

49. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations contained in paragraph 49 of Plaintiff's Complaint; therefore denied.

50. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations contained in paragraph 50 of Plaintiff's Complaint; therefore denied.

51. Denied as phrased.

52. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations contained in paragraph 52 of Plaintiff's Complaint; therefore denied.

53. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations contained in paragraph 53 of Plaintiff's Complaint; therefore denied.

54. Denied.

55. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations contained in paragraph 55 of Plaintiff's Complaint; therefore denied.

56. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations contained in paragraph 56 of Plaintiff's Complaint; therefore denied.

VI. CAUSES OF ACTION

E. Paragraph E contains to factual allegations and requires no response.

57. Paragraph 57 contains no factual allegations and requires no response.

58. Denied.

59. Denied as phrased, 59(a) through (c).

60. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations contained in paragraph 60 of Plaintiff's Complaint; therefore denied.

61. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations contained in paragraph 61 of Plaintiff's Complaint; therefore denied.

62. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations contained in paragraph 23 of Plaintiff's Complaint; therefore denied.

F. Denied.

63. Paragraph 63 contains no factual allegations and requires no response.

64. Paragraph 64 contains no factual allegations and requires no response.

65. Denied.

66. Denied.

67. Denied.

68. Denied.

69. Denied.

70. Denied.

70 – second paragraph 70. Denied.

71. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations contained in paragraph 71 of Plaintiff's Complaint; therefore denied.

72. Denied.

73. Denied.

74. Denied.

75. Denied.

THIRD CAUSE OF ACTION: VIOLATION OF PROPERTY RIGHTS UNDER U.S.C. 1982

76. Paragraph 76 contains no factual allegations and requires no response.

77. Denied.

78. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations contained in paragraph 78 of Plaintiff's Complaint; therefore denied.

79. Denied as phrased.

80. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations contained in paragraph 80 of Plaintiff's Complaint; therefore denied.

81. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations contained in paragraph 81 of Plaintiff's Complaint; therefore denied.

FOURTH CAUSE OF ACTION

82. Paragraph 82 contains no factual allegations and requires no response.

83. Paragraph 83 contains no factual allegations and requires no response.

84. Paragraph 84 contains no factual allegations and requires no response.

85. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations contained in paragraph 85 of Plaintiff's Complaint; therefore denied.

FIFTH CAUSE OF ACTION

86. Paragraph 86 contains no factual allegations and requires no response.

87. Denied.

88. Denied.

SIXTH CAUSE OF ACTION

87 second paragraph 87. Paragraph 87 under the Sixth Cause of Action contains no factual allegations and requires no response.

88 second paragraph 88. Denied.

89. Denied.

VII. JOINT AND SEVERAL LIABILITY

90. Denied.

VIII. DAMAGES

91. Paragraph 91 contains no factual allegations and requires no response.

92. Denied.

IX. ATTORNEY'S FEE AND COSTS

93. Denied.

X. RELIEF REQUESTED

94. Paragraph 94 contains no factual allegations and requires no response.

95. Denied.

XI. JURY DEMAND

96. Paragraph 96 contains no factual allegations and requires no response; however, Defendants also request a jury trial.

XII. PRAYER FOR RELIEF

97. Defendants deny that the Plaintiff is entitled to any of the relief sought in paragraph 97.

DEFENDANT MILLER'S AFFIRMATIVE DEFENSES

98. QUALIFIED IMMUNITY DEFENSE. At all times mentioned in the Plaintiff's Complaint, Defendant Miller was employed by the City of Austin as a police officer for the Austin Police Department and acting in his respective official capacity. His actions were done in good faith, without malice, and were performed with the reasonable belief that those actions were authorized by and in accord with existing law and authority.

99. Defendant Miller asserts the affirmative defense of qualified immunity in that the Defendant was, at the time of his actions, a City of Austin police officer entitled to qualified immunity from Plaintiff's claims.

DEFENDANT CITY OF AUSTIN'S AFFIRMATIVE DEFENSES

100. The City of Austin asserts the affirmative defense of governmental immunity both from suit and liability.

101. The City of Austin denies that it can be liable under 42 U.S.C. § 1983 for exemplary damages.

102. The City of Austin, as a governmental entity, asserts the protections and limitations of the Texas Tort Claims Act. TEX. CIV. PRAC. & REM. CODE § 101.001, et seq.

WHEREFORE, PREMISES CONSIDERED, Defendants pray that Plaintiff, take nothing by his suit, and for attorneys' fees, costs, and any such other and further relief, general and specific, at law and in equity, to which this Defendant may show himself to be justly entitled.

RESPECTFULLY SUBMITTED,

ROBERT ICENHAUER-RAMIREZ
Law Offices of Robert Icenhauer-Ramirez
State Bar No. 10382945
1103 Nueces Street
Austin, Texas 78701
(512) 477-7991
(512) 477-3580 [Fax]
rirlawyer@gmail.com
LINDA ICENHAUER-RAMIREZ
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State Bar No. 10382944
ljir@aol.com
KATHERINE ICENHAUER-RAMIREZ
Law Offices of Katherine Icenhauer-Ramirez
State Bar No. 24084558
kicenhauer@gmail.com
ATTORNEYS FOR DEFENDANTS RICHARD MILLER AND THE CITY OF AUSTIN

CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2019, the foregoing was sent, in compliance with the Federal Rules of Civil Procedure, via certified mail, return receipt requested, to Ravindra Singh, Ph.D., P. O. Box 10526, Austin, Texas 78766 and to all other counsel of record through the federal ECF system.

ROBERT ICENHAUER-RAMIREZ

FILED
19 APR 17 PM 3:16
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY DMY

FEDERAL DISTRICT COURT
FOR WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RAVINDRA SINGH, PH.D.	§	
	§	
Plaintiff,	§	Cause No.: 1:17-CV-1120-RP-ML
V.	§	JURY TRIAL DEMANDED
	§	
WAL-MART STORES INC,	§	
WAL-MART STORES TEXAS LLC,	§	
ALAN MARTINDALE	§	
EVA MARIE MOSELEY; and	§	
CITY OF AUSTIN,	§	
AUSTIN POLICE DEPARTMENT,	§	
EX-POLICE CHIEF ART ACEVEDO,	§	
OFFICER RICHARD W MILLER (AP3538)	§	
JOHN DOE 1,	§	
	§	
Defendants	§	

PLAINTIFF'S MOTION FOR RECONSIDERATION IN-PART OF THE ORDER ISSUED ON MARCH 25, 2019 DISMISSING ART ACEVEDO AND JOHN DOE I

Plaintiff, Ravindra Singh, Ph.D. files this motion for Hon. Court's reconsideration of parts of the order dismissing defendants Art Acevedo and John Doe I. Plaintiff does not seek reconsideration of the entire order but only parts of it, and for this motion says as follows:

I. INTRODUCTION

This Hon. Court issued an order on March 25, 2019 (plaintiff picked up a copy from the court clerk on or around April 9, 2019 because of mail was returned by USPS) in which Court dismissed defendant John Doe I with prejudice finding the any amendment to the complaint to rename John Doe I would be futile. The Court also dismissed Chief Acevedo with prejudice in his official capacity. Plaintiff is asking the Hon. Court to reconsider those parts of the order. He is not seeking reconsideration of the entire order.

II.

A. John Doe I Should not be dismissed from this case because equity compels it.

The Hon Court dismissed John Doe I from this case on futility ground based on statute of limitations. The Court relied primarily on *Jacobsen v. Osborne,* 133 F.3d 315, 320 (5th Cir.1998). Judge Lane recommended dismissal of John Doe under Amin-Akbari v. City of Austin, 52 F Supp. 3d 830 (W.D. Tex. 2014). Plaintiff asks that the Hon. Court reconsider the dismissal in light of 5th Cir. holding in *Green v. Doe,* 260 Fed.Appx. 717, 719 (5th Cir.2007) in which the Court distinguished Jacobsen from Green, and reversed Dist. Courts dismissal of Green's case. The Court noted that among other things in Jacobsen Plaintiff had the assistance of discovery but failed to take advantage of that power and depose witnesses in a timely manner that would have allowed him to identify the 'John Doe' and amend his complaint. For that reason, Jacobsen was not entitled to the benefit of equity.

Plaintiff Green sued a John Doe correctional officer. The district court denied Green's request to conduct discovery to identify the officer before the limitations period had run. The district court then later dismissed Green's case when, after discovering the name of the officer, he amended his complaint accordingly. The district court found that the claims did not relate back under Federal Rule of Civil Procedure 15(c). Green appealed that decision and the Fifth Cir. reversed, holding that the District Court erred in denying Green the opportunity to conduct discovery, and the statute of limitations was equitably tolled. The Fifth Circuit found there was no need for the claim to relate back because the statute of limitations had been equitably tolled. The Fifth Cir. has generally, held that federal law requires that litigants diligently pursue their actions before equitable tolling becomes available. Plaintiff submits that he has shown that he has shown sufficient diligence to compel reversal of John Doe I from this case. As explained in his motion for leave for discovery

and amendment for the limited purpose of replacing John Doe with is real name, currently pending before the Court, Plaintiff pursued ascertainment of defendant John Doe true identity persistently over two year period of time: (a) asked John Doe I to provide his identity at the time of the incident on November 26-27, 2015 but was refused; (b) made multiple phone calls to both City of Austin and Walmart but was stone-walled; (c) asked the Municipal judge in a related case but was denied on the ground of irrelevancy as to that case and (d) raised the issue in the relief section of his reply to defendants' motion for dismissal. Plaintiff also raised the issue when he filed his objection to Judge Lane's R & R and finally filed a motion for leave to conduct discovery and amend complaint to substitute true name for John Doe I. Plaintiff submits that he did everything to ascertain John Doe I's true identity he could be reasonably expected to but he was unsuccessful. He was unsuccessful because of defendant City of Austin and Walmart's conduct. Plaintiff further submits that he has met the standard of due diligence required of him under the Fifth Circuit rules to be entitled to the benefit of equity.

Furthermore, against possible argument that plaintiff should have filed this action earlier and allowed time for discovery to take place within the two-year statute of limitation, plaintiff submits that: (a) plaintiff filed his suit toward the end of the limitations period, at least in part due to his pursuit of discovery of John Doe I's true identity and (b) given the blatant stone-walling by City of Austin and Walmart it would have not been reasonable to expect that City of Austin and Walmart would comply absent Court's intervention or formal discovery. Formal discovery was only possible after a final ruling on defendant's motion (due to immunity ground) which happened on March 25, 2019 – some sixteen months after the case was filed. That may a result of docket overloading – a quite justifiable reason. But would have required plaintiff to file his case sixteen months earlier reducing statute of limitations to barely eight months instead of two years provide

by the legislature. Clearly, Texas legislature did not intend that result when they provided two years-time within which to bring a lawsuit, as here. From the aforementioned, it is clear that Hon. Court should not dismiss defendant John Doe I from this suit and order defendants City of Austin and Wal-Mart to disclose John Doe I's true identity.

B. Defendant Chief Art Acevedo Should not be Dismissed

The federal courts have uniformly acknowledged that that supervisory officials can be held liable for their subordinates' constitutional misdeeds in cases where they did not actively participate in, or even witness, the constitutional violation:

> "A supervisor may be "personally involved" in the violation of a constitutional right by his supervisees if: "(1) the supervisory official, after learning of the violation, failed to remedy the wrong;(2) the supervisory official created a policy or custom under which unconstitutional practices occurred or allowed such policy or custom to continue; or (3) the supervisory official was ...

HUAMAN EX REL. JM v. Sirois, 2015

However, after conducting exhaustive search regarding supervisory liability for Section 1983 claims – or lack of it – for misconduct committed by police officers off-duty while in employ of private businesses, plaintiff has been unable to find any case law from the 5th Circuit or US Supreme Court. for guidance. At the same time, the problem is pervasive and widespread. Therefore, it requires Court's attention.

Hon. Court dismissed Defendant Art Acevedo in his official capacity from this suit on Defendant's representation that the suit in his official capacity was suit a suit against the City of Austin – another named defendant. This assertion does not address Chief Acevedo's role in his extra-official role as Chief of a Staffing Enterprise as a supplier of Personnel and Power of Badge when he allows his officers to work for third party private businesses like Walmart. For this reason, Plaintiff

requests that the Hon. Court either reconsider his order dismissing Chief Acevedo or in the alternative issue a finding of fact and conclusion of law to facilitate review by higher Courts.

III. CONCLUSIONS

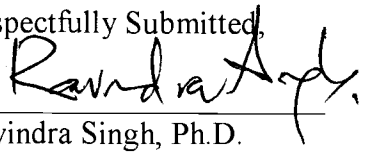
From the foregoing it is evident that Defendant JOHN Doe I should not be dismissed and case against him should be permitted to proceed. It is not as clear about Chief Acevedo. The Court may be correct in dismissing him from the lawsuit in his official capacity – when his action or omissions are limited to the scope of his official duties. Plaintiff believes, that running a temporary staffing firm to supply personnel and power of Austin Police department badge in the shadow of Austin Police Department is a legitimate function of Chief of Police. To that extent he is not entitled to dismissal of the case against him. Since, higher courts have not been presented with this issue, plaintiff is unable to brief the Hon. Court on this issue. However, in its discretion The Hon. Court may order both parties to file a brief on this matter.

IV. RELIEF REQUESTED

Wherefore, for the reason explained, the Hon. Court should enter an order reversing dismissal of Defendants John Doe I and Chief Acevedo. Issue a finding of fact and conclusion of law as to dismissal of Chief Acevedo as to his capacity as Chief of Staffing Enterprise and grant further relief in law or equity plaintiff may be entitled.

Dated: April 17, 2019

Respectfully Submitted,



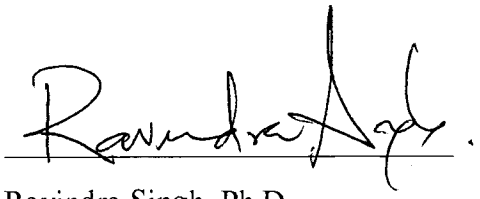
Ravindra Singh, Ph.D.
Plaintiff, Pro Se
P.O. BOX 10526
Austin, TX 78766
Phone: (512)293-7646
Email: excion_2000@yahoo.com

CERTIFICATE OF SERVICE

I certify that on April 17, 2019 I will serve a true and correct copy of above mentioned plaintiff's request to reconsider on the attorneys of record by USPS first class postage paid on the following:

Robert Icenhauser-Ramirez
1103 Nueces St.
Austin, TX

Brett Payne
WBC Lawfirm
Great Hills Corporate Center
9020 North Capital of Texas Hwy
Bldg. II Ste. 225
Austin, TX 78759



Ravindra Singh, Ph.D.

FILED
17 MAY 17 PM 3:58
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY
DEPUTY

FEDERAL DISTRICT COURT
FOR WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RAVINDRA SINGH, PH.D.	§	
Plaintiff,	§	
	§	Cause No.: 1:17-CV-1120-RP-ML
V.	§	JURY TRIAL DEMANDED
	§	
WAL-MART STORES INC,	§	
WAL-MART STORES TEXAS LLC,	§	
ALAN MARTINDALE	§	
EVA MARIE MOSELEY; and	§	
CITY OF AUSTIN,	§	
AUSTIN POLICE DEPARTMENT,	§	
EX-POLICE CHIEF ART ACEVEDO,	§	
OFFICER RICHARD W MILLER (AP3538)	§	
JOHN DOE 1,	§	
Defendants.	§	

PLAINTIFF'S NOTICE OF APPEAL

Notice is hereby given that Plaintiff, RAVINDRA SINGH, PH.D. in the above-named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from an Order DENYING Plaintiff's Motion for Reconsideration Regarding Defendants Art Acevedo and John Doe I, entered by Judge Robert Pitman in this action on the 17th day of April, 2019.

Dated: April 17, 2019

Ravindra Singh

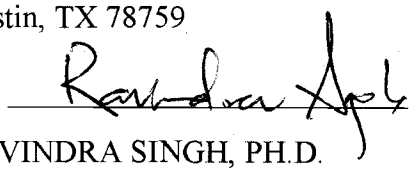
RAVINDRA SINGH, PH.D.
Plaintiff, Pro Se
P.O. BOX 10526
Austin, TX 78766
PH: (512)293-7646
Email: excion_2000@yahoo.com

CERTIFICATE OF SERVICE

I, Ravindra Singh, certify that on this 17th Day of May, 2019, I served by mailing a true and correct copy of foregoing NOTICE OF APPEAL by US Postal service, first class mail, postage prepaid on the following:

Robert Icenhauer-Ramirez
1103 Nueces St.
Austin, TX 78701

Brett Payne
WBC Lawfirm
Great Hills Corp. Center
9020 North Capital of Texas Hwy
Bldg. II. Ste. 225
Austin, TX 78759

By: 

RAVINDRA SINGH, PH.D.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

June 12, 2019

Ms. Jeannette Clack
Western District of Texas, Austin
United States District Court
501 W. 5th Street
Austin, TX 78701-0000

No. 19-50448 Ravindra Singh v. Wal-Mart Stores, Incorporated, et al
USDC No. 1:17-CV-1120

Dear Ms. Clack,

Enclosed is a copy of the judgment issued as the mandate.

Sincerely,

LYLE W. CAYCE, Clerk

Melissa Mattingly

By: _____
Melissa V. Mattingly, Deputy Clerk
504-310-7719

cc w/encl:
Mr. Robert E. Icenhauer-Ramirez
Mr. Ravindra Singh

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-50448

RAVINDRA SINGH, Ph.D.,

Plaintiff - Appellant

v.

EX-POLICE CHIEF ART ACEVEDO, in his official capacity; OFFICER JOHN DOE I, in his individual and official capacity,

Defendants - Appellees

A True Copy
Certified order issued Jun 12, 2019

Tyle W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit

Appeals from the United States District Court
for the Western District of Texas

Before DAVIS, HIGGINSON, and ENGELHARDT, Circuit Judges.

PER CURIAM:

This court must examine the basis of its jurisdiction, on its own motion if necessary. *Hill v. City of Seven Points*, 230 F.3d 167, 169 (5th Cir. 2000). In this civil rights case, the district court's order issued March 25, 2019 dismissed multiple defendants, but left claims pending against other defendants in the case. The plaintiff filed a motion to reconsider on April 17, 2019 which the district court denied the same day. The plaintiff then filed a notice of appeal from that order.

We have jurisdiction over appeals from final decisions of the district courts. 28 U.S.C. § 1291. Where an action involves multiple parties or claims,

as in this case, an order dismissing some of the claims or defendants is final for appellate purposes only if the district court has made an express determination that there is no just reason for delay and an express direction for the entry of judgment, *see* FED. R. CIV. P. 54(b), or certifies the case for immediate appeal pursuant to 28 U.S.C. § 1292(b). Here, the district court dismissed some defendants but left the claims against the remaining defendants pending. It did not enter the certification required by either Rule 54(b) or § 1292(b). Thus, the notice of appeal filed before all claims and all parties were disposed of is premature. We are without jurisdiction over this appeal and it must be dismissed. *See Borne v. A&P Boat Rentals No. 4, Inc.*, 755 F.2d 1131, 1133 (5th Cir. 1985). Accordingly, the appeal is DISMISSED for want of jurisdiction.

RECEIVED
MAR 24 2020
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WESTERN DISTRICT OF TEXAS
BY _____ DEPUTY CLERK

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MAR 24 2020
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WESTERN DISTRICT OF TEXAS
BY _____ DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

FOR WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

RAVINDRA SINGH, PH.D.	§
Plaintiff	§
	§
V.	§CAUSE NO.1:2017-cv-01120-RP
	§
WAL-MART STORES INC,	§
WAL-MART STORES OF TEXAS L.L.C.	§
ALAN MARTINDALE,	§
EVA MARIE MOSELEY,	§
CITY OF AUSTIN,	§
AUSTIN POLICE DEPARTMENT,	§
EX-CHIEF OF POLICE ART ACEVEDO,	§
RICHARD W MILLER,	§
JOHN DOE I,	§
Defendants.	§

PLAINTIFF'S MOTION TO VACATE IN PART COURTS' ORDER ISSUED ON MARCH TWENTY-FOUR TWO THOUSAND AND NINETEEN (2/4/2019)AS TO: (A) DISIMMSAL OF DEFENDANT MILLER UNDER TEXAS TRORT CLAIM S ACT; (B) DISMISSAL OF EX-CHIEF ACEVEDO (C) DISMISSAL OF PLAINTIFF'S CLAIM FOR DEFAMATION UNDER TEXAS STATE LAW AND DISMISSAL OF JOHN DOE I

Plaintiff, Ravindra Singh, Ph.D. respectfully moves this Hon. Court for entry of an order vacating in part Court's Order issued on March 24, 2019 under FED. R. CIV. P 60(b) and or

applicable Local Rule in the above styled and numbered cause and for his motion states as follows:

I. INTRODUCTION

On March 24, 2019 the Court issued which it Order granting Defendants City of Austin, Austin Police Department, Ex-Chief Art Acevedo, Richard W Miller and John Doe I ("City Defendants" or "Defendants") their motion Fed. R. CIV. P. 12(b)(6) in part, and denying in part. The Court dismissed claims against APD, Acevedo and John Doe I with prejudice in entirety. The Court dismissed IIED claim against Defendant Miller with prejudice under Texas Tort Claims Act., Sec. 101.106 The Court also dismissed Plaintiff's defamation claim against each defendant with prejudice to the extent it arises solely under Texas law. See Order pp. 10-11. As set forth more fully in this motion to vacate, Defendants were dismissed under the Texas Tort Claims Act erroneously and Plaintiff took a timely appeal. Furthermore, as set forth herein, the Court dismissed Plaintiff's defamation under Texas law by not characterizing it in a manner Plaintiff intended when it said that "[d]famation claim arises out of: (a) Miller and Mosely publicly accusing him of shoplifting, which occurred on November 26, 2015". In addition, Plaintiff's defamation claim is based on Acevedo publishing: (a) Chief's Monthly Citywide [crime] Report for the month of November, 2015 sometime in 2016 in a Microsoft Excel Spreadsheet on its website and (b) further publishing the arrest record with full personal identifying information including full name, age, gender etc based on Defendant Miller Millers report that was false, untrue and libelous to state and national criminal history repositories for the purpose of making it available to state and national investigative agencies such as FBI for law enforcement purposes (for example FBI's N-DEx System) as well non-law enforcement

purposes such as in making decision for employment, education, housing and licensing among other. Courts have held that the single publication rule does apply to this type publication and needs to be corrected. The accepts data in either a "flat file" format or a XML file format. These records are not accessible as mere reports posted on a newspaper website or opinions expressed on Yelp or Glassdoor or ripoffreport.com

Courts have held that a district Court has the authority to correct its judgement and order without remand from Court of Appeals. Accordingly Plaintiff requests the Hon. Court to grant this motion to vacate and reinstate the defendants to their position as named Defendant. However, Court of Appeals found the appeal premature and dismissed it.

II. FACTS

Plaintiff brought this action against the above named defendants resulting from violations of his federally protected rights as well as violation of rights under Texas state law at the hands of Defendant Richard W Miller (Miller) when Miller was working as a security guard inside a Wal-Mart store in his off-duty capacity on the Day of Thanksgiving, November 26, and on early morning of November 27, 2015 when Plaintiff went to shop defendant Wal-Mart "Early Black Friday Sales Event" that marks the beginning of traditional annual holiday shopping season. Plaintiff commenced this action on November 27, 2017. Defendants moved the court in March 2018, for dismissal the action in its entirety claiming untimeliness and immunities. Hon. Pittman issued an Order on March 24, 2019 granting defendants' motion in part and denying in part. Specifically, the Court dismissed defendant Richard W. Miller under Texas Tort Claims Act

based solely on defendant Miller's representations. As set fort more fully in this motion to vacate, Miller's represents were false, intentional and in utter disregard of facts known to him. Stated differently, defendant Miller procured his dismissal by perpetrating fraud on the Court and Plaintiff. The Court dismissed part of defamation claim as untimely based on so called single publication rule under Glassdoor, Inc,, et. Al. v. Andra Group, LP. Tex. Sup. Ct. No. 17-0463, Opinion Delivered January 25, 2019. The Court dismissed Acevedo. Claim against John Doe I was dismissed for lack of service due to inability to uncover his identity and without opportunity afforded for his discovery. Plaintiff took a timely appeal. On June 12, 2019 Court Appeals dismissed the appeal for want of jurisdiction.

In September 2019, Plaintiff contacted defendant Miller following Texas Supreme Court opinion in Garza v. Harrison, No. 17-0724, opinion issued May 25th , 2019 and notified him via e-mail that Defendant Miller's contention that he was entitled to dismissal under the Texas Tort Claim Act was not warranted by the facts of this case or any case law; and that it was contrary to the fact in Defendant Miller's knowledge. In an effort of judicial economy, Plaintiff sought defendant Miller's consent to vacate his dismissal. Defendant Miller's attorney Ramirez notified Plaintiff that he was not going to consent, and instead replied that the Court agreed with him in granting Miller's dismissal. Plaintiff reminded Mr Ramirez that the Court had, in granting expressly relied on his misrepresentations; representations that were false, misleading and deceptive because they were unsupported by facts and case law. Mr. Ramirez attempted to back track and disown the contentions made - in fact they were contrary to the official report submitted to APD by Defendant Miller himself. This resulted in a stalemate. Eventually, in February 2020, Plaintiff served notice on defendant Miller that should either explain the basis for

his contention or consent to vacate his dismissal failing which Plaintiff will move the Court for a show cause order. Plaintiff filed a motion for show cause order on March 18, 2020

III. ARGUMENT

A: STANARD FOR VACATING DISTRICT COURT'S ORDER

Fed. Rules of Civ. P. 60(b) provides that a district may correct its order for a variety of reasons. In pertinent part it provides:

"the court may relieve a party ... from a final judgment ... (1)mistake, inadvertence, surprise, or excusable neglect;(3)fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; or (6) [for] any other reason that justifies relief." The Fifth Circuit has recognized that "Rule 60(b) is to be construed liberally to do substantial justice." Frew v. Janek, 780 F.3d 320, 327 (5th Cir. 2015) (quoting Johnson Waste Materials v. Marshall, 611 F.2d 593, 600 (5th Cir. 1980)). Furthermore, "[t]he rule is broadly phrased and many of the itemized grounds are overlapping, freeing Courts to do justice in hard cases where the circumstances generally measure up to one or more of the itemized grounds." Id.

II. ARGUMENTS

A.Defendant Miller's Dismissal under Texas Civil Practice & Remedies Code § 101.106 was in error and should be vacated because under the facts of this case Texas Civil Practice & Remedies Code § 101.106 is inapplicable.

The Court dismissed defendant Miller solely on the basis of Defendants' contention that Miller was entitled to dismissal under said section of Texas Tort Claims Act.

5. "Based on Singh's agreement, Judge Lane recommended dismissing all of Singh's claims against APD. (R. & R., Dkt. 37, at 4). Meanwhile, because Singh asserts his IIED claim against both the City and its employee (Miller), and the City has moved for dismissal of the claim against Miller under Texas Civil Practice &

Remedies Code § 101.106, (Mot. Dismiss, Dkt. 18, at 5), the IIED claim against Miller must be dismissed. Tex. Civ. Prac. & Rem. Code § 101.106(e)."

Opinion Footenote 5

Texas Supreme Court in a recent opinion issued on May 24, 2019 in the case of Garza v. Harrison, Tex. S. Ct., No. 17-0724,, explained in a case involving an off-duty police officer in employ of third party, as here, that an off-duty police officer may instantly become on-duty if a crime is committed in his view or his presence. In the instant case, it is uncontroverted that Plaintiff committed any crime when Miller failed to recover any stolen merchandise after search of Plaintiff's person - only reason for detaining and searching Plaintiff. It is clear the Defendant Miller Defendant Miller could not assert Texas Rort Claims Act because during the incident he was off-duty and employ of Wal-Mart as a security guard and saw Plaintiff commit no crime.

Furthermore, to this day, despite Plaintiff's multiple requests to his attorney Mr. Ramirez, Miller has failed produce a statement under penalty of perjury that he was not: (a) off-duty (b) in employ of Wal-Mart as a security guard'. He has failed to show any evidence that he observed Plaintiff commit the crime for which he was detained – i.e. shoplifting. In addition he has failed to provide with particularity any basis for initiating Plaintiff's stop, detention and body-search. He has provide the any photo and price list for the item purportedly shoplifted – despite Plaintiff's multiple requests. In fact Mr. Ramirez has responded by saying he does not have any particularized information about purported theft. Defendant Miller's dismissal should be vacated.

(a) Dismissal of Defendant Richard W. Miller should be vacated because as a matter of law Miller was not acting within the course and scope of his employment with City of Austin and Texas Civil Practice & Remedies Code § 101.106 is inapplicable because he failed to recover any stolen merchandise after subjecting Plaintiff to body-search in plain public view where accusation of theft was the sole basis for initially stopping and detaining Plaintiff.

(b) Dismissal of Defendant Miller should be vacated because he procured his dismissal by perpetrating fraud on the Court and Plaintiff when he knowingly, intentionally and purposely made false, misleading and deceptive representation to the Court through his attorney Mr. Ramirez that his acts in detaining and searching Plaintiff's person but failing to recover any stolen merchandise after the search were acts taken in the course and scope of his employment as a police officer with City of Austin, and not as a security guard in employ of Wal-Mart in off-duty status from Austin Police Department because he stepped back or became a police officer entitling him to dismissal under Texas Tort Claims Act Sec. 101.106 or a fact issue exists justifying vacation of his dismissal at this stage of the case, as to whether Miller was acting as a police officer or as a security guard.

Plaintiff's in his Complaint asserted that Defendant Miller's was working as a security guard, and was not there as a result of any call for service because of any report of theft by Plaintiff. Defendants have not provided any conclusive proof that Plaintiff's assertions were false. At this stage the Court is obligated to treat Plaintiff's allegations as true and make all reasonable inferences in his favor. By dismissing Miller on Rule 12(b)(6) motion under these circumstances, the court clearly erred and the dismissal should be vacated. Under Fed. R. Civ. P. (60) the Court has authority to do so. It need not wait for a remand from the Court of Appeals.

(B) Claim of defamation under Texas Law should be vacated because the dismissal is based erroneous characterization of facts alleged or attempted to be alleged.

Here the Court dismissed Defendant Miller on the following basis in footnote six(6).

> 6. Like Singh's IIED claim, his defamation claim against Miller must also be dismissed because of the City's motion. Tex. Civ. Prac. & Rem. Code § 101.106(e).

As explained above, Defendant Miller is not entitled to dismissal under the Texas Tort Claims Act. His dismissal from defamation claim should be vacated.

C. Dismissal of Acevedo should be vacated for the following reason:

(1) Mr Acevedo posted false information on APD website as a Microsoft Excel sheet stating that Plaintiff committed a crime and he was arrested on was November 27, 2015 at Wal-Mart location. Mr. Acevedo disclosed Plaintiff's identifying information including full name, age, height, weight and gender among other. This information was false and it caused Plaintiff injury in his reputation.

(2) Mr Acevedo subsequently published this false information to national and state criminal history repositories for the purpose of making the arrest record available for law enforcement as well as non-law enforcement purposes with full knowledge of the consequences of doing so:

"The Austin Police Department has successfully transitioned to the National Incident-Based Reporting System (NIBRS) under the Uniform Crime Reporting (UCR) program, as a part of a nationwide implementation by the FBI. Previously, the department followed the traditional UCR Summary Report System, which provided a count of crimes based on eight offense categories. Under UCR reporting rules, only the most serious offense on the crime incident is reported to the FBI. The NIBRS reporting system reports all crime types, not just the highest offense. The transition to NIBRS will improve the overall quality of crime data collected by APD and show a much more holistic view of crime in the City. Our Chief' s Monthly Report (CMR) counts crime by UCR Summary Report rules. We are in the process of developing a new report that provides crime counts according to NIBRS which will make our reporting more encompassing. The adoption of this new reporting methodology will make comparisons to previous CMR reports incomparable. The Chief' s Monthly Report will not be posted until we create a new report. Thank you for your patience. For more information on UCR and the nationwide implementation to NIBRS, see the FBI' s link provided below. FBI-UCR Information:

https://www.fbi.gov/services/cjis/ucr/nibrs "

Extracted from Austin Police Website: Last Visited March 20/2020 3:41 PM

Such consequences include enhanced scrutiny and even loss of housing, employment, educational, lisensiung and career, and credit opportunities among others.

(3) The aforementioned information continues to be available to law enforcement and non-law enforcement purposes to this day.

Court dismissed defamation claim under Texas state law on the basis of single publication rule citing Glassdoor v. Andra Group. A closer examination of that opinion and cases relied on, suggests that single publication rule is not appropriate here. This case does not a mass media despite association with Internet. One can expect no more than a handful people accessing this information on the web. This case is more close **Swoford,** where a Tennesse Court of Appeals refused to apply single publication rule stating that such communications, as here, are not mass media communication and thus single publication rule is in applicable. Even 5th Circuit in Nationwide Biweekly v Belo Corp. observed that Swofford was a different case than a case of mass media publication as did Texas Supreme Court in Glassdoor. The instant case is clearly more akin to Swofford than either Glassdoor, or Nationwide. Therefore, Plaintiff's defamtion case under Texas law is not time-barred and should be reinstated.

IV. CONCLUSION

From the foregoing it is clear that dismissal of Defendant Miller was an error and procured by fraud and it should be vacated and Defendant Miller should be reinstated as a full named Defendant.. It is also clear that dismissal of defamation claim against Miller and all other defendant was also an error and should reinstated.

V. RELIEF REQUESTED.

WHEREFORE, Plaintiff requests that the Hon. Court grant Plaintiff following relief:

1. Vacate Defendant Miller's dismissal under Texas Tort Claims act and reinstate him fully as named defendant.

2. Vacate dismissal of defamation claim under Texas law.

3. Vacate dismissal of Acevedo.

4. Grant further relief that Plaintiff shows himself to be entitled.

Dated: March 23, 2010

Respectfully submitted,

Ravindra Singh

By: Ravindra Singh Ph.D.
Plaintiff, Pro Se
P. O. BOX 10526

Austin, TX 78766
512 293 7646

VERIFICATION

I, Ravindra Singh, certify that I have read the foregoing motion, and under penalty of perjury certify that it is correct to the best of my knowledge and belief.

Ravindra Singh

RAVINDRA SINGH, PH.D.

PLAINTIFF

CERTIFICATE OF SERVICE

I, Certify that I served a true and correct copy of foregoing motion to vacate on Defendants attorneys of record at their address on file with the Court Clerk.

Ramiro Ramirez

Attorney Ramirez
VIA USPS
CERTIFIED
Ref. Rcpt Req
7019 - 1640 - 0000 - 5502 - 2299.
Attn. Payne
USPS 1st class

FedEx Express

ORIGIN ID:BBMA (000) 000-0000
R. SINGH, PHD
PO BOX 10526
AUSTIN, TX 78766
UNITED STATES US

SHIP DATE: 23MAR20
ACTWGT: 0.10 LB
CAD: 6998410/SSF02102

BILL CREDIT CARD

TO US DISTRICT CLERKS OFFICE
501 WEST FITH ST
STE 1100
AUSTIN TX 78701
(512) 916-5806
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DEPT:

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TRK# 0201 3913 3153 4079

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SCANNED BY CSO
MAR 24 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RAVINDRA SINGH,	§	
	§	
Plaintiff	§	
	§	
vs.	§	**NO. 1:17-CV-1120-RP-ML**
	§	
WAL-MART STORES, INC.;	§	
WAL-MART STORES, LLC;	§	
ALAN MARTINDALE	§	
EVA MARIE MOSELEY; CITY OF	§	
AUSTIN; AND RICHARD W. MILLER	§	
	§	
Defendants	§	

DEFENDANT RICHARD W. MILLER AND THE CITY OF AUSTIN'S
RESPONSE TO PLAINTIFF'S DOCUMENTS 68 AND 70

Defendants City of Austin and Richard W. Miller respectfully submit this Response to Plaintiff's Motion to Show Cause, etc., (Doc. 68) and Motion to Vacate, etc., (Doc. 70).

I. INTRODUCTION

Ravindra Singh (hereafter "Plaintiff" or "Singh") filed this lawsuit against the City of Austin and Richard W. Miller on November 27, 2017. (Doc. 1). The complaint asserts generalized claims for civil rights violations under 42 U.S.C. §§ 1981, 1983, 1985(b)(3) and rights under the United States Constitution and laws of the State of Texas. He also brings suit against Wal-Mart Stores, Inc., Wal-Mart Stores Texas LLC, Alan Martindale, and Eva Marie Moseley. All Defendants have answered.

II. FACTS

Two years ago, on March 15, 2018, Defendants Miller and the City of Austin, hereafter "City Defendants," filed a Motion to Dismiss based upon, amongst other reasons, that Plaintiff was barred by Tex. Civ. Prac. & Rem. Code 101.106(f). (Doc. 18). On April 6, 2018, the

Honorable Mark Lane submitted the Report and Recommendation of the United States Magistrate Judge. (Doc. 20). On April 20, 2018, Plaintiff requested leave to file a delayed motion in opposition to the recommendations of the magistrate, claiming that the email sent from counsel for City Defendants was sent to his junk mail. (Doc. 26). On April 26, 2018, the Court granted the Plaintiff's motion. (Doc. 31). On May 10, 2018, Plaintiff filed his Response in Opposition to Defendants City of Austin, Austin Police Department, Art Acevedo and Richard W. Miller's Motion to Dismiss. (Doc. 33). On May 15, 2018, Defendants City of Austin and Richard Miller filed their reply to Plaintiff's response. (Doc. 35). On January 3, 2019, the Honorable Mark Lane submitted his Report and Recommendation of the United States Magistrate Judge. (Doc. 37). Plaintiff filed his objections on January 18, 2019. (Doc. 40). On March 25, 2019, the Court issued an Order dismissing Singh's claims against APD with prejudice; dismissing claims against Art Acevedo with prejudice; dismissing claims against John Doe I with prejudice; dismissing Plaintiff's defamation claim against each of the City Defendants to the extent it arises solely under Texas law; and, dismissing Plaintiff's IIED claim against Miller with prejudice. (Doc. 41).

On March 29, 2019, Plaintiff filed his Supplemental Objections to United States Magistrate Judge's Report and Recommendations. (Doc. 43). Despite the Court having dismissed John Doe I from the lawsuit with prejudice (Doc 41), Plaintiff filed a motion for leave to conduct discovery for the limited purpose of discovering the identity of John Doe I. (Doc. 44). On April 4, 2019, City Defendants filed their answer. (Doc. 47). On April 4, 2019, City Defendants filed their response to the Plaintiff's documents 43, 44 and 45. (Doc. 48). On April 17, 2019, Plaintiff moved for reconsideration of the Court order dismissing Art Acevedo and John Doe I. (Doc. 54). On April 17, 2019, the Court entered a docket entry denying Plaintiff's request found in Doc. 54. (Docket entry 55).

On May 17, 2019, Plaintiff filed a notice of interlocutory appeal to the United States Court of Appeals for the Fifth Circuit challenging the dismissal of Art Acevedo and John Doe I. (Doc. 57). On June 12, 2019, the United States Court of Appeals for the Fifth Circuit issued a judgment as a mandate dismissing Plaintiff's appeal. (Doc. 58).

On October 29, 2019, the United States Magistrate Judge denied Plaintiff's request to conduct discovery for the limited purpose of discovering the identities of John Doe I and John Doe II requested by Plaintiff in Document 44. (Doc. 60).

In the two motions at bar, Plaintiff again seeks to revive a claim long disposed of by the Court in the Court's Order dated March 25, 2019.[1] Plaintiff claims that the undersigned "procured his dismissal by perpetrating fraud on the Court and the Plaintiff when he knowingly, intentionally and purposely misled the Court by making false representation to the Court." (Doc. 68, page 1). Consequently, Plaintiff seeks to sanction the undersigned. The allegation is not true.

In his motion to vacate the Court's Order of March 25, 2019 (Doc. 70), Plaintiff yet again seeks to revisit the dismissal of certain claims against Miller, reinstate Art Acevedo as a Defendant and reinstate John Doe I as a Defendant.

Plaintiff has also requested that the Court sanction the undersigned. Plaintiff has claimed on several occasions that the undersigned sent him an email from which he claims to quote the undersigned as saying, "Go ahead. File a sanction motion against me." (Doc. 68, page 4 and Doc. 69, page 7). The undersigned requests that Plaintiff produce a copy of the email that contains that quotation and attach it as an exhibit.

[1] Plaintiff incorrectly dates the Court's Order in his Motion as March 24, 2019.

III. Argument

Plaintiff refuses to be bound by the rulings of the Court or by the rules of the federal court system. The law which resulted in the Court rulings in 2018 and 2019 mandates that the rulings stand. Plaintiff should be barred from raising the same issues again.

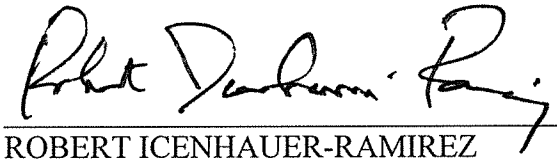
Singh's abuse of the judicial process is expensive for parties. City Defendants would argue that the Court has indulged the Plaintiff long enough. If the City Defendants must respond to each one of the Plaintiff's renewed requests and the requests are denied, the City Defendants would ask the Court to order the Plaintiff to reimburse the parties for their expenses.

IV. CONCLUSION

Plaintiff Singh's motions contained in Documents 68 and 70 should be denied. Defendants City of Austin and Richard W. Miller pray that the Court deny Plaintiff's motion and for all other relief to which these Defendants may show themselves to be justly entitled.

Dated: March 26, 2020.

RESPECTFULLY SUBMITTED,



ROBERT ICENHAUER-RAMIREZ
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(512) 477-7991
(512) 477-3580 [Fax]
rirlawyer@gmail.com
ATTORNEY FOR DEFENDANTS
CITY OF AUSTIN & RICHARD W. MILLER

CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2020, the foregoing was sent, via first class mail, to:

Ravindra Singh
P. O. Box 10526
Austin, Texas 78766

And, via EM/ECF to:

Mr. Brett H. Payne
WALTERS, BALIDO & CRAIN, L.L.P.
Great Hills Corporate Center
9020 N. Capital of Texas Hwy
Building II, Ste 225
Austin, Texas 78759
Attorney for Wal-Mart Defendants

ROBERT ICENHAUER-RAMIREZ

FILED

JUN 29 2020

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY _____
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RAVINDRA SINGH, PH.D. Plaintiff,	§	
v.	§	CAUSE NO.1:2017-cv-01120-RP
WAL-MART STORES INC, WAL-MART STORES OF TEXAS L.L.C. ALAN MARTINDALE, EVA MARIE MOSELEY, CITY OF AUSTIN, AUSTIN POLICE DEPARTMENT, EX-CHIEF OF POLICE ART ACEVEDO, RICHARD W MILLER, JOHN DOE I, Defendants.	§	

PLANTIFF'S MOTION TO RECONSIDER HON. JUDGE MARK LANE'S ORDER DATED JULY 10, 2020 DENYING PLAINTIFF'S MOTION TO VACATE DISMISSAL OF DEFENDANTS RICHARD W. MILLER, ART ACEVEDO AND JOHN DOE I AND DEFAMATION CLAIM UNDER TEXAS LAW BASED ON THE SINGLE PUBLICATION RULE

TO HON. ROBERT PITMAN:

Plaintiff Ravindra Singh, Ph.D. moves the Hon. Court to reconsider Hon. Judge Mark Lane's Order issued June 10, 2020 denying Plaintiff's motion to vacate dismissal of Defendants Richard W Miller, Art Acevedo and John DOE I, and vacation of Plaintiff's claim for defamation under Texas law. Plaintiff does not ask the Court to reconsider the denial of a show-cause order against attorney Ramirez. Plaintiff, However, reserves his rights to bring a separate motion against attorney Ramirez for his conduct at a future date. For this motion to reconsider Plaintiff asserts as follows:

///

I. INTRODUCTION

This is a civil rights action brought under US Constitution and law as well as claims for injury under Texas state law. This action arose from conduct of Defendant Richard Miller, working off-duty and within the course and scope of his duties as a security guard for his private employer Wal-Mart, and not under the course and scope of his employment as police officer with the City of Austin on Thanksgiving Day on November 26-27, 2015 when Defendant Miller, without justification, accused Plaintiff of shoplifting; stopped him, and prevented him from leaving the store; conducted a body-search in plain public view and failed to recover any shoplifted merchandise because at no time did Plaintiff commit or attempted to commit or help anyone shoplift – Plaintiff was as innocent as it could be. Defendant Miller's conduct on that Thanksgiving day is central to this action. He was dismissed under Texas Tort Claims Act (TTCA), based expressly and solely on his representation without factual support and authority. It was an error because TTCA may shield a government officer for acts done in "course and scope of his governmental employment" and does not shield off-duty conduct while in employ of private employer. With respect to off-duty conduct of a police officer, there is an exception to that rule because a police officer has a duty to stop crime – make arrest without warrant – when he observes a suspect commit a crime. When arrest is not supported by probable cause, as in the instant case, immunity of TTCA is not available. For that reason, dismissal of Defendant Miller is an error and the Court is obligated to correct it for which it has authority under FRCP 60(b).

Similarly, the dismissal of Plaintiff's claim for defamation under Texas state law based on the single publication rule of accrual was in error because this case is governed by the multiple or continuous publication rule because it does not involve mass-communication for which single

publication rule is designed. Courts that have considered the issue have consistently held that single publication rule applies to mass communication only.

Defendant Acevedo should not be dismissed because he is directly and personally involved in publishing defamatory information to the Federal (FBI) and state criminal record databanks for purpose of republication. A review of General Order 949 would show direct involvement of Acevedo in running APD's, off-duty law enforcement related employment (LERE) policy and practice that resulted in violation of Plaintiff's constitutionally guarantee right and injuries. Defendant Acevedo should have an opportunity to explain himself. It was an error to dismiss him and it should be reversed.

And lastly, John DOE I's dismissal should be vacated and plaintiff allowed to substitute his real name. Under U.S. Supreme court teaching in *Krupski v. Costa Crociere*, (2010) amendment, if allowed will relate back and not be futile.

II FACTS

Plaintiff brought this action against the above named defendants resulting from violations of his federally protected rights as well as violation of rights under Texas state law at the hands of Defendant Richard W Miller (Miller) when Miller was working as a security guard inside a Wal-Mart store in his off-duty capacity on the Day of Thanksgiving, November 26, and on early morning of November 27, 2015 when Plaintiff went to shop defendant Wal-Mart "Early Black Friday Sales Event" that marks the beginning of traditional annual holiday shopping season. Plaintiff commenced this action on November 27, 2017. Defendants moved the court in March 2018, for dismissal the action in its entirety claiming untimeliness and immunities. Hon. Pitman issued an Order on March 25, 2019 granting defendants' motion in part and denying in part.

Specifically, the Court dismissed defendant Richard W. Miller under Texas Tort Claims Act based solely on defendant Miller's representations. As set forth more fully in this motion to vacate, Miller's represents were false, intentional and in utter disregard of facts known to him. Stated differently, defendant Miller procured his dismissal by perpetrating fraud on the Court and Plaintiff. The Court dismissed part of defamation claim as untimely based on so called single publication rule under *Glassdoor, Inc., et. Al. v. Andra Group, LP. Tex. Sup. Ct. No. 17-0463,* Opinion Delivered January 25, 2019. The Court dismissed Acevedo. Claim against John Doe I was dismissed for lack of service due to inability to uncover his identity and without opportunity afforded for his discovery. Plaintiff took a timely appeal. On June 12, 2019 Court Appeals dismissed the appeal for want of jurisdiction.

In September 2019, Plaintiff contacted defendant Miller following Texas Supreme Court opinion in *Garza v. Harrison, No. 17-0724*, opinion issued May 25th, 2019 and notified him via e-mail that Defendant Miller's contention that he was entitled to dismissal under the Texas Tort Claim Act was not warranted by the facts of this case or any case law; and that it was contrary to the fact in Defendant Miller's knowledge. In an effort of judicial economy, Plaintiff sought defendant Miller's consent to vacate his dismissal. Defendant Miller's attorney Ramirez notified Plaintiff that he was not going to consent, and instead replied that the Court agreed with him in granting Miller's dismissal. Plaintiff reminded Mr. Ramirez that the Court had, in granting expressly relied on his misrepresentations; representations that were false, misleading and deceptive because they were unsupported by facts and case law. Mr. Ramirez attempted to back track and disown the contentions he made that Miller-stepped back into his role as a police officer that the Court relied on in dismissing Defendant Miller.

Plaintiff filed a motion for show cause order on March 18, 2020. On March 22, 2020 Plaintiff filed a motion to vacate dismissal of Defendant Miller, Acevedo, John DOE I and dismissal of claim for defamation under Texas law. Judge Mark Lane denied Plaintiff's motion on June 10, 1020. Plaintiff received a copy of the signed order via USPS on June 15, 2020. Plaintiff timely files this motion for reconsideration of Judge Lanes order except as to his show-cause order against attorney Ramirez. Plaintiff reserves his rights to bring a separate motion at a future date.

III. ARGUMENT

A: STANARD FOR VACATING DISTRICT COURT'S ORDER

Fed. Rules of Civ. P. 60(b) provides that a district may correct its order for a variety of reasons. In pertinent part it provides:

> "the court may relieve a party ... from a final judgment ... (1) mistake, inadvertence, surprise, or excusable neglect;(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; or (6) [for] any other reason that justifies relief." The Fifth Circuit has recognized that "Rule 60(b) is to be construed liberally to do substantial justice." Frew v. Janek, 780 F.3d 320, 327 (5th Cir. 2015) (quoting Johnson Waste Materials v. Marshall, 611 F.2d 593, 600 (5th Cir. 1980)). Furthermore, "[t] he rule is broadly phrased and many of the itemized grounds are overlapping, freeing Courts to do justice in hard cases where the circumstances generally measure up to one or more of the itemized grounds." Id.

B: DEFENDANT MILLER WAS ERRONEOUSLY DISMISSED UNDER THE TEXAS TORT CLAIMS ACT BECAUSE THE TORT CLAIMS ACT RELIED UPON IS INAPPLICABLE TO THE FACTS OF THIS CASE AND HIS DISMISSAL MUST BE VACATED.

A brief description of TTCA is provided for context:

"The Tort Claims Act waives governmental and sovereign immunity of these entities and determines the liability of governmental entities related to personal injury and property damage

caused by the negligence of a government employee or defect in government property." Before the enactment of the Tort Claims Act, Texas courts held that a municipality could not be held liable for property damages, personal injury, or death arising from a "governmental function" performed by the municipality. However, municipalities were liable for damages, injuries, or death arising from a "proprietary function," where the courts treated municipalities in the same manner that a private entity would be treated and subjected them to the same risks as private entities. Dilley v. City of Houston, 222 S.W.2d 992 (Tex. 1949). See also Tooke v. City of Mexia, 197 S.W.3d 325, 343 (Tex. 2006).

Generally, **governmental functions were those which the municipality was required by state law to perform in the interest of the public. Proprietary functions were those which the municipality chose to perform** when it believed it would be in the best interest of its inhabitants, or **when it sought to compete with private enterprise**. Among the operations held to be governmental functions were: garbage collection and disposal, sanitary sewer operations, police, fire suppression, and traffic regulation. Activities held to be proprietary functions included: construction of sanitary sewer lines; construction, repair, and maintenance of streets; and construction and operation of storm sewer facilities.

As part of the tort reform laws in 1987, the Legislature sought to define governmental functions and thereby limit the liability of municipalities. Some functions previously held to be proprietary in court decisions were changed to governmental functions by the Legislature. By Texas constitution now legislature, not the courts may decide which of those functions of a municipality that are to be considered governmental and those that are proprietary.

By the adoption of Tex. Civ. Practices and Remedies Code Section 101.0215, the Texas Legislature defined which functions were governmental and which were proprietary. Subsection

(a) provides that a municipality is liable for damages arising from its governmental functions, which are those functions that are enjoined on a municipality by law and are given to it by the state as part of the state's sovereignty, to be exercised by the municipality in the public interest, including, but not limited to:

(1) police and fire protection and control;

(2) health and sanitation services;

(3) street construction and design;

(4) bridge construction and maintenance and street maintenance;

(5) cemeteries and cemetery care;

(6) garbage and solid waste removal, collection, and disposal;

(7) establishment and maintenance of jails;

(8) hospitals;

(9) sanitary and storm sewers;

(10) airports;

(1 1) waterworks;

(1 2) repair garages;

(1 3) parks and zoos;

(1 4) museums;

(1 5) libraries and library maintenance;

(1 6) civic, convention centers, or coliseums;

(1 7) community, neighborhood, or senior citizen centers;

(1 8) operation of emergency ambulance service;

(1 9) dams and reservoirs;

(2 0) warning signals;

(2 1) regulation of traffic;

(2 2) transportation systems;

(23) recreational facilities, including but not limited to swimming pools, beaches, and marinas;

(24) vehicle and motor driven equipment maintenance;

(25) parking facilities;

(26) tax collections;

(27) firework displays;

(28) building codes and inspection;

(29) zoning, planning, and plat approval;

(30) engineering functions;

(31) maintenance of traffic signals, signs, and hazards;

(32) water and sewer service;

(33) animal control;

(34) community development or urban renewal activities undertaken by municipalities and authorized under Chapters 373 and 374, Local Government Code;

(35) latchkey programs conducted exclusively on a school campus under an interlocal agreement with the school district in which the school campus is located; and

(36) enforcement of land use restrictions under Subchapter A, Chapter 230, Local Government Code.

Tex. Civ. Prac. & Rem. Code Ann. §101.0215(a) (Vernon 2005 & Supp. 2006).

Section 101.0215 provides that the Tort Claims Act does not apply to the liability of a municipality for damages arising from its proprietary functions, which are those functions that a municipality may, in its discretion, perform in the interest of the inhabitants of the municipality, including, but not limited to:

(1) the operation and maintenance of a public utility;

(2) amusements owned and operated by the municipality; and

(3) any activity that is abnormally dangerous or ultra-hazardous.

§101.0215(b).

Further, Section 101.0215(c) provides that the proprietary functions of a municipality do not include the thirty-six functions listed in Section 101.0215(a). **For proprietary functions, a political subdivision has the same liability as a private person.** Although the vast majority of actions by a governmental unit will be governmental functions, court of appeals decisions have held the following actions of a city to be proprietary.

The election of remedies provision is not applicable to instant inquiry because the relevant inquiry is the capacity in which Defendant Miller was acting immediately prior to his decision to seize and search Plaintiff suspecting Plaintiff was involved in theft of Wal-Mart merchandise by concealing it on his as he worked his off-duty job as a security guard for Wal-Mart. If Miller observed Plaintiff in engaged in alleged shoplifting crime – shoplifting by concealment, under Texas Penal Code 14.01(b), which concerns authority of a peace officer in Texas (either active duty or off-duty) to make arrest without warrant for crimes committed his view or presence.

> Art. 14.01. **OFFENSE WITHIN VIEW.** (a) A peace officer or any other person, may, without a warrant, arrest an offender when the offense is committed in his presence or within his view, if the offense is one classed as a felony or as an offense against the public peace.
>
> (b) **A peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view.(Emphasis added)**
>
> Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722. Amended by Acts 1967, 60th Leg., p. 1735, ch. 659, Sec. 8, eff. Aug. 28, 1967.

Miller would, in the eye of law, step-back or become active duty instantaneously, and thereby would be entitled to protection of TTCA irrespective of whether the plaintiff pleads sec.

101.106(e) as Plaintiff here or 101.106(f) *Garza in Garza v. Harrison* as he represented to the Court in his reply to Plaintiff's response in opposition to Defendants' Rule 12(b) (6) motion.

Facts of this case are not in dispute. Plaintiff alleged that Miller was working as security guard as off-duty Austin police officer, not active duty. Defendant Miller has never, signed a statement, despite Plaintiff's request that he was there in response to a call for service and was not in employ of Wal-Mart. Clearly, under the facts and applicable, Texas penal code 14.1(b) Millers acts in seizing and searching Plaintiff on suspicion of theft but failing to recover any stolen merchandise is fatal to his suggestion and claim that he is entitled to dismissal under TTCA. The Hon. Court made an error in granting dismissal. Judge Lane made an error in not conducting proper inquiry and supporting the erroneous dismissal. The Court has authority under The Court has authority both Under R 60(b)(1) and (6), and indeed an obligation to correct it's error, and vacate Miller's dismissal and provide him with an opportunity to explain himself.

https://statutes.capitol.texas.gov/Docs/CP/htm/CP.101.htm

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C: THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF'S DEFAMATION COMPLAINT UNDER TEXAS LAW BECAUSE DEFAMATORY STATEMENTS MADE THROUGH THE FEDERAL BUREAU OF INVESTIGATION DATABANK ARE PROPERLY SUBJECT TO THE 'MULTIPLE PUBLICATION RULE,' TRIGGERING A NEW STATUTE OF LIMITATIONS WITH EACH SUBSEQUENT PUBLICATION AUTHORIZED, INTENDED, OR FORESEEN BY DEFENDANT ACEVEDO.

It is the general rule that each communication of the same defamatory matter, whether to a new person or to the same person, is a separate and distinct publication for which a separate cause of action arises. *Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984).* Single publication rule is an exception to the general rule. Texas adopted the "single publication rule" in Holloway v. Butler when Dr. Holloway sued attorney Butler for defamation and malicious prosecution

related to a story Published in Texas Monthly magazine implicating Dr. Holloway of medical malpractice. When the malpractice suit against Dr. Holloway was dismissed, he brought a suit against attorney Butler. The trial court dismissed the suit on statute of limitations ground he appealed. The court adopted the single publication rule explaining:

> "No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as anyone edition or issue of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture. Recovery in any action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions.
>
> We hold that publication is complete on the last day of the mass distribution of copies of the printed matter. It is that day when the publisher, editors and authors have done all they can to relinquish all right of control, title and interest in the printed matter. Publication, however, does not encompass retail sales of individual copies or sales of back issues of the printed matter
>
> Furthermore, we are not limiting a plaintiff to a single cause of action in the event the same information appears in separate printings of the same publication or in different publications. **The single publication rule applies strictly to multiple copies of a libelous article published as part of a single printing.**." (emphasis added.)

Holloway v. Butler, 662 S.W.2d 688, 690 (Tex. App. 1983)

In the instant case after the slanderous publication at the time of the incident, Miller reported to APD Plaintiff' arrest. Defendant Acevedo, next published alleged reason for arrest that was untrue and false in MS Excel worksheet format and not as an article or story. Next Acevedo published the defamatory information concerning Plaintiff arrest to several criminal record databanks including those kept by the Federal Bureau of Investigation (FBI), Texas Department of Public Safety (Tex. DPS) and Travis County Serif 's office pur the purpose of making them continuously available for law enforcement purposes and to private entities who have permission to do. The databank access as restricted and not open to general public. There is no expectation of mass publication but there is expectation that it will be accessed by law enforcement and other

qualified persons and entity pur purposes of determining suitability for employment, housing, education and personal and social relationship. This is not expected to be a mass dissemination of defamatory information. As such, the case is more close to *Swafford v. Memphis Individual Practice Association, No. 02A01-9612- CV-00311, 1998 WL 281935 (Tenn. Ct. App. 1998)* not close *to Glassdoor, Inc v Andra Group* the Court relied on dismissing claim under Texas law.

Both, US Fifth Circuit (Nationewide-BiWeekly) and Texas Supreme Court in Glassdoor, have observed the difference that where mass-publication is absent, there is no justification for applying single publication rule. US Fifth circuit seems to have treated *Swafford* in its observation as a case of continuous publication and instant case should be given the same treatment because both involve publication to and from databanks with restricted access.

Additionally, Austin police officers by training, about arrest record. Plaintiff, since that incident, has been asked: "Have you ever been arrested?" and Plaintiff has to respond in affirmative. At least two of these stops occurred within a year of the November 26-27, 2015 incident. Most recent incident occurred in February of 2020. The case is in very preliminary stage. Court is obligated to give benefit of doubt and resolve any doubts in Plaintiff's favor and not in favor of defendants as it currently stands. The dismissal should be reversed.

D: DEFENDANT ACEVEDO'S DISMISSAL SHOULD BE VACATED BECAUSE HE IS DIRECTLY INVOLVED IN PUBLISHING DEFAMATORY INFORMATION ABOUT PLAINTIFF TO CRIMINAL RECORD DATABANKS MAINTAINED BY THE FBI, TEXAS DEPARTMENT OF PUBLIC SAFETY AND TRAVIS COUNTY & HIS ACTS OR OMISSION AS FINAL DECISION MAKER WITH RESPECT TO APD'S OFF-DUTY LAW ENFORECEMENT RELATED POLICIES AND PRACTICES AND WITH RESPECT TO LAW ENFORCEMENT ACTIVITIES OF CITY OF AUSTI

It is well settle under US Fifth circuit precedence that in the state of Texas that chief of police for the municipality is the final decision maker with respect to its law enforcement

function. As such, Acevedo is vicariously liable for misconduct of Defendant Miller because it the City of Austin its, Charter has assigned the job of running what has been variously dubbed as a "Badge for Hire" business. Any police officer with one year on the job can go out and seek work for City of Austin's police officer's in off-duty from the City, assign the job to another officer and collect fee for officers off-duty services. The cost of the service is extremely high in relation to the regular wages paid by the City. Businesses hire off-duty Austin police officer , as Miller in the instant case, primarily for their ability to exercises police powers in their behalf and not necessarily because of their skills as a security guard for specific type of business. Once the officer retire – meaning he can not exercise any police powers, businesses like Wal-Mart become disinterested, or do not pay the same high wages claim is proven. Supplying off-duty contractors is not a governmental function of a City. It is nowhere listed as governmental function. City of Austin Charter does not authorize it. Neither does Texas legislature. Despite that, the practice is fully entrenched within City of Austin and its police department. Even the police union can enter into contract with businesses like Wal-Mart of employment of off-duty officers. When these officers engage in off-duty conduct the City protects itself by getting a waiver from the off-duty employer and neglects entirely the victim of the misconduct. Not only it neglects the interest of the victim-citizens, the city works with off-duty employer to do everything in the books to make it difficult if not impossible for the victim-citizen, as Plaintiff in the instant case vindicate his rights in a Court of law. The question is whose behalf the city is working in? Why it should not be treated as an independent business for the LERE of off-duty officers. It was Defendant Acevedo's job under his own APD General Order 948 to run the program which is available on the web at: https://www.documentcloud.org/documents/2661319-Austin-Police-Department-Policy-Manual-2015.html Last Accessed: 6/25/2010 TIME 3:41 PM. It is interesting to note that City of Austin has assigned its policy making function as to control of Austin

Police Department to a for profit company LEXIPOL – [their logo appears on each and every page of Austin Police Department Policy Manual] and has voluntary taken up a LERE Badge for Hire business to compete with other private business prov. ding similar services. A review of General Order 949 would direct involvement of Acevedo through his LERE policy and practice that resulted in violation of Plaintiff's constitutionally guarantee right and injuries. It was an error and should be reversed.

D. DISMISSAL OF DEFENDANT JOHN DOE I SHOULD BE VACATED BECAUSE IT WOULD NOT BE FUTILE UNDR U.S. SUPREME COURT DECISION IN KRUPSKI V. COSTA CROCIERE S p. A (2010)

The Court dismissed JOHN DOE on the grounds of futility. It reasoned that because the two-year statute had expired the amended complaint would not relate back under US 5th circuit precedence. FRCP 16 governs amendment of complaint and requirements for relating back. It provides:

> (c) RELATION BACK OF AMENDMENTS.
>
> (1) *When an Amendment Relates Back.* An amendment to a pleading relates back to the date of the original pleading when:
>
> (A) the law that provides the applicable statute of limitations allows relation back;
>
> (B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading; or
>
> (C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:
>
> (I) received such notice of the action that it will not be prejudiced in defending on the merits; and
>
> (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

Here requirements were fully satisfied for all condition for Plaintiff's complaint to related back: First, John Doe had notice, both actual and constructive. Second, he would not be prejudiced in defending the action because most likely would have been represented by same attorney Mr. Ramirez. Third, is intricately related to other defendants who have been properly served – i.e. City of Austin, Miller, Acevedo. Fourth, the complaint against him arose out of the same incident.

An extensive review of case law indicates that many District Courts including some in 5th Circuit feel constraint despite Krupski decision. Granted case law as to this claim is not as clear as those others explained above. However, it is entirely unfair for Plaintiff, that a lawbreaking police officer can hide behind the Court Plaintiff might what constitutes a "mistake" technicality of Rule 15. The police officer' are fully aware of the problem lack of identity presents to a victim in seeking vindication of his rights. It is no surprise, why Austin police never provide victim their business cards, even though APD policy requires it. Data on this is eye opening. Out of some twenty-one request for business card, Plaintiff still has not found one office that would oblige. It is revealing. It is revealing about the policies and customs entrenched in Austin Police Department. Court should give Plaintiff an opportunity to Plaintiff to ask JOHN DOE about it, but more important give JOHN DOE II to explain himself. The Court should reverse John Doe I dismissal.

IV. CONCLUSION

From the foregoing it is clear that dismissal of Defendant Miller under TTCA was an error because there is no support for the dismissal in fact or law – both statutory and decisional. Similarly, defamation claim under Texas law on the grounds of single publication rule of accrual

is an error because single publication rules is in applicable Instant claim under the general multiple/continuous accrual rule, and timely on facts, and is not barred on statute of limitations.

Dismissal of Defendant Acevedo should be vacated because his direct involvement in Plaintiffs claim for defamation. Additionally, dismissal of Acevedo should the vacated because of his acts and omissions in with respect APD off-duty employment practices. The Off-duty employment of Austin police officers is not authorized by City's Charter or Texas legislature even though it is a long standing practice. It adversely impacts Austin Citizens in general and Plaintiff in particular. Plaintiff has been forced to execute equivalent to two separate law suit, and City's tax-payers have been forced to bear the cost while Wal-Mart, World's richest corporation is in fact transferring the cost of litigation on to the City. As such City's claim for freedom from vicarious liability is impermissible. In this regard, it should be noted that City of Austin has abandoned its duty to make rules as to Austin Police Department and farmed it out to out-of-state to a for profit LEXIPOL while voluntarily taken up its "Badge for Hire" program which can be described as a proprietary. Distinction between governmental function for which immunity exists and non-government or proprietary function for which there is no liability protection for municipalities. Yet City of Austin claims blanket liability protection, even for acts done in performance of non-governmental functions. If proven, City of Austin should be held vicariously liable for all conducts violating Plaintiff's rights secured under US constitution and law.

V. RELIEF REQUESTED

WHEREFOE, Plaintiff Ravindra Singh, Ph.D. request that the Hon. Court grant him relief as follows:

(1) Vacate dismissal of Defendant Richard W. Miller under Texas Tort Claims Act, and reinstate him as a defendant.

(2) Vacate dismissal of Defendant Acevedo in his official capacity and reinstate him as a defendant.

(3) Vacate dismissal of defamation claim under the single publication rule.

(4) Vacate dismissal of JOHN DOE I and grant discovery of his true identity.

(5) Do the needful to address issues raised by Plaintiff with respect to City of Austin Policy and Practices.

(6) Grant further relief that Plaintiff may show himself to be entitled.

Dated: June 25, 2020

By: Ravindra Singh, Ph.D.
RAVINDRA SINGH, PH.D.
Plaintiff, Pro Se

P. O. BOX 10526
Austin, Texas, 78766
(512)293-7646
excion_2000@yahoo.com

CERTIFICATE OF SERVICE

I, Ravindra Singh, Ph.D. certify that on this day of 25th Day of June, 2020, I served a true and correct copy of foregoing document via USPS on the following:

Robert Icenhauer-Ramirez
1103 Nueces St.
Austin, TX 78701

Brett Payne
WB&C
GREAT HILLS CORP. CTR.
9020 CAPITAL OF TEXAS HWY.
BLDG II STE 225
AUSTIN, TX, 78759

Ravindra Singh, Ph.D.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RAVINDRA SINGH, PH.D, Plaintiff, v. WAL-MART STORES, INC., et al., Defendants.	§ § § § § § § § §	1:17-cv-1120-RP

ORDER

Before the Court is Plaintiff Ravindra Singh's ("Singh") appeal of United States Magistrate Judge Mark Lane's Order, (Dkt. 75). (Appeal, Dkt. 78).[1] In his order, Judge Lane (1) denied Singh's motion to show cause, (Dkt. 68), (2) denied Singh's motion to vacate Judge Lane's order, (Dkt. 70), (3) granted Singh's motion to withdraw deemed admissions, (Dkt. 69), (4) ordered that Singh file amended admissions on or before June 25, 2020, and (5) granted in part and denied in part Defendant Richard W. Miller and the City of Austin's motion to compel and motion to sanction, (Dkt. 62). (Order, Dkt. 75). Singh timely filed his appeal on June 29, 2020.[2] (Appeal, Dkt. 78). In his appeal, Singh states that he only challenges Judge Lane's order as to Singh's motion to vacate. (*Id.* at 1). Defendants did not file a response.

A district judge may reconsider any pretrial matter determined by a magistrate judge where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law. 28 U.S.C. § 636(b)(1)(A). District courts apply a "clearly erroneous" standard when reviewing a magistrate judge's ruling under the referral authority of that statute. *Castillo v. Frank*, 70 F.3d 382, 385 (5th Cir.

[1] Singh captions his filing as a "Motion to Reconsider." (Dkt. 78, at 1). Because the Court is reviewing Judge Lane's order, (Dkt. 75), the Court construes Singh's motion as an appeal of Judge Lane's order.
[2] The Court considers Singh's appeal to be timely filed under Federal Rule of Civil Procedure 6(d) or, alternatively, if it was untimely, this Court accepts the late filing. (*See* Second Amended Emergency Order in Light of COVID-19 Pandemic, Dkt. 76).

1995). The clearly erroneous or contrary to law standard of review is "highly deferential" and requires the court to affirm the decision of the magistrate judge unless, based on the entire evidence, the court reaches "a definite and firm conviction that a mistake has been committed." *Gomez v. Ford Motor Co.*, No. 5:15-CV-866-DAE, 2017 WL 5201797, at *2 (W.D. Tex. Apr. 27, 2017) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). The clearly erroneous standard "does not entitle the court to reverse or reconsider the order simply because it would or could decide the matter differently." *Id.* (citing *Guzman v. Hacienda Records & Recording Studio, Inc.*, 808 F.3d 1031, 1036 (5th Cir. 2015)).

Because Singh timely appealed a portion of Judge Lane's order, the Court reviews that portion of Judge Lane's order for clear error or for conclusions that are contrary to law. Having done so, the Court denies Singh's appeal. Upon its own review, this Court finds that Judge Lane's order was not clearly erroneous or contrary to law.

Accordingly, the Court **AFFIRMS** the order denying Singh's motion to vacate, (Dkts. 75), and **DENIES** Singh's appeal, (Dkt. 78).

SIGNED on July 7, 2020.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

RECEIVED
JUL 15 2020
CLERK, U.S. DISTRICT CLERK
WESTERN DISTRICT OF TEXAS
BY DEPUTY

FILED
JUL 15 2020
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RAVINDRA SINGH, PH.D. §
Plaintiff §
§
v. § CAUSE NO.1:2017-cv-01120-RP
§
WAL-MART STORES INC, §
WAL-MART STORES OF TEXAS L.L.C. §
ALAN MARTINDALE, §
EVA MARIE MOSELEY, §
CITY OF AUSTIN, §
AUSTIN POLICE DEPARTMENT, §
EX-CHIEF OF POLICE ART ACEVEDO, §
RICHARD W MILLER, §
JOHN DOE I, §
Defendants. §

PLAINTIFF'S SUPPEENTAL RESPONSE IN SUPPORT OF MOTION TO RECONSIDER JUDGE MARK LANE'S JUNE 10TH, 2020 ORDER DENYING PLAINTIFFS MOTION TO VACATE:(A) DFENDANTS RICHARD W. MILLER, ART ACEVEDO AND JOHN DOE I; AND (B) VACATE PLAINTIFF'S CLAIM FOR DEFAMATION AND IIED UNDR TEXAS LAW (RE:DEFENDANTS' DOCUMENT 68 &70)

TO HON. ROBERT PITMAN:

Plaintiff Ravindra Singh, Ph.D. files this supplemental response in support of motion to reconsider Judge Mark Lane's order issued June 10, 2020 denying Plaintiff's motion to vacate the dismissal of Defendants Richard W. Miller, Art Acevedo and John DOE I in the above styled and numbered cause pursuant to Dist. Court's order issued March 25, 2018. Plaintiff, also files his supplemental response in support of his opposition to denial of his request to vacate the dismissal of his claim for defamation under Texas law. Plaintiff does not seek reconsideration of denial of his request for show-cause order against Attorney Ramirez but reserves his right to bring that matter before the court in a separate motion and asserts as follows:

I. INTRODUCTION

Plaintiff filed a motion under Fed. R. Civ. P. 60(b) on or about March 22, 2020 seeking reversal of dismissals of Defendants' Richard W. Miller, Art Acevedo and John DOE I along with dismissal of his claim for defamation under Texas law pursuant to the District Court's Order issued on March 25, 2019. Plaintiff asserted that these dismissals were in error. More specifically, Plaintiff asserted that Defendant Miller's dismissal under the Texas Tort Claims Act (TTCA) Tex. Civ. Prac. & Rem. Code §101.106(e) was not only in error, it was also fraudulently procured. Plaintiff attached a "Verification" to his motion seeking vacation of the dismissals. Hon. Mark Lane issued an order on June 10, 2020 denying Plaintiff's aforementioned requests in its entirety under the FRCP 60(b)(1) and (3). He did not consider Plaintiff's request under FRCP 60(b)(6) – the catch all clause. Plaintiff believed he should have, especially after denying it under FRCP 60(b) (1) and (3).

As set forth more fully in this supplement, Judge Lane's order is in error and unwarranted for several reasons. It is long settled law in Texas that Police officers are governmental agents that derive all their powers under the law through their employing governmental entity. *Blackwell v. Harris County*, 909 S.W. 2d 135, 138 (Tex. App. Houston 14th Dist. 1995 Writ denied). Texas law recognizes certain circumstances where an off-duty police officer is authorized to make arrest without warrant. Texas Code of Criminal Procedure provides that:

> "A peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view".

Tex. Code of Crim. Proc. Art 14.01(b)

That is true even when a police officer like Defendant Miller in the instant case is off-duty from his City of Austin Police Department governmental job, and while he is working for a private

private employer such as Wal-Mart in the instant case. As the Texas Supreme Court noted in Garza v. Harrison (2019) difficulty often arises in determining when an off-duty officer turned on-duty for the purposes of TTCA while he was working for a private non-governmental employer. The problem often arises in Workers compensation context for non-law enforcement governmental officials as well. However, this determination is critical to whether Defendant Miller is entitled to dismissal under the TTCA as he claimed, and was granted by the District Judge without making a showing that he was so entitled. Because Plaintiff named both Miller and City of Austin as defendants, under sec. 101.106(e) of the Tex. Civ. Prac. & Rem. Code the burden is on the City of Austin and not on Miller to put forth facts to make a showing, and not merely claiming, that Miller is entitled to his dismissal under the TTCA:

> "If a suit is filed under this chapter against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit."

Tex. Civ. Prac. Rem. Code Sec. 101.106(e).

Texas Tort Claims Act defines the scope of employment of government officer including Defendant Miller as follows:

> "Scope of employment" means the performance for a governmental unit of the duties of an employee's office or employment and includes being in or about the performance of a task lawfully assigned to an employee by competent authority.

Tex. Civ. Prac. & Rem. Code §101.001(5)

Nowhere in Judge Lane's June 10th, 2020 Order there is any indication that he undertook this analysis. No facts have been identified that would trigger Defendant Miller's status to change from a security guard in employ of his private employer Wal-Mart to his governmental employer the City of Austin. This inquiry was critical to any determination that Miller is entitled to his dismissal under the TTCA. Hon. District Court should not have granted Miller's dismissal

in the first place because City of Austin made no showing that Miller was entitled to his dismissal with and facts supported by applicable law, the City merely made a contention in its Rule(12) (b) motion and reply briefs. It asserted that Miller stepped back from his role as a security guard working for Wal-Mart to his status as on-duty police officer in employ of City of Austin. The problem is that City presented no facts to support this assertion – not then, not now, not ever during these proceedings. Yet the District Court, expressly relying on City's mere assertions, and despite missing predicate facts, granted Miller's wish. In so doing, the District failed to accept Plaintiff's "all well-pleaded facts as true; failed to consider those facts in the light most favorable to the Plaintiff" as it was required to do in violation of long established US 5th Cir. precedence. See *Stokes v. Gann*, 498 F.3d 483, 484 (5th Cir. 2007). Furthermore, the District Court also improperly

resolved fact issues as to Defendants' Acevedo and John DOE I when granted dismissal with prejudice, and without first giving Plaintiff an opportunity to amend his complaint and plead more facts, especially as to Acevedo and as to defamation claim under Texas law. Judge Lane's June 10th, 2020 order does not indicate that he addressed these when he conclusion that reversal of Miller's dismissal is not justified. Judge Lane failed to address dismissal of defamation under Texas law on the basis of the single publication rule or dismissal of Acevedo or John Doe I on the ground that:

> "[m]otion to reconsider are not for "rehashing evidence, legal theories, or arguments that could have been offered or raised before the [court's decision]." Templet Hydrochem, Inc. 367 F.3d. 473, 479 (5th Cir. 2004). Because this is Singh's second motion to reconsider the dismissal of Art Acevedo, see Dkt. #54, and because Singh's argument is nothing more than a second (or third) attempt to relitigate this issue, the court declines to reconsider the dismissal of Acevedo."

Judge Lane's Order, dated June 10, 2020, page 7

As set forth more fully Templet case involved and attempt to open summary judgement with ample opportunity to present facts after discovery. Compare to that case, in the instant matter the Court itself has not allowed Plaintiff any discovery before the deciding the Rule 1(b)(6) motion. Because the Court itself denied Plaintiff's request for discovery before deciding the dismissal presumably because when Miller asserted his "qualified Immunity" defense the Curt was not allowed to permit discovery. That being the case, it is not proper for Hon. Judge Lane to deny relief herein. Therefore, denial of relief on the basis of failure to present evidence is entirely unwarranted.

II. FACTS

Late in the evening on November 26, 2015, the Thanksgiving day, Plaintiff went to Wal-Mart store (#3569) in Austin to purchase a specific make and model of Chromebook computer based on Wal-Mart's advertisement for what was early Black Friday sales event that traditionally marks the beginning of the annual holiday shopping season. Officer Miller was off-duty that day from his job as a municipal police officer for City of Austin ("the City") and working as a private security guard for Wal-Mart. Miller wore his police uniform while working as a private guard, as required by Wal-Mart and the City of Austin. With Miller also working as security guard was off-duty City of Austin police officer John DOE II. When Plaintiff was leaving the store without making any purchases, Defendant Miller, working in concert with Wal-Mart security officer Defendant Eva Marie Moseley falsely accused Plaintiff of shoplifting store merchandise by concealing it on his person without ever advising Plaintiff about the true nature of the purported shoplifted merchandise, detained, and searched Plaintiff person in plain public view merely hunch based on impermissible racial stereotyping and without justification that Plaintiff had engage in purported shoplifting. Needless to say Defendant Miller failed to recover any

shoplifted merchandise upon search of Plaintiff's person. After Miller failed to recover any purported shoplifted merchandise upon search of Plaintiff, Miller in disregard of APD policy refused to provide Plaintiff with his full identity/business card and took affirmative actions to cover up his misconduct and avoid accountability. Specifically, Miller intentionally blocked Plaintiff by stepping in front of him and prevented Plaintiff from making contact with eyewitnesses that had gathered, several of them recording the incident on their cellphones. Miller threatened Plaintiff with jail if Plaintiff attempted to obtain contact information from eyewitnesses and did not leave the store right away. In response, Plaintiff clearly advised Miller that he would leave shortly but that he needed to preserve video evidence and witness information and needed to buy a pen to take notes with after Miller refused Plaintiff's request to borrow Miller's pen. Miller physically blocked Plaintiff from re-entering the store denying him any opportunity to buy a pen and takes notes preserving witness contact and video evidence in order to lodge a complaint against Miller – APD policy in effect at the time require Plaintiff to provide witness name and phone number in order to accept a complaint against an officer. Without such witness information no complaint against Defendant Miller could be accepted by APD.

Plaintiff protested Defendant Miller's conduct towards him by exercising his 1st Amendment right to US constitution. Miller became angry at Plaintiff and responded by violently grabbing Plaintiff's arms and wrists and violently twisting them behind his back and pulling them with great for with intention to inflict injury and cause pain. Miller handcuffed Plaintiff and pushed him into a windowless investigation room where he was surrounded by five people and interrogated by John DOE I on suspicion of being an unlawful alien based on

Plaintiff's brown skin, national origin, Hispanic appearance, without ever asking for his citizenship – Plaintiff is, and a US citizen and of Asian/pacific islander protected class.

When Miller physically blocked Plaintiff frustrating his effort to secure witness and cellphone Plaintiff protested Miller's conduct by announcing rhetorically, "I can't believe this is happening! This is America! Is it a police state?" to attract attention of Wal-Mart store management staff. But no one responded and Miller turned irate and violent. Miller violently grabbed Plaintiff by his arms and wrists, forcefully twisted them behind his back and handcuffed him inflicting serious injuries to his elbows and shoulder joints. The entire incident was broadcast live on the surveillance monitors of the store. Plaintiff has not fully recovered from the injuries to his elbow joint and surrounding soft tissues to this day.

Plaintiff commenced this action on November 27, 2017 asserting claims under US and Texas constitutions laws. On March 15, 2018 Defendants City of Austin, Richard W. Miller, Art Acevedo, Austin Police Department and John DOE I (City Defendants) moved the court under FRCP 12(b)(6) for dismissal of the entire case on limitations ground. Miller also raised defense of "qualified immunity (QI) as to federal claims and governmental immunity under the Texas Tort Claims Act (TTCA). Defendants' Wal-Mart Inc, Wal-Mart Texas LLC, Eva Marie Moseley and Alan Martindale (Wal-Mart Defendants) moved to join City Defendants' motion to dismiss. The request was denied by Judge Mark Lane.

On March 25, 2019, the District Court – Hon. Robert Pitman granted City Defendants' motion in part and denied in part. The Court granted dismissal of Miller under TTCA on Miller's representation that he was entitled to dismissal under the TTCA, because he "stepped-back" or reverted to his on-duty status to on-duty officer in employ of City of Austin police department from his off-duty status as security guard in employ of Wal-Mart – in effect claiming

that he observed Plaintiff commit a crime, specifically shoplifting by concealment on his person when he commenced his initial stop, detention and search of Plaintiff's person alleging shoplifting by concealment. This representation was false because it is uncontroverted that Miller did not recover anything after subjecting Plaintiff to search of his person in Plain public view as Plaintiff did not commit the alleged crime. Plaintiff was as innocent as it could be. On these facts, dismissal of defendant Miller was an error and requires correction.

The Court also dismissed Plaintiff claim for defamation under Texas law on the grounds of limitation under the so called "single publication" rule of accrual and time-barred. This was an error because instant case is governed by, the general multiple or continuous publication rule because the mass publication requirement for single-publication rule to be applicable is not present. In this Acevedo published defamatory information about Plaintiff to limited access databanks including those maintained by the Federal Bureau of Investigation (FBI), Texas department of Public safety (DPS) and Travis County Sheriff's Office among others. Access to these databanks is restricted, precluding mass publication.

The Court through its March 25, 2019 order dismissed Defendant Acevedo with prejudice. City may be vicariously liable for Acevedo's acts or omissions in performance of City's proprietary or non-governmental functions – administration of City of Austin's policy concerning secondary or extra-duty employment of APD officers including Defendant Miller. Unlike Texas Department of Safety (DPS). Texas legislature has never authorized municipal police officers, secondary employment in their official uniforms where the third party employers line Wal-Mart expect that off-duty officers will use the power of their badge on their behalf as in the instant case. In the instant case Wal-Mart employed off-duty officer Miller with expectation that Miller will use power of his badge on its behalf when needed. City of Austin by its charter,

has not expressly authorized off-duty officer to engage in LTRE. Yet, its charter requires its police chief to run a "Badge-for-Hire" program where it unfairly competes with private entities in security services industry, see Exhibit – C.

Defendant Acevedo is directly implicated in publication of defamatory information concerning Plaintiff to criminal record databanks the instant case, Acevedo published defamatory information concerning Plaintiff to databanks. In addition to his role as the final policymaker as to police functions of the city, Defendant Acevedo's act or omission as final policymaker as to City of Austin's policy and practices concerning secondary employment of Austin police officer dubbed "Badge for Hire" is also at issue in this action. Acevedo is vicariously liable for misconduct of Miller as final decision-maker permitting Miller's employment with Wal-Mart. Acevedo himself formulated that policy, see Exhibit – D. Attached. Court also granted dismissal of Acevedo with prejudice - holding official capacity suit being synonymous with claim against the City of Austin itself; APD with prejudice – holding that APD lacked capacity to be sued under City's charter and dismissing Defendant John DOE I with prejudice on the ground of futility. Plaintiff timely filed a motion to reconsider the dismissals except as to APD which was promptly denied by the Court.

On March 29,2019 Plaintiff filed a motion for limited discovery for the purpose of discovering identities of John DOE I and John DOEII. Judge Lane denied the motion in October 2019.

On April 22. 2019 Plaintiff timely filed a notice of appeal seeking review of dismissal of Miller under TTCA; defamation claim under Texas law and dismissal of John DOE I. The Court of Appeals dismissed the appeal for want of jurisdiction.

On September 11, 2020 Plaintiff sought consent from Miller to vacate his dismissal under the TTCA. He refused prompting Plaintiff to file a motion to vacate the dismissal on March 23, 2020. Judge Lane issued an order denying Plaintiff's request on June 10, 2020. Plaintiff timely filed a motion to reconsider on June 25, 2020 which is currently pending with the Court. Plaintiff files this supplement to his motion pending motion to reconsider. A certify copy of facts is attached in Appendix – A.

III. ARGUMENTS

A: Applicable Standard for Review of a Judgment Directly From the District Court

FRCP 60(b) permits a party to seek review of an unfavorable judgment or order directly from the district court. Specifically, FRCP 60(b) allows a party to seek relief from a final judgment, order or proceeding directly from the district court judge in the following circumstances:

(1) Mistake, inadvertence, surprise, or excusable neglect (*FRCP 60(b)(1)*).

(2) Newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under FRCP 59(b) (*FRCP 60(b)(2)*).

(3) Fraud, misrepresentation or misconduct by an opposing party (*FRCP 60(b)(3)*).

(4) The judgment is void (*FRCP 60(b)(4)*).

(5) The judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable (*FRCP 60(b)(5)*).

(6) Any other reason that justifies relief (*FRCP 60(b)(6)*).

A motion made under FRCP 60(b) must be made within a "reasonable time" after entry of the judgment or order or the date of the proceeding being challenged (*FRCP 60(c)*). For

subsections (b)(1), (2) and (3), a reasonable time is further defined as no more than a year after entry of the judgement or order or the date of the proceeding (*FRCP 60(c)*).

> "The purpose of Rule 60(b) is to delineate the circumstances under which relief may be obtained from the operation of final judgments, whether they are entered by default, see Fed.R.Civ.P. 55(c), or otherwise. By its very nature, the rule seeks to strike a delicate balance between two countervailing impulses: the desire to preserve the finality of judgments and the "incessant command of the court's conscience that justice be done in light of all the facts." Bankers Mortgage Co. v. United States, 423 F.2d 73, 77 (5th Cir.), cert. denied, 399 U.S. 927, 90 S.Ct. 2242, 26 L.Ed.2d 793 (1970)
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> "In this light, it is often said that the rule should be liberally construed in order to do substantial justice. E. g., Greater Baton Rouge Golf Ass'n v. Recreation Park Comm'n, 507 F.2d 227, 228-29 (5th Cir. 1975); Laguna Royalty Co. v. Marsh, 350 F.2d 817, 823 (5th Cir. 1965); In Re Casco Chem. Co., 335 F.2d 645, 651 n. 18 (5th Cir. 1964); Serio v. Badger Mutual Ins. Co., 266 F.2d 418, 421 (5th Cir.), cert. denied, 361 U.S. 832, 80 S.Ct. 81, 4 L.Ed.2d 73 (1959). What is meant by this general statement is that, although the desideratum of finality is an important goal, the justice-function of the courts demands that it must yield, in appropriate circumstances, to the equities of the particular case in order that the judgment might reflect the true merits of the cause. See Bros., Inc. v. W. E. Grace Mfg. Co., 320 F.2d 594, 610 (5th Cir. 1963); Serio v. Badger Mutual Ins. Co., 266 F.2d at 421. This is not to say that final judgments should be lightly reopened. The desirability of order and predictability in the judicial process calls for the exercise of caution in such matters. See Fackelman v. Bell, 564 F.2d 734, 736 (5th Cir. 1977). But there can be little doubt that Rule 60(b) vests in the district courts power "adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." Klapprott v. United States, 335 U.S. 601, 614-15, 69 S.Ct. 384, 390, 93 L.Ed. 266 (1949); Menier v. United States, 405 F.2d 245, 248 (5th Cir1968)

Seven Elves, Inc. v. Eskenazi, 635 F.2d 396 (5th Cir. 1981)

FRCP 60(b)(1) allows a district court to undo or alter a final judgment based on, among other things, a "mistake." A party can seek FRCP 60(b)(1) relief to correct legal errors, an area traditionally reserved for an appellate court.

B: District Court May Correct Legal Errors Even if Those Errors Would be Correctable on Appeal

In FDIC v. Castle US Fifth Circuit explained that "[t]he law of this circuit permits a trial judge, in his discretion, to reopen a judgment on the basis of an error of law" (*FDIC v. Castle, 781 F.2d 1101, 1104 (5th Cir. 1986)*(citation omitted)). Other circuits have held similarly. For example, the US Court of Appeals for the Seventh Circuit recently examined the circumstances under which a district court can correct legal errors on an FRCP 60(b) motion, modifying its prior rulings suggesting that such relief is unavailable. In *Mendez v. Republic Bank*, the district court had initially ruled for the plaintiff, Nereida Mendez, and the defendant, Republic Bank, timely appealed that ruling (*No. 12-cv–2585, WL 3821532, at *4 (7th Cir. July 25, 2013)*). However, the district court later changed course after reading a magistrate judge's report and recommendation on the issues, which convinced the court that it should have file an FRCP 60(b) motion for relief from judgment. Republic Bank then moved to remand the appeal to the district court and filed an FRCP 60(b) motion. The district court granted the motion and then issued a new order in favor of Republic Bank (*WL 3821532, at *4*).

On appeal, the Seventh Circuit discussed the applicability of FRCP 60(b)(1). The court found that prior reluctance to extend the rule to correct appealable errors stemmed from a concern that parties could use FRCP 60(b) to "circumvent the deadlines for filing appeals" and "revive cases in which a party failed to appeal within the standard deadline" (, *at *7*). Where, as here, the rule is "not a device to avoid expired appellate time limits," a party may use FRCP 60(b) as an alternate way to correct errors that could also be corrected on appeal (, *at *7*).

The court concluded that where a district court judge is convinced of a legal or factual error, there is no purpose in prohibiting the court from remedying that error itself. This

conclusion is consistent with the Federal Rules of Civil Procedure's goal of securing a "just, speedy and inexpensive" resolution of disputes and also spares parties of the effort and expense of "preparing an appeal and educating a new court on the particulars of their case" (, *at* *7 (citing *FRCP 1*)).

In reaching this result, the Seventh Circuit joined several other circuit courts that have permitted parties to use FRCP 60(b) to seek relief from judgment for legal errors that also may be corrected on appeal. Many of these decisions also emphasize that while this remedy is available, it cannot be used to circumvent appellate filing deadlines. Similarly, the Second Circuit held that: Finding that "Rule 60(b)(1) [is] available for a district court to correct legal errors by the court," and noting that such relief may not be requested after the time for appeal has elapsed (*In re 310 Assocs., 346 F.3d at 35*) (citations omitted); see also *Colucci v. Beth Israel Med. Ctr., No. 12–cv-3694, , at *2 (2d Cir. Aug. 27, 2013)*). In the Sixth Circuit: Rule 60(b)(1) relief is available where "the judge has made a substantive mistake of law or fact in the final judgment or order" (*United States v. Reyes, 307 F.3d 451, 455 (6th Cir. 2002)*(citation omitted)) the Ninth Circuit holds that: "The law in this circuit is that errors of law are cognizable under Rule 60(b)" (*Liberty Mut. Ins. Co. v. EEOC, 691 F.2d 438, 441 (9th Cir. 1982)* (citation omitted)). The Tenth Circuit reiterates that "certain substantive mistakes in a district court's rulings may be challenged by a Rule 60(b)(1) motion," but holding that such a motion must be filed within the time frame required for the filing of a notice of appeal (*Cashner v. Freedom Stores, Inc., 98 F.3d 572, 578 (10th Cir. 1996)*). In the Eleventh Circuit: Rule 60(b(1) "encompasses mistakes in the application of the law" (*Parks v. U.S. Life & Credit Corp., 677 F.2d 838, 840 (11th Cir. 1982)* (citation omitted)).

FRCP 60(b)(6): The Catch-all

FRCP 60(b)(6) permits relief from a judgment for "any other reason that justifies relief," and does not include an outer bound on the time limitation to make the motion. However, the Supreme Court has limited this catch-all category to "extraordinary" circumstances (*Gonzales v. Crosby, 545 U.S. 524, 535 (2005)*; *Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 863-64 (1988)*). Moreover, an FRCP 60(b)(6) motion cannot be used to circumvent the one-year outer time limitation provided for subsections (1), (2) or (3) (see *FRCP 60(c)*; *Liljeberg, 486 U.S. at 863 & n.11*; *United Airlines, Inc. v. Brien, 588 F.3d 158, 175 (2d Cir. 2009)*).

C: Contrary to Judge Lane's opinion reconsideration is not only warranted it's mandated under the Rule 1 of Federal Rules of Civil Procedure that is often invoked by US Supreme Court.

Rule 1 governs civil action in US Dist. courts. Its primary purpose is to secure just determination of issues:

> These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding. See Krupski v. Costa Crociere S. p. A., - 560 U.S. 538, 130 S. Ct. 2485 (2010)

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Here Judge Lane failed to give befit of this fundamental principle embodied in the rule and refused to address important issues as to Acevedo or John Doe 1. Finality is a worthy goal but in American system justice trumps finality, we were taught in school. Determination of controversies on merits is to be preferred over dismissal on technical grounds, especially in the instant where it is apparent Plaintiff is not pursuing frivolous claims. His claims have merit. The Hon. Court should reconsider Judge Lane's order.

D: Court's conclusion that *Garza* does not warrant reconsideration is in error because Judge Lane failed to make relevant inquiry as to whether Defendant Miller was acting as a police officer or an off-duty security guard in employ of Wal-Mart when he falsely accused Plaintiff of shoplifting, detained and searched his person but failed to recover alleged shoplifted merchandise.

Judge Lane's only ground for denying relied is the following:

> **"Because Garza v. Harrison does not discuss the clause relied upon by the District Court, it does not warrant reconsideration."** (Emphasis added)

Judge Lane's order dated June 10th, 2020 at p. 5, n. 13-14

Judge Lane reached his conclusion based on the following assumptions he made about what Texas Supreme Court held in that case. In Judge Lane's own words:

> "First, reconsideration is not warranted under Garza v. Harrison. The Texas Supreme Court's decision in Garza v. Harrison related solely to the court's interpretation of section 101.106(f) of the Texas Tort Claims Act. 574 S.W.3d 389, 394 (Tex. 2019), TEX. CIV. PRAC. & REM. CODE §101.106(f). However, as noted by Singh, the District Court Dismissed the IIED and defamation claims against Miller under section 101.106(e). Dkt.#41 at 5 n.5, , 8 n.6; see Dkt. #70 at 7. These two clauses of section 101.106 provide distinct and separate remedies depending, in part, on who a suit is filed against. See TEX. CIV. PRAC. & REM. CODE §101.106 (clause 101.106(e) provides relief when a suit is filed against both a government unit and its employee, where clause 101.106(f) provides relief when a suit is filed against an employee of a governmental unit but could have been brought against the governmental unit). Because Garza v. Harrison does not discuss the clause relied upon by the District Court, it does not warrant reconsideration."

Id. Page 5

In doing so Judge Lane failed to grasp the Supreme Court's analysis of the central issue of that case – i.e. whether Garza was acting within the scope of his employment with government employer or he was acting as a security guard for his private employer. In Garza v. Harrison Texas Supreme Court explained the difficulties presented in ascertaining the capacity in which a police officer might be acting when he takes off-duty employment like Miller in the instant case:

"But because a police officer is always a police officer, even during off-duty hours, the capacity in which an officer is acting may be amenable to uncertainty. The confusion is compounded when, as in this case and many others, an officer has undertaken private employment during off-duty hours. To determine what capacity a peace officer was acting in when conduct providing the basis for a claim has occurred, *Blackwell v. Harris County* suggests some helpful guidelines.[68] An officer enforcing general laws in accordance with a statutory grant of authority is acting in the course and scope of employment as a peace officer. But if an officer is protecting a private employer's property, ejecting trespassers, or enforcing rules and regulations promulgated by the private employer, a fact question may arise as to whether the officer's conduct is in a private or official capacity.[70] Although we cannot envision a scenario in which a peace officer acting beyond his or her official power to act could ever be doing so in an official capacity, we need not consider the matter we need not consider the matter here because Garza was carrying out general duties of a peace officer pursuant to an express legislative grant of authority."

"Under article 14.03(g)(2), once a police officer observes criminal activity, status as a peace officer is activated even if the officer is outside the commissioning employer's geographic jurisdiction. Article 6.06 invokes official authority in a similar manner but in limited circumstances where person and property are imperiled.[73] At a minimum, once Garza saw Santellana in possession of marijuana he immediately became an on-duty peace officer enforcing general laws under article 14.03(g)(2), notwithstanding the fact that he was outside of his primary jurisdiction, his employment with the Navasota Police Department conferred authority to make a warrantless arrest. In attempting to arrest Santellana—whether accomplished in an improper manner as alleged—Garza was enforcing public laws. This is true even if the arrest also benefitted the apartment complex. Because an arrest was authorized only by virtue of Garza's capacity as a peace officer, he was acting in his official capacity as a matter of law."

Garza v. Harrison 574 S.W.3d 389 (2019)

[Note that Defendant Miller in the instant case was working within his jurisdiction so that section does not apply to him.]

Furthermore, the Court opined:

""[s]ection 101.106's election scheme favors the expedient dismissal of governmental employees when suit should have been brought against the government.".

Garza v. Harrison, Tex. Sp. Ct. (2019)

However, off-duty or secondary-employment with private employer is not covered under the protection of TTCA. An off-duty officer may be entitled to dismissal under the TTCA like

Garza only if he takes law enforcement action after observing a crime or a rime being committed in his presence, but not otherwise. Here in the instant case, because Defendant Miller failed to recover purported shoplifted merchandise concealed on Plaintiff's person, as a matter of law he could not have seen Plaintiff commit the alleged crime – shoplifting by concealment – and therefore could not have become on-duty officer eligible for protection of the TTCA. Judge Lanes conclusion is in error. Miller's dismissal must be reversed.

E: Templet v. Hyrochem. Inc relied upon by Judge Lane in declining the Rule 60(b) relief is an error because that case is procedurally and factually distinguishable than the instant case at bar.

In that case Plaintiff brought a Rule 59(e) FRCP motion for reconsideration of a summary judgement order where the moving party had plenty of opportunities to present facts. The party unlike Plaintiff in the present case was represented by a counsel, and not pro se as Plaintiff in the instant case. In addition, in that case, unlike the situation in the instant case, in court's view the request was not timely. In court's own words:

> "A Rule 59(e) motion "calls into question the correctness of a judgment." *In re Transtexas Gas Corp.*, 303 F.3d 571, 581 (5th Cir.2002). This Court has held that such a motion is not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment. *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir.1990). Rather, Rule 59(e) "serve[s] the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence." *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 473 (5th Cir.1989) (internal quotations omitted)."

The 5th Circuit explained:

> "In *Lavespere*, this Court recognized that while a district court has considerable discretion in deciding whether to reopen a case in response to a motion for reconsideration, such discretion is not limitless. **This Court has identified two important judicial imperatives relating to such a motion: 1) the need to bring litigation to an end; and 2) the need to render just decisions on the basis of all the facts. The task for the district court is to strike the proper balance between these competing interests."** *(Citation omitted)*

> "In this case, the district court stated that a motion for new trial in a nonjury case or a petition for rehearing pursuant to a **Rule 59(e) motion should be based upon manifest error of law or mistake of fact**, and a judgment should not be set aside except for substantial reasons. **The district found that the Defendants' motion for summary judgment was filed while the Irvins "were represented by counsel, who did not request a continuance of the motion or a rescheduling of the deadlines." The district court also noted that it ruled on the unopposed motion more than sixty days after it was filed, and then issued judgment nearly three weeks later.** In denying the Irvins' motion for reconsideration, the district court explained:
>
> "We have held that an **unexcused failure to present evidence available at the time of summary judgment provides a valid basis for denying a subsequent motion for reconsideration**. *Russ v. Int'l Paper Co.*, 943 F.2d 589, 593 (5th Cir.1991). **In this case, the underlying facts were well within the Irvins' knowledge prior to the district court's entry of judgment**. However, **the Irvins failed to include these materials in any form of opposition or response to the Defendants' motion for summary judgment**. Although the Irvins correctly point out that they were not represented by counsel for approximately five months between March and August 2002, **they were represented by counsel, George Tucker, before the Defendants filed their motion for summary judgment and after the district court subsequently granted the motion**.

In the instant case at bar because Defendants' moved for dismissal under Rule 12(b)(6) and "Qualified Immunity" discovery during the pendency of that motion. Record would show that that the court denied Plaintiff's request for limited discovery. In addition, the court was duty bound per 5th Cir. precedence to presume Plaintiff's well-pleaded facts as true and resolve any doubt in his favor. At all-time relevant during these proceedings Plaintiff alleged that Miller was employed as a security guard for Wal-Mart and not City of Austin. Plaintiff in his Original Complaint alleged that at all time relevant during that incident Miller was working as a security guard for Wal-Mart. At all-time relevant to the proceedings in this matter and in the Plaintiff's original Petition Plaintiff alleged that he was stopped and searched by Defendant but Miller failed to recover any shoplifted merchandise upon search.

Because the Court did not permit opportunity for discovery before its March 25, 2019 Order, Judge Lanes refusal to consider Plaintiff's requests as to Acevedo and John Doe I and Defamation and Miller, and denial of relief is an error and not warranted under Templet v. Hyrochem.

IV: CONCLUSION

In light of the foregoing it is clear that Hon. Judge Lanes Order issued on June 10th, 2020 his conclusion that reversal of Defendant Miller's dismissal under the Texas Tort Claims Act Tex. Civ. Prac. & Rem. Code § 101.106 (e) is in error and should be corrected. It is also clear Judge Lane's and denial reversal of dismissal of Acevedo and John Doe I is also in error. Templet is inapplicable. Texas Supreme Court opinion in Garza v. Harrison requires that Defendant Miller's dismissal be vacated. It is also clear that reversal of dismissal of Plaintiff defamation claim under the single publication rule is in error because the instant case does not involve mass-publication for which that rule was intended. And lastly, dismissal of John Doe I should be vacated and Plaintiff be permitted to conduct discovery and amend his complaint to substitute John Doe I's real name. John Doe I has at least constructive notice of the case against him as other City defendants have been served timely. John Doe I cannot claim any un fair prejudice in defendant against the suit because the case is in very preliminary stage and he is likely to be represented by Mr. Ramirez who is representing City defendants. In addition, there is unity of purpose between Joh Doe I and other City defendants because the claim against him arose from the common set of facts.

V: RELIEF REQUESTED

WHEREFORE and for all the foregoing reasons Plaintiff asks the Hon. Court to grant him relief as follows:

(1) Reverse Defendant Miller's dismissal under the TTCA and re-institute him as a full defendant;

(2) Reverse Plaintiff's defamation claim under the Texas law and permit him to amend his complaint as to that claim and plead additional facts;

(3) Reverse dismissal of Acevedo and hold him and the City vicariously liable for acts or omissions as to the City of Austin of Austin's "secondary – employment" policy and practices;

(4) Reverse dismissal of John Doe I;

(5) Certify the issues for proper review by the Court of Appeal in the event the Court cannot grant relief under item 1 – 4 above; and

(6) Grant further relief in equity and law that Plaintiff may show

himself to be entitled.

Dated: July 9, 2020

Respectfully submitted,

By: Ravindra Singh, Ph.D.

RAVINDRA SINGH, PH.D.

Plaintiff, Pro Se
P.O. BOX 10526
Austin, Texas 787066

(512)293-7646

excion_2000@yahoo.com

CERTIFICATE OF SERVICE

I certify that on this Day of July 10, 2020 I served a true and correct copy of the foregoing document via USPS on the following"

Robert Icenhauer Ramirez
1103 Nueces Street
Austin TX 78701

Brett Payne
WB& C LLC
Great Hills Corp. Ctr.
9020 Capital of Texas Hwy
Buildg II Ste. 225
Austin, TX 78759

Ravindra Singh, PH.D.

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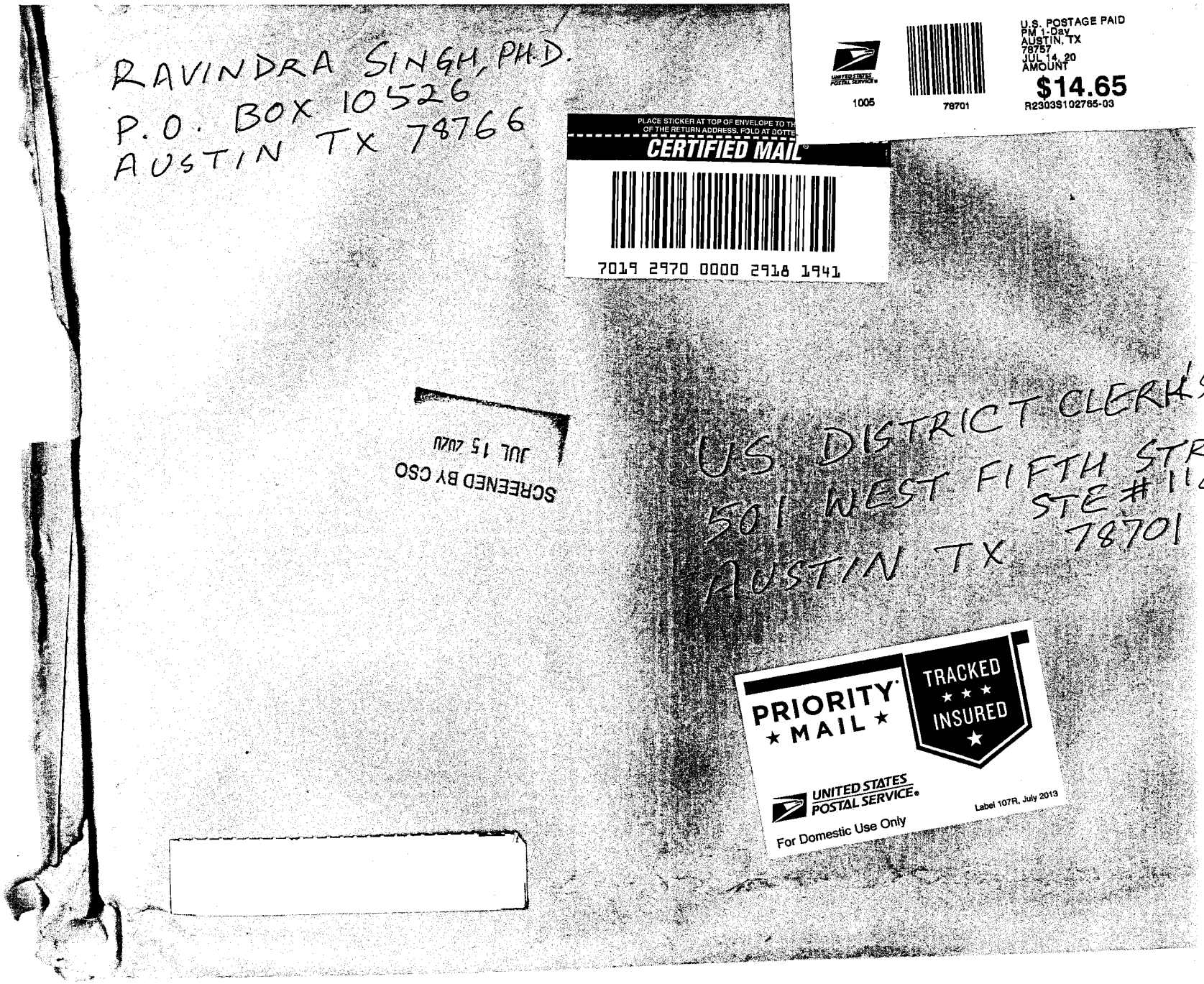


IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RAVINDRA SINGH,	§	
	§	
Plaintiff	§	
	§	
vs.	§	**CAUSE NO. 1:16-CV-00930-RP**
	§	
WAL-MART STORES, INC.;	§	
WAL-MART STORES, LLC;	§	
ALAN MARTINDALE	§	
EVA MARIE MOSELEY; CITY OF	§	
AUSTIN; AND RICHARD W. MILLER	§	
	§	
Defendants	§	

DEFENDANT RICHARD W. MILLER AND THE CITY OF AUSTIN'S MOTION TO SANCTION AND DISMISS CASE FOR PLAINTIFF RAVINDRA SINGH'S FAILURE TO COOPERATE IN DISCOVERY AND COMPLY WITH COURT'S ORDER

Defendants City of Austin and Richard W. Miller respectfully submit this Motion to Sanction and Dismiss Case for Plaintiff Ravindra Singh's Failure to Cooperate in Discovery and Comply with the Court's Order, pursuant to Federal Rules of Civil Procedure 37 and 41.

I. INTRODUCTION

Ravindra Singh (hereafter "Plaintiff" or "Singh") filed this lawsuit, proceeding *pro se*, against the City of Austin and Richard W. Miller on November 27, 2017. (Doc. 1). The complaint asserts generalized claims for civil rights violations under 42 U.S.C. §§ 1981, 1983, 1985(b)(3) and rights under the Constitution and laws of the State of Texas. He also brings suit against Wal-Mart Stores, Inc., Wal-Mart Stores Texas LLC, Alan Martindale, and Eva Marie Moseley. Richard W. Miller and the City of Austin answered. (Dkt. 47). Defendants Wal-Mart Stores, Inc., Wal-Mart Stores, Texas, LLC answered. (Dkt. 14). Defendant Alan Martindale and Eva Marie Moseley have also answered. (Dkts. 29 & 30, respectively).

II. FACTS

Singh has failed to cooperate in discovery.

In August, 2019, Defendant Miller sent his First Request for Production and First Set of Interrogatories to Plaintiff via certified mail, return receipt requested. Singh refused to answer the discovery, and Defendant Miller eventually filed a motion for his failure to do so.

On June 10, 2020, the Court entered an Order requiring Singh to comply with Defendant's discovery requests by June 25, 2020. (Doc. 75). The Court noted in an Order dated July 15, 2020 that, "To date, Singh has still not complied with either this court's Order or Defendants' discovery requests." (Doc. 83).

Seven weeks after the Court Ordered that Singh provide the discovery, Singh has still not complied. He has also steadfastly refused to confer via telephone with defense counsel. Despite extensive email correspondence, he refuses to provide the discovery that was Ordered by the Court in June, 2020.

As of today, Singh has indicated that he has no intention of abiding by the Court's Order. "As I indicated to you," he wrote today, "I will respond to interrogatories and production request promptly after I have taken care of the Notice of Appeal requirements. It might require a motion to sever part of the order of the order. That means it will take time."

III. ARGUMENT AND AUTHORITY

1. Motion for Sanctions.

The Plaintiff has simply refused to comply with the Court's Order of June 10, 2020. Singh permitted the Court's deadline to respond to discovery pass and seven weeks after the entry of the Order has not made an attempt to comply with the Order. The undersigned requests that the Court

sanction Singh by an award of attorney's fees to Defendants for their work in seeking to compel the Plaintiff to respond to discovery.[1]

2. Motion to Dismiss.

Two years and eight months have elapsed since Singh filed this lawsuit. During that time, he has unwaveringly refused to participate in the discovery process, producing not a single response to interrogatories or requests for production. Nearly a year has passed since discovery was first sent to Plaintiff. Seven weeks have passed since the Court entered an Order requiring the Plaintiff to respond to Defendant's discovery requests without the Plaintiff complying with that Order. In *Berry v. CIGNA/RSI-CIGNA,* 975 F.2d 1188, 1191 (5th Cir. 1992), the Court held that dismissals are warranted "when (1) there is a clear record of delay or contumacious conduct by the plaintiff, and (2) the district court has expressly determined that lesser sanctions would not prompt diligent prosecution, or the record shows that the district court employed lesser sanctions that proved to be futile." In the case at bar, each of these elements has been met. Pursuant to Fed.R.Civ.P. 41(b), Defendants Miller and City of Austin move to dismiss the action for the plaintiff's failure to comply with the rules of discovery and with the Court's Orders.

IV. CONCLUSION

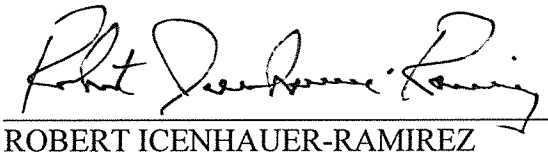
Dr. Singh's complaint against the City of Austin, the Austin Police Department, Art Acevedo and Richard W. Miller should be dismissed pursuant to Rule 41(b) because (1) Plaintiff has failed to prosecute this case over the past two years and eight months, (2) plaintiff has refused to comply with the rules of discovery, despite a Court Order requiring that he comply, and (3) plaintiff has refused to comply with the Court's Order requiring that he respond to discovery that

[1] If the Court finds reason to award attorney's fees, the undersigned requests permission to submit an affidavit detailing the attorney's fees that were reasonable and necessary in seeking to compel the Plaintiff to respond to discovery.

was first tendered to him in August 2019. Defendants City of Austin and Richard W. Miller pray that the Court dismiss this action and for all other relief to which these Defendants may show themselves to be justly entitled.

Dated: July 28, 2020.

RESPECTFULLY SUBMITTED,



ROBERT ICENHAUER-RAMIREZ
Law Offices of Robert Icenhauer-Ramirez
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1103 Nueces Street
Austin, Texas 78701
(512) 477-7991
(512) 477-3580 [Fax]
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KATHERINE ICENHAUER-RAMIREZ
Law Offices of Katherine Icenhauer-Ramirez
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kicenhauer@gmail.com
ATTORNEYS FOR DEFENDANTS
CITY OF AUSTIN & RICHARD W. MILLER

CERTIFICATION OF ATTEMPT TO CONFER

Pursuant to F.R.C.P. 37(a)(1), the undersigned certifies that movant has in good faith attempted to confer with the party failing to make discovery in an effort to obtain it without court action.

ROBERT ICENHAUER-RAMIREZ

CERTIFICATE OF SERVICE

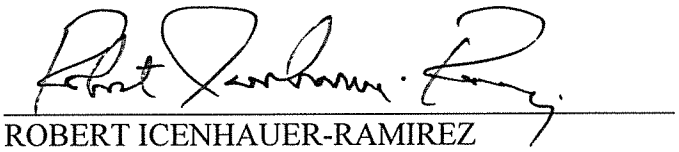
I hereby certify that on July 28, 2020, the foregoing was sent, via first class mail, to:

Ravindra Singh
P. O. Box 10526
Austin, Texas 78766

Certified Mail:
7014 0510 0001 8149 7815
Return Receipt Requested

And, via EM/ECF to:

Mr. Brett H. Payne
WALTERS, BALIDO & CRAIN, L.L.P.
Great Hills Corporate Center
9020 N. Capital of Texas Hwy
Building II, Ste 225
Austin, Texas 78759
Attorney for Wal-Mart Defendants



ROBERT ICENHAUER-RAMIREZ

RECEIVED
JUL 29 2020
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY _____ DEPUTY

FILED
JUL 29 2020
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY _____ DEPUTY CLERK

IN THE DISTRICT COURT
FOR WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RAVINDRA SINGH, PH.D.	§	
	§	
Plaintiff,	§	Cause No.: 1:17-CV-1120-RP-ML
V.	§	JURY TRIAL DEMANDED
WAL-MART STORES INC,	§	
WAL-MART STORES TEXAS LLC,	§	
ALAN MARTINDALE	§	
EVA MARIE MOSELEY; and	§	
CITY OF AUSTIN,	§	
AUSTIN POLICE DEPARTMENT,	§	
EX-POLICE CHIEF ART ACEVEDO,	§	
OFFICER RICHARD W MILLER (AP3538)	§	
JOHN DOE 1,	§	
	§	
Defendants	§	

MOTION TO RECONSIDER

To: Hon. Robert Pitman,
District Judge

Plaintiff Ravindra Singh, Ph.D. moves the Hon. Court to reconsider Hon. Judge Mark Lane's order issued July 15, 2020 denying Plaintiff's Request to Defendants Richard W. Miller, City of Austin, Wal-Mart Defendants for Initial Disclosure and Motion for Extension of Time to Respond to City Defendants' Discovery Request (Dkt. #77) in time to comply with Courts order to comply with Court's order to comply with defendant's remaining discovery request by June 25, 2020. Plaintiff is extremely concerned about Hon. Judge Lane's largely unwarranted admonishments, threats of dismissal for want of prosecution and denial of Plaintiff's "longstanding requests" for disclosure and asserts as follows:

///

///

I. INTRODUCTION

On July 20, 2020 Plaintiff received via US Postal Service Hon. Judge Lane's Order signed July 15, 2020. By that Order, Judge Lane: (1) denied Plaintiff's Request to Defendant Richard W. Miller, City of Austin, Wal-Mart Defendants for Initial Disclosure and (2) denied Plaintiff's Motion for Extension of Time to Respond to City Defendants Discovery Request per Court's Order. The basis for denying Plaintiff's request for initial disclosure is some "defendants' stipulation" that Plaintiff is not aware of or being a party to. More specifically, Judge Lane found Plaintiff's Motion to Compel being moot because ""**In their response, Defendants stipulate that they have complied with, or working on complying with , Singh's discovery requests.** *See Order on page 3, emphasis added.* The language is not only vague, it is wholly incorrect because Defendants to this day have neither complied, nor advised Plaintiff that they are working to comply with the disclosure requested of them.[1] Neither Mr. Ramirez or Mr. Payne have ever advised Plaintiff of any steps they have taken to comply. Plaintiff considers denial of Plaintiff's request based on some stipulation between Judge Lane and Mr. Ramirez without Plaintiff's knowledge highly improper.

Judge Lane denied Plaintiff's extension of time of time based on the duration of time the discovery request had been overdue. This duration of overdue time is approximately the same as Plaintiff's request for initial disclosure had been overdue by defendants, especially City defendants. This delay on part of Plaintiff was not caused by his intentional failure but inadvertent mistake in misplacing the mail. Most importantly, the delay in large part was caused by Defendants' own failure to move to compel earlier after they did not receive a response from Plaintiff. City Defendants did nothing to compel a response from Plaintiff for over nine months. It was only after Plaintiff served a notice of motion to show cause, City Defendants' in a

gamesmanship moved the Court to compel discovery. Clearly, Plaintiff cannot be held for all the delay as Judge Lane indicates where Defendant just sat and did nothing to compel. Plaintiff also notes that City Defendants have taken no similar action to compel discovery from Wal-Mart even though they also served Wal-Mart with discovery requests at about the same time they served Plaintiff. The Court should ask City Defendants to explain their blatantly discriminatory behavior towards Plaintiff when it comes to request for discovery sanctions.

II. SUMMARY OF FACTS

According to judge Lanes Order, Defendants Miller's request to Plaintiff were sent on 21-22 August, 2019. According the copy provided to Plaintiff Defendant City of Austin on August 22, 2019 Defendant Miller and City of Austin also sent their discovery request to Wal-Mart. Plaintiff sent disclosure request to defendant Miller via Mr. Ramirez on or around September 12, 2019. Thereafter, Plaintiff has constantly reminding defendant Miller about need to provide preliminary disclosures. Defendant Miller ignored Plaintiff's requests. To this day Defendants have provided none of the requested disclosures[1].

City Defendants made no effort to remind Plaintiff that they would seek the Court's intervention until Plaintiff moved for a show-cause Order in March of 2020. To this day City defendants have done nothing to obtain discovery they sought from Wal-Mart where as they moved the Court to compel discovery from Plaintiff. Both Wal-Mart and Plaintiff were sent discovery request by Miller the same day – around August 22, 2019. According to Judge Lanes Order of June 15, 2020 "the undersigned ordered that Singh file his amended admissions no later than June 25, 2020, and answer Discovery Defendants' interrogatories [and request for production] by June 25, 2020. Plaintiff now files for reconsideration of June 15, 2020 Order.

III. ARGUMENT

A. The Court Should Grant Plaintiff Extension of Time for Complying with Remaining Portion of Discovery – Reply Request to Admit Was filed and Served with Plaintiff's Request for Leave to Amend Deemed Admissions.

Plaintiff has already complied partially, by filing his reply to Millers request to admit. It was filed before Judge Lanes June 10, 2020 Order as part of request for leave to amend deemed admissions. Plaintiff notes that Judge Lane granted request to amend deemed admissions. Defendants were provided a copy of full response as to their request to admit. As a result, Plaintiff is perplexed why Judge Lane still made a mention indicating request to admit is still overdue.

Record would show that during the time-period at issue, Plaintiff has filed several papers with the court. They include Plaintiff's Rule 60(b) motion and motion to reconsider. The record would show that Plaintiff filed a supplement to motion to reconsider. All this work takes time. It takes Plaintiff inordinate amount of time to make one filing given his current physical limitation (elbow injury sustained during the incident), and his efficiency with the keyboard.

In denying Plaintiff extension of time, Judge Lane noted that Plaintiff's keyboard efficiency is excellent based on his filings. Plaintiff thanks Judge Lane for being kind, wishes that he would be aware of reality. Plaintiff can only get by if he has sufficient time. Plaintiff uses his two fingers. They hurt with any prolonged use and elbow injury. Plaintiff intended to comply with Judge Lane's Order not violate it. This is precisely, why Plaintiff asked for extension.

Additionally, at this time Plaintiff must decide whether and how to proceed with appeal of the order denying reversals. The deadline to take appeal is fast approaching. As a result, Plaintiff finds no time to devote to discovery request. Plaintiff has so advised Mr. Ramirez and made clear that as soon as the time to take appeal passes, Plaintiff will work to respond to the

remaining discovery requests. In light of the above, the Court should grant him extension requested so that he may not be unnecessarily in violation of the Court's order.

B: **The Court Should Enter an Order Directing Defendants to Comply with Plaintiff's Disclosure request as it is Unfair to Hold Defendants to a Different Standard than the Plaintiff as to Compliance with Discovery Matters.**

Plaintiff's has been asking Defendants for disclosures at issue over the past ten months – that is as long as the Defendants having been seeking their discovery from Plaintiff. These consist of records businesses and organizations maintain as regular part of their operation They do not require any special preparation. To this day neither City Defendants nor Wal-Mart defendants have produced any disclosures.

Judge Lane denied Plaintiff's request as being moot. I Judge Lane's own words:

> "Lastly, the Court finds Singh's motion is **MOOT** to the extent he asks the court to "direct defendants' [sic] to comply with Plaintiff's longstanding requests (informal via email) for disclosure of certain information" Dkt. #77) at 6. In their response, Defendants stipulate that they have complied with, or working on complying with, Singh's discovery request. Accordingly, Singh's Motion to Compel is **MOOT**." Emphasis original.

Judge Lane Order, dated July 15, 2020, p. 3.

The above language is not only vague and misleading but also wholly false. First, of It sounds odd that Judge Lane would stipulate with Defendants during the pendant motion to compel without Plaintiff's knowledge of same. Plaintiff has no knowledge of, and was never consulted on that matter by either City of Austin Defendants or Wal-Mart Defendants Second, Judge Lane assertion that defendants have **"complied with" part of the purported stipulation is false**. To this day Wal-Mart Defendants has not complied with any, not even half of one disclosure requested. Likewise, City Defendants have not complied with even one item of disclosure.[1]

1 City Defendants provided Plaintiff with a Copy of the Citation issued by Miller via email attachment and have refused to provide with copy of the citation suitable for expert examination. Plaintiff has advised Mr. Ramirez that the citation has been clearly tampered with and Plaintiff will request the Court for an in-camera review of the same at a future date.

Third, despite multiple requests including formal requests neither defendants have ever advised Plaintiff that they intend to comply. They have not advised Plaintiff of anything they are doing or have done to constitute inference that they are working on complying with Plaintiff's disclosure requests. They have ignored Plaintiff's requests totally. If Defendants have stipulated something without Plaintiff's knowledge and obviously behind his back to avoid issuance of a proper order, Plaintiff is not a party to it. In addition, Plaintiff is not sure it is proper for a Court to deny a request by stipulating something behind Plaintiff's back. Therefore, the entire stipulation is invalid. The denial of order to compel should be reversed.

C. Plaintiff is Concerned about Judge Lane's Admonitions Because Are Unwarranted.

Instant order at issue seems to suggest that Plaintiff is being purposely dilatory and not being diligent enough in prosecuting this action Plaintiff makes unfounded excuses for certain of his errors. In the past, Plaintiff has misplaced some pieces of mail and as a result he missed to perform certain acts. Failing to respond to Defendants' discovery is one of those missed acts. However, in other cases some mail has been returned as undeliverable for reasons not within his control or minor error. As example, a certain piece of mail from the court was returned to the Court because of a "typo" in the address. Specifically, in one instance Plaintiff wrote P.O. BOX 10625 instead of correct address on file with the Court is 10526. The Clerk's office mistook that Plaintiff has moved and failed to make an address correction. Plaintiff received an Order asking him to correct his address. In response, Plaintiff filed a motion for relief from the order, explaining that he had not moved. Plaintiff also noted that the correct P.O. BOX 10526 appeared on the same page of the paper filed as the P.O. BOX 10625. It appears that Judge Lane has not forgiven Plaintiff for the typo" as he continues to use that incident as a part of pattern of willful

act. Plaintiff has been diligent in prosecuting this matter as the filing made with the court would indicate.

Plaintiff has been attempting to deal with discovery issues created by Defendants out of Court's view until now. That could have created a false impression. Plaintiff is concerned about Judge Lane's unwarranted about dismissing the action for want of prosecution. In that light, Plaintiff finds it highly perplexing that Judge Lane would deny Plaintiff's disclosure request on the basis for some stipulation without Plaintiff knowledge.

Plaintiff is especially concerned about procedural fairness. For example, in the instant case, both Plaintiff and the City defendants and Plaintiff began their discovery request at about the same time around mid-August 2019 – September 2019. Both parties were similarly responsible for failing to comply. Yet in one case, City defendants were beneficiaries of an Order to Compel while Plaintiff was denied the same. Especially troubling is that Plaintiff was denied on some stipulation about which Plaintiff had no knowledge. Obviously, we have two different results on largely similar set of facts. Another, example is also troubling. Here Defendants City of Austin sought discovery from Plaintiff and Wal-Mart on the same date – August 22, 2019. Neither defendant complied. City defendants moved to compel and sanctions against Plaintiff but no such thing against Wal-Mart. While I am not a lawyer, is it permissible under the Court's watch? I have been trying hard to learn the rules and have always intended to follow them. But I refuse to be bullied by Defendants and will seek intervention of the Court as needed. I do not have resources of the Defendants. As a result, I may need more time to respond to orders in compliance of the Rules. I hope the Court does not misconstrue it as sign of defiance because it is certainly not intended.

IV. CONCLUSION

From the forgoing it is clear that that Plaintiff's request for extension should be granted. It is also clear that Court should also enter an order compelling Defendants – both Wal-Mart and City of Austin defendants – to comply with Plaintiff's request for disclosure.

IV. RELIEF REQUESTED

WHEREFORE, Plaintiff requests that the Hon. Court grant him relief as follows:

(1) Enter appropriate order directing City and Wal-Mart Defendants to comply with Plaintiff's Disclosure request before Plaintiff can submit his proposed plans for scheduling order the Court might be contemplating.

(2) Grant Plaintiff extension of June 25, compliance deadline so that Plaintiff can comply with Court's order in a timely manner and not forced to be out of compliance considering Plaintiff also might be required to make a motion for appeal – that would take time.

(3) Grant further relief Plaintiff may show himself to be entitled.

Dated: July 28, 2020

Respectfully submitted,

By: Ravindra Singh PH.D

RAVINDRA SINGH, PH.D.
Plaintiff, Pro Se
P.O. BOX 10526
Austin, TX 78766
(512)293-7646
Excion_2000@yahoo.com

CERIFICATE OF SERVICE

I, Ravindra Singh, Ph.D. certify that on this 28th Day of July 2020, I served a true and correct copy of aforementioned document via USPS on the defendants' counsel at the following address via USPS First Class Mail Postage Prepaid on the following:

Robert Icenhauer-Ramirez
1103 Nueces Street
Austin, TX 78701

Brett Payne
WB&C LLC
Great Hills Corporate Center
9020 North Capital of Texas Hwy.
BUILDING II STE. 225
Austin, TX 78759

Ravindra Singh Ph.D.
RAVINDRA SINGH, PH.D.

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R. SINGH, PH.D.
P.O. BOX 10526
AUSTIN TX 78766

PLACE STICKER AT TOP OF ENVELOPE TO THE RIGHT OF THE RETURN ADDRESS, FOLD AT DOTTED LINE

CERTIFIED MAIL®

7020 0640 0000 7889 6418

UNITED STATES POSTAL SERVICE®

1000

78701

U.S. POSTAGE PAID
FCM LG ENV
AUSTIN, TX
78757
JUL 28, 20
AMOUNT
$8.00
R2305H126487-13

SCAN

RETURN RECEIPT REQUESTED

US DISTRICT COURT SECRETARY.
501 WEST FIFTH ST. # 1100
AUSTIN TX 78701.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RAVINDRA SINGH,	§	
	§	
Plaintiff	§	
	§	
vs.	§	**CAUSE NO. 1:16-CV-00930-RP**
	§	
WAL-MART STORES, INC.;	§	
WAL-MART STORES, LLC;	§	
ALAN MARTINDALE	§	
EVA MARIE MOSELEY; CITY OF	§	
AUSTIN; AND RICHARD W. MILLER	§	
	§	
Defendants	§	

DEFENDANT RICHARD W. MILLER AND THE CITY OF AUSTIN'S
RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO RECONSIDER

Defendants City of Austin and Richard W. Miller respectfully submit this Response in Opposition to Plaintiff's Motion to Reconsider.

I. INTRODUCTION

Ravindra Singh (hereafter "Plaintiff" or "Singh") filed his Motion to Reconsider the Court's Order (Doc. 83).

II. FACTS

The Court found that Singh's motion to compel disclosure of certain information moot based on the Defendant's stipulation "that they have complied with, or are working on complying with, Singh's discovery requests." (Doc. 83, page 3).

Singh alleges in his motion to reconsider that "Defendants to this day have neither complied, nor advised Plaintiff that they are working to comply with the disclosure requested of them." (Doc. 87, page 2). This is untrue.

What follows is not an exhaustive list of correspondence regarding providing discovery to Plaintiff. However, it will make clear that any assertion that the Defendant has failed to respond to his requests is untrue.

On March 27, 2020, Defendant emailed Plaintiff attaching a copy of the citation, which he had requested, and indicating that Defendant was unaware of any surveillance video of the incident (but indicating to him that if a video existed that it could be in the possession of Wal-Mart). See Exhibit "A."

On July 17, 2020, the undersigned emailed Plaintiff that "I am preparing the responses to your requests for disclosure and should have something to you by next Friday, hopefully. If an Incident Report exists, I will have it for you."

On July 19, 2020, I wrote the Plaintiff the following: "My understanding of police protocol is consistent with what you were told at the Municipal Court - that there are not Incident Reports filed with Class C citations. Also, an Incident Report is the same document as an Offense Report, simple different names for the same document. I have requested copies of any document that was generated in your case. However, given the staffing right now, it may prove longer to receive than I would like."

On July 24, 2020, I sent Singh a four-page letter with enclosures[1] responsive to his requests. I indicated that there were several items that would be provided when they were received by me. See Exhibit "B."

On July 27, 2020, I emailed Singh that "I have indicated to the Court that I am in the process of responding to your requests for discovery. I have also emailed you indicating that and

[1] It should be noted that Dr. Singh requests "hard-copies," not emailed PDFs. Thus, the PDF copy of the citation which was emailed to him months ago was insufficient for him because it is not "suitable for expert examination," and he claims that the citation has been "tampered with." All documents are sent via mail.

letting you know that I am attempting to get the information that I don't have in my file from APD. Once that is given to me, I will immediately provide it to you. Don't forget that you indicated that you wanted "hard-copies" of these documents. I mailed them to you last week and will mail the rest of the requested documents to you when they are given to me. (Emphasis added). I have made the requests to APD and am waiting on a response. My response to you will be immediate once I receive the documents.

Yes, I do have an objection to any request that you have to comply with my discovery requests. The Court has Ordered you to comply and you have steadfastly refused to do so. As I stated, I am going to make a motion to sanction perhaps as early as tomorrow."

Finally, on July 28, 2020, I sent Plaintiff, via certified mail, return receipt requested, another letter with a copy of the Incident Report, CAD sheet as well as copies of the items that I had already sent Plaintiff. The items were resent with the certified mailing because of the suspicion that Plaintiff would claim that he had received no items from the undersigned, and this was made explicit in the letter of that date. See Exhibit "C."

III. ARGUMENT

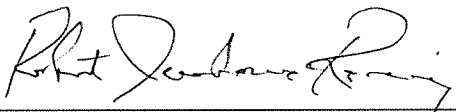
Plaintiff's motion should be denied because it merely re-urges that which has been argued repeatedly in this case.

II. CONCLUSION

The undersigned opposes this motion to reconsider. However, ultimately, the undersigned did not want the Court to be misled by Plaintiff's assertions that Defendants were not producing documents responsive to Plaintiff's informal requests for disclosure.

Dated: July 30, 2020.

RESPECTFULLY SUBMITTED,



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ATTORNEYS FOR DEFENDANTS
CITY OF AUSTIN & RICHARD W. MILLER

CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2020, the foregoing was filed electronically with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

Mr. Brett H. Payne
WALTERS, BALIDO & CRAIN, L.L.P.
Great Hills Corporate Center
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Building II, Ste. 225
Austin, Texas 78759
Attorneys for Wal-Mart Defendants

And, via Certified Mail, Return Receipt Requested, # 7014 0510 0001 8149 7822, to:

Dr. Ravindra Sigh, Ph.D.
Pro Se
excion_2000@yahoo.com
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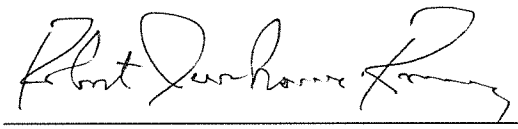

ROBERT ICENHAUER-RAMIREZ

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF TEXAS

RAVINDRA SINGH, PH.D., Plaintiff,	§	
v.	§	CIVIL ACTION NO. 1:17-CV-1120
WAL-MART STORES, INC., WAL-MART STORES TEXAS, LLC, ALAN MARTINDALE, EVA MARIE MOSELEY; AND CITY OF AUSTIN, AUSTIN POLICE DEPARTMENT, EX-POLICE CHIEF ART ACEVEDO, OFFICER RICHARD W. MILLER (AP3538), OFFICER JOHN DOE 1, Defendants.	§	

DEFENDANT WAL-MART STORES TEXAS, LLC, WAL-MART STORES INC., ALAN MARTIN, AND EVA MARIE MOSELEY'S RESPONSE TO PLAINTIFF'S MOTION TO RECONSIDER

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, Wal-Mart Stores Texas, LLC, Wal-Mart Stores, Inc., Alan Martin, and Eva Marie Moseley (referred to herein as Wal-Mart Defendants), Defendants in the above entitled and numbered cause, and files this their Response to Plaintiff's Motion to Reconsider and in support thereof would respectfully show the Court as follows:

I.

Plaintiff is requesting that the Court reconsider the Court's order, (Dkt. 75), denying Plaintiff's Motion to Compel Defendants to comply with Plaintiff's discovery requests. Plaintiff asserts in his Motion that Defendants failed to comply with his requests and further failed to advise Plaintiff that Defendants are making efforts to comply with the same. (Dkt. 87). Plaintiff's statements are inaccurate. On February 2, 2020 (and prior to Plaintiff's Request for Initial Disclosures, Dkt. 77), Wal-Mart Defendants mailed Plaintiff twenty-five pages of documentation pertinent to this matter and the

parties involved. (See Exhibit "A"). These documents are included in the list of documents of which Plaintiff requests disclosure and of which Plaintiff represents to the Court in his Motion to Reconsider have not been disclosed. Further, and as previously represented by Co-Defendant to Plaintiff (noted in Dkt. 88, pg. 2), there is no surveillance video of the alleged underlying incident.

II.

Wal-Mart Defendants are opposed to Plaintiff's Motion to Reconsider as the issues contained therein and the relief sought by Plaintiff was previously addressed multiple times by this Court. Additionally, Wal-Mart Defendants present this Response to the Court to further illustrate the efforts made by Defendants in light of Plaintiff's representation to the contrary.

WHEREFORE, PREMISES CONSIDERED, Wal-Mart Defendants pray that this Honorable Court take into consideration the legal arguments, factual grounds, and evidence submitted and issue an ordering denying Plaintiff's Motion to Reconsider and for further relief to which Defendants are justly entitled and will ever pray.

Respectfully submitted,

WALTERS, BALIDO & CRAIN, L.L.P.

BY: */s/ Brett H. Payne*
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ATTORNEY FOR WAL-MART DEFENDANTS

CERTIFICATE OF SERVICE

This is to certify that on this the 31st day of July, 2020, a true and correct copy of the foregoing has been forwarded to all counsel of record.

/s/ Brett H. Payne
BRETT H. PAYNE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RAVINDRA SINGH, PH.D, Plaintiff, v. WAL-MART STORES, INC., et al., Defendants.	§ § § § § § § § §	1:17-cv-1120-RP

ORDER

Before the Court is Plaintiff Ravindra Singh's ("Singh") appeal of United States Magistrate Judge Mark Lane's Order, (Dkt. 83). (Appeal, Dkt. 87). In his order, Judge Lane addressed Singh's Request to Defendants Richard W. Miller, City of Austin, Wal-Mart Defendants for Initial Disclosures and Motion for Extension of Time to Respond to City Defendants' Discovery Requests, (Mot., Dkt. 77). (Order, Dkt. 83). Judge Lane denied Singh's motion to the extent it related to Richard W. Miller, City of Austin, and the Wal-Mart Defendants' (together, "Defendants") discovery motions and requests for admission, noting that Singh's "[c]ontinued failure to comply [with] the discovery process will likely be met with this case being dismissed for failure to prosecute.") (*Id.* at 2). Because Singh failed, again, to timely file his answers to Defendants' requests for admission, Judge Lane found those requests to be admitted. (*Id.* at 2–3). Finally, Judge Lane found his motion requesting Defendants to respond to discovery to be moot. (*Id.* at 3). Singh timely filed his appeal on July 29, 2020.[1] (Appeal, Dkt. 87). In his appeal, Singh appears to challenge all of Judge Lane's findings and orders and expresses his "concern" about Judge Lane's "unwarranted" admonitions. (*Id.* at 6–7). Defendants timely filed a response to his appeal on July 31, 2020. (Dkt. 89).

[1] The Court considers Singh's appeal to be timely filed under Federal Rule of Civil Procedure 6(d) or, alternatively, if it was untimely, this Court accepts the late filing. (*See* Second Amended Emergency Order in Light of COVID-19 Pandemic, Dkt. 76).

A district judge may reconsider any pretrial matter determined by a magistrate judge where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law. 28 U.S.C. § 636(b)(1)(A). District courts apply a "clearly erroneous" standard when reviewing a magistrate judge's ruling under the referral authority of that statute. *Castillo v. Frank*, 70 F.3d 382, 385 (5th Cir. 1995). The clearly erroneous or contrary to law standard of review is "highly deferential" and requires the court to affirm the decision of the magistrate judge unless, based on the entire evidence, the court reaches "a definite and firm conviction that a mistake has been committed." *Gomez v. Ford Motor Co.*, No. 5:15-CV-866-DAE, 2017 WL 5201797, at *2 (W.D. Tex. Apr. 27, 2017) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). The clearly erroneous standard "does not entitle the court to reverse or reconsider the order simply because it would or could decide the matter differently." *Id.* (citing *Guzman v. Hacienda Records & Recording Studio, Inc.*, 808 F.3d 1031, 1036 (5th Cir. 2015)).

Because Singh timely appealed Judge Lane's order, the Court reviews Judge Lane's order for clear error or for conclusions that are contrary to law. Having done so, the Court denies Singh's appeal. Upon its own review, this Court finds that Judge Lane's order was not clearly erroneous or contrary to law.

Accordingly, the Court **AFFIRMS** Judge Lane's order on July 15, 2020, (Dkt. 83), and **DENIES** Singh's appeal, (Dkt. 87).

SIGNED on August 3, 2020.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF TEXAS

RAVINDRA SINGH, PH.D., Plaintiff,	§	
v.	§	CIVIL ACTION NO. 1:17-CV-1120-RP
WAL-MART STORES, INC., WAL-MART STORES TEXAS, LLC, ALAN MARTINDALE, EVA MARIE MOSELEY; AND CITY OF AUSTIN, AUSTIN POLICE DEPARTMENT, EX-POLICE CHIEF ART ACEVEDO, OFFICER RICHARD W. MILLER (AP3538), OFFICER JOHN DOE 1, Defendants.	§	

DEFENDANT WAL-MART STORES TEXAS, LLC, WAL-MART STORES INC., ALAN MARTINDALE, AND EVA MARIE MOSELEY'S MOTION TO DISMISS FOR PLAINTIFF RAVINDRA SINGH'S FAILURE TO COOPERATE IN DISCOVERY AND FAILURE TO COMPLY WITH THE COURT'S ORDERS

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, Wal-Mart Stores Texas, LLC, Wal-Mart Stores, Inc., Alan Martindale, and Eva Marie Moseley (referred to herein as Wal-Mart Defendants), Defendants in the above entitled and numbered cause, and files this their Motion to Dismiss for Plaintiff Ravindra Singh's Failure to Cooperate in Discovery and Failure to Comply with the Court's Orders, and in support thereof would respectfully represent and show unto the Court the following:

I. BACKGROUND

1.1 Ravindra Singh filed this lawsuit against the Wal-Mart Defendants stemming from an incident that occurred on November 26, 2015. Singh alleges various civil rights violations under 42 U.S.C. §§ 1981, 1983, 1985(b)(3) and rights under the Constitution and laws of the State of Texas. He also brought suit against the City of Austin, Austin Police Department, Art Acevedo, Richard Miller,

and Officer John Doe 1 (referred to herein as Austin Defendants). The Wal-Mart Defendants move for dismissal of Plaintiff's claims against them and the factual basis and legal reasons regarding the Plaintiff's failure to prosecute his case and comply with the Court's orders (Dkt. 75 and 83) are the same as those set forth in the Austin Defendant's Motion. (Dkt. 86).

II. ARGUMENTS AND AUTHORITY

2.1 If the plaintiff does not actively pursue the lawsuit, the court may dismiss the case for failure to prosecute. *Id.*; *Link v. Wabash R.R.*, 370 U.S. 626, 630 (1962); *Larson v. Scott*, 157 F.3d 1030, 1031 (5th Cir. 1998); *Baker v. Latham Sparrowbrush Assocs.*, 72 F.3d 246, 252-53 (2d Cir. 1995); *see, e.g., Doe v. Megless*, 654 F.3d 404, 411 (3d Cir. 2011) (dismissal was appropriate because P's actions made adjudicating claim impossible when his motion to proceed anonymously was denied and he continued to refuse to proceed under his real name); s*ee also Chamorro v. Puerto Rican Cars, Inc.*, 304 F.3d 1, 4 (1st Cir. 2002) (court's inherent power to dismiss cases for failure to prosecute is reinforced and augmented by FRCP 41(b)). Dismissal for failure to prosecute is a harsh sanction that should be used only in extreme situations, such as when there is a clear record of delay or contempt or when less drastic sanctions are unavailable. *DiMercurio v. Malcom,* 716 F.3d 1138, 1140 (8th Cir. 2013).

2.2 Appellate courts require the district courts to consider certain factors when deciding whether to dismiss a case for failure to prosecute. *Berry v. CIGNA/RSI-CIGNA*, 975 F.2d 1188, 1191 (5th Cir. 1992) (two regular factors plus three aggravating factors). In *Williams v. Brown & Root, Inc.*, the Fifth Circuit discussed the standard imposed with regards to involuntary dismissals of a plaintiff's case with prejudice:

> "We will affirm only if a 'clear record of delay and contumacious conduct by the plaintiff' exists and "lesser sanctions would not serve the best interests of justice." Additionally, most courts affirming dismissals have found at least one of three

> aggravating factors: (1) delay caused by plaintiff himself and not his attorney; (2) actual prejudice to the defendant; or (3) delay caused by intentional conduct."

828 F.2d 325, 328-29 (5th Cir. 1987). "Where further litigation on the claim will be time-barred, a dismissal without prejudice is no less severe a sanction than a dismissal with prejudice, and the same standard of review is used. *McGowan v. Faulkner Concrete Pipe Co.*, 659 F.2d 554, 556 (5th Cir. Unit A Oct. 1981).

2.3 The district court may also dismiss a suit if a party does not comply with discovery. *See* FED. R. CIV. P. 37(b)(2), (c)(1). In these instances, the court should consider these factors: (1) the degree of actual prejudice to the defendant; (2) the amount of interference with the judicial process; (3) the culpability of the litigant; (4) whether the court warned the party in advance that dismissal would be a likely sanction for noncompliance; (5) the effectiveness of lesser sanctions; (6) the history of delay; (7) whether the conduct of the party or the attorney was willful or in bad faith; and, (8) the merit of the claim. *Bass v. Jostens, Inc.*, 71 F.3d 237, 241 (6th Cir. 1995); *Archibeque v. Atchinson, Topeka & Santa Fe Ry.*, 70 F.3d 1172, 1174 (10th Cir. 1995); *Harris v. City of Phila.*, 47 F.3d 1311, 1330 n.18 (3d Cir. 1995).

2.4 In the instant case, Plaintiff failed to serve discovery responses to Defendants' request for the same which were served on Plaintiff one year ago, as detailed in Austin Defendants' Motion to Dismiss. (Dkt. 86). Plaintiff has neither prosecuted his case - either by responding to discovery or timely propounding discovery to Defendants - nor has he complied with the Court's orders in this matter. (Dkt. 75 and 83). Furthermore, Defendants prepared for and were present at the properly noticed deposition of Plaintiff; however, Plaintiff failed to appear for that deposition. (Dkt. 62).

2.5 Now, the Defendants are no better prepared to evaluate this case for settlement or trial than before suit was filed. The parties are unable to engage in meaningful settlement negotiations in advance of trial because Defendants have not been provided any records or testimony to aid in an

evaluation of Plaintiffs' claims in the more than two and a half years this case has been in litigation. Defendants have made a good faith effort to comply with the Court's orders. However, Plaintiff's inability to confer with parties, comply with the Court's discovery deadlines and signed orders, or comply with Defendants' requests for discovery (including Plaintiff's deposition) have irreparably harmed and prejudiced Defendants. *See Williams*, 828 F.2d at 328-29. Therefore, dismissal with prejudice is warranted.

III. CONCLUSION

3.1. Based on the foregoing statutory and case law, Defendants are entitled to dismissal with prejudice as to Plaintiffs' case against them.

WHEREFORE, PREMISES CONSIDERED, Wal-Mart Defendants respectfully request that the Court grant Wal-Mart Defendants Motion for Dismissal with Prejudice pursuant to Federal Rule of Civil Procedure 37 and 41(b), and for all such other and further relief to which they may be justly entitled and will ever pray.

Dated: August 3, 2020.

Respectfully submitted,

WALTERS, BALIDO & CRAIN, L.L.P.

BY: */s/ Brett H. Payne*

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ATTORNEY FOR WAL-MART DEFENDANTS

CERTIFICATE OF SERVICE

This is to certify that on this the 3rd day of August, 2020, a true and correct copy of the foregoing has been forwarded to all counsel of record:

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***Via CMRRR*: 7015 1730 0000 0461 4601**

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Via EM/ECF

/s/ Brett H. Payne

BRETT H. PAYNE

FILED
August 05, 2020
CLERK, U.S. DISTRICT CLERK
WESTERN DISTRICT OF TEXAS BY
Laura R. Thomson
DEPUTY

IN THE DISTRICT COURT
FOR WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RAVINDRA SINGH, PH.D.	§	
	§	
Plaintiff,	§	Cause No.: 1:17-CV-1120-RP-ML
V.	§	JURY TRIAL DEMANDED
WAL-MART STORES INC,	§	
WAL-MART STORES TEXAS LLC,	§	
ALAN MARTINDALE	§	
EVA MARIE MOSELEY; and	§	
CITY OF AUSTIN,	§	
AUSTIN POLICE DEPARTMENT,	§	
EX-POLICE CHIEF ART ACEVEDO,	§	
OFFICER RICHARD W MILLER (AP3538)	§	
JOHN DOE 1,	§	
	§	
Defendants	§	

NOTICE OF APPEAL

Notice is hereby given that Ravindra Singh, Ph.D. Plaintiff in the above named case, hereby appeals to the United States Court of Appeals for the Fifth Circuit under 28 U.S.C. § 1292(b) and Fed. R. App. P. 5 from the Order of the District Court issued the 7th day of July, 2020 denying reconsideration of Rule 60(b) order issued by Judge Mark Lane on June 10th, 2020 seeking to vacate dismissal of Defendant Richard W. Miller under the Texas Tort Claims Act TEX. CIV. Prac.& Rem. Code §101.106 ruling that Miller's employer City of Austin is the proper party instead; dismissal of claim for defamation under Texas-state law as time-barred on the basis of the single publication rule of claim accrual; dismissal of Defendant Art Acevedo on the ground that the City of Austin is the proper party instead, and dismissal of Defendant John DOE 1 by denying opportunity to amend the complaint after discovery on the ground that amendment would be futile because it would not relate back because statute of limitations had run, granted by the District

Court pursuant to its ORDER signed March 25, 2019 following Defendants' motion to dismiss under the Fed. Civ. Proc. Rule 12(b)(6).

Dated: August 5, 2020

Respectfully submitted,

/s/Ravindra Singh, Ph.D.
By: _____
RAVINDRA SINGH, PH.D.

Plaintiff, Pro Se
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(512)293-7646
excion_2000@yahoo.com

CERIFICATE OF SERVICE

I, Ravindra Singh, Ph.D. certify that on this 5th Day of August 2020, I filed a true and correct copy of aforementioned NOTICE OF APPEAL on the U.S. District Court Clerk at: 501 West Fifth Street, Ste. #1100 Austin, Texas 78701 via DROP BOX located at: https://www.txwd.uscourts.gov/filing-without-an-attorney/

I also served a true and correct copy of the foregoing document via USPS First Class Mail Postage Prepaid on the following:

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Brett Payne
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/S/Ravindra Singh, Ph.D.
_____
RAVINDRA SINGH, PH.D.

FILED
August 19, 2020
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY: LRT
DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RAVINDRA SINGH, PH.D.	§	
Plaintiff,	§	
V.	§	
	§	
WAL-MART STORES INC	§	1:17-CV-1120-RP-ML
WAL-MART STORES TEXAS LLC	§	
ALAN MARTINDALE	§	
EVA MARIE MOSELEY	§	
CITY OF AUSTIN	§	
AUSTIN POLICE DEPARTMENT	§	
EX-POLICE CHIEF ART ACEVEDO	§	
OFFICER RICHARD W MILLER	§	
OFFICER JOHN DOE I	§	
Defendants.	§	
	§	

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS RICHARD W. MILLER AND THE CITY OF AUSTIN'S MOTION TO SANCTION AND DISMISS CASE FOR PLAINTIFF RAVINDRA SINGH'S (ALLEGED) FAILURE TO COPERATE IN DISCOVERY AND COMPLY WITH COURT ORDER

TO: Hon. Robert Pitman
District Court Judge

Plaintiff Ravindra Singh, Ph.D. respectfully submits this Response in Opposition to Defendants Richard W. Miller and City of Austin's Motion to Sanction and Dismiss Case for Plaintiff's (alleged) Failure to Cooperate in Discovery and Comply with Court's order.

I. INTRODUCTION

This motion to sanction and dismiss arose out of a discovery dispute and a confusing order by Hon. Mark Lane and defense counsel Ramirez's gamesmanship. Defendants procured an Order on June 10, 2020 from Hon. Judge Lane. That order required Plaintiff to answer defendants certain

request for production, interrogatory and request to admit by June 25, 2020.It was confusing because Plaintiff had already answered defendants' Request to Admit on March 18, 2020. Because Plaintiff received a copy of the order on June 15, 2020 via United States Postal Service (USPS) leaving him with insufficient time Plaintiff filed a request for extension of the June 25, 2020 deadline. That order was issued based on Defendants' representation to the court that Plaintiff had not provided any discovery despite the fact that Plaintiff answered fully defendants Request to Admit. Plaintiff appealed that order of denial of extension. Hon. Judge Pitman denied the appeal on August 3, 2020. Plaintiff on June 17, 2020 answered the remainder of the discovery request – Request for Production and the Interrogatory. Plaintiff's Second Motion to Compel filed on the same day is now pending with the Court. Plaintiff respectfully asks the Court to deny defendants instant motion for lack of merit.

II. FACTS

Relevant facts, specific to instant motion are as follows:

According City Defendants, they sent some discovery request to Plaintiff in August 2019. In mid-September Plaintiff also served email-request seeking initial disclosure on Defendant Miller and City of Austin through attorney Ramirez. For reasons beyond Plaintiff's control, the discovery request to him were misplaced, and the matter escaped his attention. When Plaintiff became aware – not due to any concern expressed on part of Defendant Miller/Mr. Ramirez but only due to a casual reference to it while Plaintiff was attempting address the propriety of dismissal of Defendant Miller under the Texas Tort Claims Act (TTCA) by the Court in its March 25, 2019 Order (Dkt. 41) in light of recent Texas Supreme Court's opinion in *Garza v. Harrison* – Plaintiff took steps to address that issue of pending discovery. In this regard, First, Plaintiff requested Defendant Miller provide him with a copy of the discovery allegedly sent to Plaintiff. However,

Mr. Ramirez did not respond to the request for over a month. This prompted Plaintiff to send to Mr. Ramirez a second email-reminder indicating that should Mr. Ramirez fail to respond in a prompt manner, Plaintiff would conclude that mention of overdue discovery request was made in error. Mr. Ramirez still did not respond. It was only after the Plaintiff served an email-notice of his intention to move the Court for a show cause order why Miller's dismissal under TTCA should not be vacated, Mr. Ramirez in an act of gamesmanship, dashed to the Court with a Motion to Compel and Sanctions against Plaintiff. On March 18, 2020 Plaintiff filed a motion for leave to amend deemed admission. The text of the motion included a full, point –by-point answer to each of the requests to admit. Defendants were served with this document on March 18, 2020 as well. Judge Lane granted Plaintiff leave to amend in a "text only" order on March 31, 2020. There is no docket number associated with said order granting Plaintiff leave to amend deemed admissions. On June 10, 2020 Judge Lane granted Defendants' motion to compel requiring Plaintiff to answer discovery request. The Order included directive to answer request to admit on or before June 25, 2020 as well – Plaintiff had already answered them fully on March 18, 2020 itself. It appears that a confusion occurred as a result of lack of associated docket number entry because it was a text only. In that June 10, 2020 Order (Dkt. # 75) Judge Lane correctly observed that neither parties answered the discovery requests: "**It appears from the parties' filings that no discovery requests have been answered by either side of the case**" (See Judge Lane's Order, Dated June 10, 2020; emphasis added, Foot Note 7 at 12). (Dkt. 75). On Jun 25, 2020 Plaintiff filed for extension of time. Judge Mark Lane denied that request. On July 15, 2020 Judge Lane denied that motion. (Dkt. 83). Before that, on July 29, 2020 Defendant Miller moved this Court for sanctions and dismissal of the case, contending erroneously that the case should be dismissed because in two years and eight months Plaintiff has refused to participate in the discovery process (see Defendant

Richard W Miller and City of Austin's Motion to Dismiss and Sanctions and Dismiss Case for Plaintiff's Ravindra Singh's failure to Cooperate in Discovery and Comply with discovery Order, at page 2) ignoring their own failures to answer Plaintiff's disclosure requests. (Dkt. #86). On August 3, 2020 Judge Pitman denied Plaintiff's appeal of Judge Lane's June 10, 2020 order denying Plaintiff extension of June 25, 2020 deadline. (Dkt. # 91). Plaintiff received a copy of that Order via USPS on August 10, 2020. On August 17, 2020 Plaintiff sent his answer to – just a week after Judge Pitman's order denying his appeal of Judge Lane's June 10, 2020 order Plaintiff sent his answers to Interrogatories and Request for Production via email – request to admit were sent earlier on March 18, 2020. In addition, on August 17, 2020 Plaintiff filed a Second Motion to Compel answers to his long overdue answers for disclosure as Judge Lanes in his earlier denying Plaintiff extension of time, directed Plaintiff to file a separate motion for this purpose.

III. ARGUMENTS

1. Sanction Is Entirely Unwarranted

A: Defendants' contention that plaintiff has made no attempt to comply after seven weeks of entry of order is Bad Mathematics and should be rejected

As Defendants claim, and it may be true that "Two years and eight months have elapsed since Singh filed this lawsuit" in their Motion to dismiss (Dkt. 86 at 3). It is, however, an utter folly when they claim that "During that during that time, he (Plaintiff) has unwaveringly refused to participate in the discovery process". Id. Defendants' math is bad for several reasons.

First, by their own admission, Defendants did not serve any discovery request until August 2019. Given that, the maximum time period of inaction on part of Plaintiff, it was true, would be no more than 10-11 months – a drastic difference from claimed "Two years and eight months of their alleged refusal. until know full well that while their Rule 12(b) (6) motion was pending.

Second, can all that time of alleged inaction attributed to Plaintiff only or defendants also share some of the blame? Here, defendants went into a sleep mode after sending their discovery request even in face of missed scheduled oral examination. Any prudent person would have followed the communication pattern in effect at the time between Plaintiff and Mr. Ramirez, and sent a little email about the missed deposition. But Defendants did nothing for approximately two and a half months. That reduces the maximum potential time period of inactivity properly attributable to Plaintiff to about 7 to 8 months, if nothing more happened. Here, it is proper to consider what parties did or failed to do to address the issue. Here, when Plaintiff became aware of the matter in September – October of 2019, while parties were attempting to address possible reversal of Defendant Miller's dismissal under the Texas Tort Claims Act (TTCA) in light of Texas Supreme Court decision in *Garza v. Harrison* – Plaintiff contacted Mr. Ramirez about this opinion on September 9, 2019. Subsequently, Mr. Ramirez mentioned in passing during these email-conversation that he had sent some discovery requests. At no time during these conversations, or prior Mr. Ramirez expressed any concerns about missed discovery. Or draw Plaintiff's attention to that issue. Because Plaintiff had not seen the discovery request (lost mail), it was Plaintiff who first asked Mr. Ramirez to re-send the discovery requested, to him. Mr. Ramirez ignored Plaintiff's request to re-send the discovery for over a month. Because of the inaction on Defendants' part, Plaintiff again send Mr. Ramirez an email-reminder and made clear that should Mr. Ramirez fail to respond to the request to resend a copy of discovery sought, Plaintiff will conclude that his mention of mailing discovery to Plaintiff was in error. Even after this terse message, Mr. Ramirez did not re-send the discovery to Plaintiff. This, and subsequent three-month period was marked by contentious email-arguments between Plaintiff and Mr. Ramirez. Clearly, any delay cannot be solely attributable to Plaintiff under these circumstances. It is difficult to see how Plaintiff was

solely responsible for all this alleged delay. The Court should take note that Plaintiff also served his email-discovery request to Defendants soon after his September 9, 2020 email to Mr. Ramirez when he first made contact with Mr. Ramirez about the *Garza v. Harrison* decision of Texas Supreme Court. Defendants have not answered them to this day. Instead, they continue their effort to manufacture appearance of compliance by sending bits and pieces of information not covered in Plaintiff's disclosure request, and not relevant to resolution to this action. As a result, Plaintiff's second motion to compel is pending before the court.

Third, as explained earlier, even prior to Judge Lane's June 10, 2020 order requiring Plaintiff to comply by June 25, Plaintiff had already answered, in full, defendant's Request to Admit – on March 18, 2020 when he moved the court for leave to amend deemed admissions. Defendants were served with a copy of Plaintiff's answer in full.

Fourth, Plaintiff promptly answered the remaining discovery request completely and fully on August 17, 2020 via email, only a week after he received Judge Pitman's August 7, 2020 order denying his appeal of extension of June 25, 2020 deadline.

Fifth, defendants themselves continue to resist discovery while thy lay blame on Plaintiff. As explained in Plaintiff's Second Motion to Compel, defendants have provided just one item – the copy of the citation issued to Plaintiff by Defendant Miller. That translates into ninety-five percent (95%) failure rate and a miserable compliance rate indeed – five percent (5%). Even that citation has been tampered with and Mr. Ramirez has been so notified. What is worse is that Defendants recently sent bits and pieces of information not asked for in the disclosure, and irrelevant to the instant case at bar in an effort to create an appearance of compliance. Plaintiff requests that the court should take note that Plaintiff's Second Motion to Compel disclosure is currently pending.

Clearly Plaintiff is in full compliance – in less than a week after Judge Lanes June 10th order became final and effective on August 3, 2020. That is diligence, and not any example of doing nothing in seven weeks justifying dismissal and sanction, especially given the physical limitations Plaintiff faces of which it has apprised the court previously. In light of foregoing attorney fee is not warranted. The request should be denied.

(a) Law of the Circuit Does Not Support Dismissal, and in fact Counsels Against It.

It is a settled principle of law that Discovery is not meant to be the setting for the Court to dispose of claims – although the Court can and deploy the "draconian" sanctions of dismissal and default judgment as a last resort where nothing else will deter litigants from flouting the rules or discovery orders. See *U.S. For Use of M-CO Const., Inc. v. Shipco General, Inc., 814 F.2d 1011, 1014 (5th Cir. 1987).* Also long settled law in fifth circuit dismissal in the instant case would mean dismissal with prejudice – as urged by defendants, herein, It is settled that "the ultimate sanction," "the death penalty" should only be used in the "most egregious," "most flagrant," and "extreme" circumstances. This ultimate sanction should only be used when lesser sanctions prove futile.":

> "We have consistently recognized, however, that dismissal with prejudice "`is an extreme sanction that deprives a litigant of the opportunity to pursue his claim,'" *McGowan v. Faulkner Concrete Pipe Co.*, 659 F.2d 554, 556 (5th Cir.1981) (quoting *Gonzalez v. Firestone Tire & Rubber Co.*, 610 F.2d 241, 247 (5th Cir.1980)); accordingly, we have, in a long line of cases, sought to define the limits of the district court's discretion in this context. In *Rogers v. Kroger Co.*, 669 F.2d 317 (5th Cir.1982), we reviewed the cases from this circuit and restated the rule that we have consistently applied: "dismissals with prejudice [for want of prosecution] will be affirmed only upon a `clear record of delay or contumacious conduct by the plaintiff, ..., and when lesser sanctions would not serve the best interests of justice.'" *Id.* at 320 (quoting *Pond v. Braniff Airways, Inc.*, 453 F.2d 347, 349 (5th Cir.1972)). Moreover, we noted that most of the cases affirming dismissals with prejudice have involved the presence of one or more of three "aggravating factors": (1) delay attributable directly to the plaintiff, rather than his attorney; (2) actual prejudice to the defendant; and (3) delay caused by intentional

> conduct. *Id.* From this review, we concluded that the sanction of dismissal with prejudice is reserved for "the most egregious circumstances."

Callip v. Harris County Child Welfare Dept., 757 F. 2d 1513, U.S. 5th Circuit (1985)

Applying above principles to the facts of this it is clear that dismissal is not warranted.

First, there is no delay attributable directly to Plaintiff. As Judge Lane himself observed in his opinion: "neither side of the case have answered discovery"[i]. Since that Order, facts have changed in favor of Plaintiff and against defendants. Here, Defendant's sole basis for claim of dismissal is alleged violation of Court's set deadline of July 25, 2020. It is therefore, pertinent, to examine progression of that order in the court proceedings. First, Plaintiff filed a timely appeal. On August 3, 2020 Judge Pitman issued a final order of denial. Plaintiff received a copy of the order via USPS on August 7, 2020. Plaintiff filed his answers on Monday, August 17, 2020. These facts are uncontroverted.

It is relevant to consider defendant conduct as well in the interest of fairness and equal justice. Plaintiff served email-notice for certain disclosures in mid-September 2019 – approximately around the same time defendants sent their discovery to Plaintiff. To this day, despite repeated reminders they have answered just one out of twenty disclosures – a full ninety-five percent remain unanswered. Even worse, defendants recently sent Plaintiff bits and pieces of information that Plaintiff did not ask for and is not relevant to this case. The clear purpose is to wrongfully manufacture an appearance of compliance without actually providing the information they are required to by rule. Plaintiff's second motion to compel is pending with the Court. Clearly, under these circumstances dismissal is unwarranted.

IV. CONCLUSION

From the foregoing it is clear that Plaintiff has fully complied with Defendants discovery request. It is also clear that defendants have not when they were given approximately same amount of time to respond. It is also clear, that the time between receipt of final order on August 7, 2020 concerning the due date and Plaintiff's mailing of his answers on August 17, 2020 does not constitute violation egregious enough to warrant dismissal.

Dated: August 19, 2020

Respectfully Submitted,

/s/Ravindra Singh, Ph.D.
By: _____
RAVINDRA SINGH, PH.D.
Plaintiff, Pro Se
P.O. BOX 10526
(512)293-7646
excion_2000@yahoo.com

CERTIFICATE OF SERVICE

I Certify that on this 19th Day of August, I served a copy of foregoing document via email on the following:

Robert Icenhauer-Ramirez
1103 Nueces Street
Austin, Texas 78701

Brett Payne
Great Hills Corp. Center
9020 N Capital of Texas Hwy.
Building II Ste. 225

Austin Texas 78759

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RAVINDRA SINGH, PH.D., Plaintiff,	§	
v.	§	CIVIL ACTION NO. 1:17-CV-1120-RP-ML
WAL-MART STORES, INC., WAL-MART STORES TEXAS, LLC, ALAN MARTINDALE, EVA MARIE MOSELEY; AND CITY OF AUSTIN, AUSTIN POLICE DEPARTMENT, EX-POLICE CHIEF ART ACEVEDO, OFFICER RICHARD W. MILLER (AP3538), OFFICER JOHN DOE 1, Defendants.	§	

DEFENDANT WAL-MART STORES TEXAS, LLC, WAL-MART STORES INC., ALAN MARTIN, AND EVA MARIE MOSELEY'S RESPONSE TO PLAINTIFF'S SECOND MOTION TO COMPEL AND DEFENDANTS' MOTION FOR COSTS

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, Wal-Mart Stores Texas, LLC, Wal-Mart Stores, Inc., Alan Martin, and Eva Marie Moseley (referred to herein as Wal-Mart Defendants), Defendants in the above entitled and numbered cause, and files this their Response to Plaintiff's Second Motion to Compel Disclosure and Defendants' Motion for Costs in support thereof would respectfully show the Court as follows:

I. BACKGROUND

Plaintiff represents to the Court in his most recent motion that Judge Lane included in his order, dated June 10, 2020 (Dkt. 75), that Plaintiff must file a separate Motion to Compel discovery as Plaintiff mislead the Court by suggesting Wal-Mart Defendants had not responded to discovery requests. Wal-Mart Defendants have never received any requests for discovery from Plaintiff. If the Court considers what Plaintiff included in his pleadings, dated June 29, 2020 (Dkt. 77), as proper discovery requests, those were not presented to the Court until nineteen days after Judge Lane's order

referenced and relied upon by Plaintiff on page 2, paragraph 2 of Plaintiff's most recent Motion. More importantly, those requests were never served on Wal-Mart Defendants outside of Plaintiff's Motion to Compel the same. Further, in Judge Lane's July 15, 2020 order (Dkt. 83), the Court noted that Singh's issue with "Disclosure requests" to Defendants was moot as Defendants had complied with or were in the process of complying with the requests. This ruling was affirmed by Judge Pittman in his order, dated August 3, 2020 (Dkt. 91). Defendants continued to represent the same efforts in email correspondence to Plaintiff, attached hereto as Exhibit "A" (emails dated August 14, 2020 – August 17, 2020). Plaintiff again disingenuously certifies to the Court in his "Certificate of Conference" at the end of the Motion to Compel currently before the Court that he conferred with counsel of record and had not received any reply as of the date of filing (August 17, 2020). That is a blatant misrepresentation to the Court, as evidenced in the attached correspondence. Plaintiff has unnecessarily involved the Court in this matter and caused Defendants to incur time and expense in preparing this Response.

Further, and in an abundance of caution, Wal-Mart Defendants served its Initial Disclosures on parties today (per FRCP 26(a)) which included the same information previously disclosed to Plaintiff. Interestingly, Plaintiff is moving the Court to compel responses to "Disclosure requests", that if considered proper were served for the first time on Wal-Mart Defendants on June 29, 2020 (Dkt. 77) and were included in the body of Plaintiff's Motion to Compel the same. Wal-Mart Defendants represented to Plaintiff they either previously provided the requested documentation to him or are in the process of gathering the same. Plaintiff's Motion requesting that the Court order Wal-Mart Defendants to provide discovery responses to requests that have never been properly served upon Defendants is in light of the fact that Plaintiff was properly served with discovery requests on August 21, 2019, nearly a year ago, and has still refused to respond to the same despite multiple orders instructing him to do so.

II. ARGUMENT AND AUTHORITY

Plaintiff is moving the Court to compel Defendants to respond to Disclosure requests (governed by FRCP 37(a)(3)(A)). However, Plaintiff incorrectly relies on FRCP 37(a)(3)(B)(iii) – (iv) which addresses a party's failure to answer an interrogatory submitted under FRCP 33 or a party's failure to produce documents or failure to respond that inspection will be permitted – or fails to permit inspection – as requested under FRCP 34. To date, Wal-Mart Defendants have never received Interrogatories or Request for Production/Inspection from Plaintiff, pursuant to FRCP 33 and 34, respectively. The relief sought in Plaintiff's Motion is improper as it relies on incorrect statutory law and the "facts" relied on by Plaintiff are simply untrue.

Further, FRCP 37(a)(5) states that the Court must not order cost against Defendants if: (i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action; (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or (iii) other circumstances make an award of expenses unjust. In the instant case, Wal-Mart Defendants produced documentation to Plaintiff and he was also advised that Wal-Mart Defendants were making efforts to locate additional documentation/information out of good faith, and prior to the filing of Plaintiff's Motion, even though Wal-Mart Defendants were never served with proper discovery requesting the same. Plaintiff unnecessarily involved the Court in this instance in refusing to follow proper procedure, in deliberately ignoring Defendants responses to him, and ignoring the Court's prior orders. Moreover, Wal-Mart Defendants are essentially having to play a guessing game in addressing Plaintiff's issues contained in his Motion to Compel Disclosures. As such, a lack of response or nondisclosure, if any, is substantially justified. Lastly, Plaintiff's request for sanctions in this matter for discovery responses he claims were never produced to him or based on his allegation that Wal-Mart Defendants were not making efforts to provide the same is curious given the fact that

Plaintiff has at least twice failed to comply with the Court's order regarding Plaintiff's discovery requests. Accordingly, an award of sanctions/costs against Wal-Mart Defendants would be wholly unjust.

III. MOTION FOR COST

Plaintiff continues make egregious misrepresentations in his pleadings with this Court. He has multiple times suggested that he served Wal-Mart Defendants with discovery a year ago and that those requests have gone unanswered. Stated plainly and again, Wal-Mart Defendants have never received discovery requests from Plaintiff - unless the list of items included in Plaintiff's pleadings, dated June 29, 2020 (Dkt. 77) constitute discovery requests. If that is the case, Wal-Mart Defendants have shown the Court and Plaintiff (prior to his Motion to Compel Disclosures) that they complied with or are complying with such requests. Further, Plaintiff's certification to the Court that his attempts to confer on his Motion went unanswered is false and meritless, as mentioned above. Judge Lane notes in his order, dated July 15, 2020 (Dkt. 83), that "the court warns Singh that any improper conduct will likely be met with sanctions." Wal-Mart Defendants believe Plaintiff's behavior is at a minimum improper.

Wal-Mart Defendants have incurred time and cost in reviewing the pleadings in this matter, researching statutory law, and preparing its Response to Plaintiff's Second Motion to Compel Disclosures. Wal-Mart Defendants are seeking the cost for the time spent preparing this Response. Counsel for Wal-Mart Defendants' billable rate is $180.00/per hour and it took approximately four hours to prepare this Response.[1] The total cost requested is $720.00.

WHEREFORE, PREMISES CONSIDERED, Wal-Mart Defendants pray that this Honorable Court take into consideration the legal arguments, factual grounds, and evidence submitted and issue an ordering denying Plaintiff's Second Motion to Compel and granting Wal-Mart Defendants' Motion

[1] Exhibit "B": Affidavit of Katie S. McLean

for Costs and for further relief to which Defendants are justly entitled and will ever pray.

Respectfully submitted,

WALTERS, BALIDO & CRAIN, L.L.P.

BY: */s/ Katie S. McLean*
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ATTORNEY FOR WAL-MART DEFENDANTS

CERTIFICATE OF SERVICE

This is to certify that on this the 21st day of August, 2020, a true and correct copy of the foregoing has been forwarded to all counsel of record.

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Plaintiff

/s/ Katie S. McLean
KATIE S. MCLEAN

FILED
August 24, 2020
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY: LRT
DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RAVINDRA SINGH, PH.D.	§	
Plaintiff,	§	
	§	
v.	§	CAUSE NO.1:2017-cv-01120-RP
	§	
WAL-MART STORES INC,	§	
WAL-MART STORES OF TEXAS L.L.C.	§	
ALAN MARTINDALE,	§	
EVA MARIE MOSELEY,	§	
CITY OF AUSTIN,	§	
AUSTIN POLICE DEPARTMENT,	§	
EX-CHIEF OF POLICE ART ACEVEDO,	§	
RICHARD W MILLER,	§	
OHN DOE I,	§	
Defendants.	§	

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS WAL-MART STORES INC, WAL-MART STORES TEXAS LLC, ALAN MARTINDALE AND EVA MARIE MOSELEY'S MOTION TO DISMISS FOR FAILURE TO COOPERATE IN DISCOVERY AND FAILURE TO COMPLY WITH COURT'S ORDERS

TO: Hon. Robert Pitman
District Court Judge

Plaintiff Ravindra Singh, Ph.D. pro se, submits his response in opposition to Defendants Wal-Mart Stores Inc., Wal-Mart Stores Texas Inc., Alan Martindale and Eva Marie Moseley's ("Wal-Mart Defendants") motion for dismissal for alleged failure to cooperate in discovery and failure to comply with discovery and asserts as follows:

I. SUMMARY OF FACTS AND PROCEEDINGS

A. FACTS

This is a Civil Rights action against Wal-Mart and City of Austin and their related employees, agents or representative arising out of a most egregious incident on

Thanksgiving day, 2015 in which Defendant Richard W. Miller, an off-duty City of Austin Police Officer, while working in course of his employment within a Wal-Mart store as a security guard, falsely accused Plaintiff of shoplifting by concealing store merchandise on his person, detained and arrested him, and subjected him to body-search in plain public view without recovering any purported shoplifted merchandise. There was no other allegation of criminal conduct or impropriety leading up to the incident. When Defendant Miller failed to offer an apology for his misconduct, Plaintiff's asked for his identification in an effort to take up the matter with his employers. – Wal-Mart and City of Austin. Miller not only refused to provide his identity but also lied about Austin Police Department (APD) policies concerning duties of officers to provide full identification upon request – "I cannot give out business card because it is against APD's policy" he said. That is simply not true and is a lie because APD policy expressly requires its officers to provide identity upon request by a citizen. Miller's response prompted Plaintiff to request Miller to write down his identifying information on the Wal-Mart Black Friday Sale Advertisement Plaintiff was carrying in his hand. Miller refused again saying "I am not going to write down anything" which caused Plaintiff to make a request to borrow Miller's pen so that Plaintiff could make a note about the incident and preserve identification and contact phone numbers of eye witnesses, and cell phone video recordings of the incident to support his complaint – APD policy in effect at the time, required a complaint against an officer to be supported by names, addresses and phone numbers of at least two witnesses. Additionally, Plaintiff needed to collect information from witnesses who were recording the incident on their cell phones so that he could obtain a copy of same and preserve the evidence to pursue complaint against Miller. When Miller refused to cooperate, Plaintiff informed him that he

was going to buy a pen from Wal-Mart, and then turned to re-enter the store. Miller responded by stepping in front of Plaintiff and physically blocking his entry and preventing Plaintiff from purchasing a pen resulting in loss of contact information about the witnesses and loss of video evidence of the incident – Defendants have refused to provide Plaintiff with a copy of the Wal-Mart store surveillance video. When Plaintiff objected, Miller became angry and violent towards him. Miller threatened Plaintiff with jail and commanded him to leave the place instantly – leave without contact information about the witnesses or the cell phone video footage of the incident. Plaintiff's pleaded that he would leave promptly but he needed the witness information. In response, Miller forcefully blocked Plaintiff and prevented him from entering the sore to buy the pen he needed to document the incident. In frustration Plaintiff rhetorically said addressing the assembled gathering and Wal-Mart employees: "I can't believe this is happening! It is America! Is it a Police state? in the hope of drawing Wal-Mart's management's attention. In response, Defendant Miller grabbed Plaintiff by his arm and wrist, violently twisting and pulling them behind his back applying full force of his large body one at a time, and placed Plaintiff in handcuffs inflicting serious and permanent injury to his elbow joints and surrounding tissues. Miller, working in concert with Defendant Moseley forcefully pushed Plaintiff into a windowless detention room, where he was surrounded by five persons – three male City of Austin police officers, and two Wal-Mart employees including another male besides Defendant Moseley. Defendant John Doe I interrogated Plaintiff about Plaintiff's country of birth and his reasons for being present in Austin in a manner reserved for persons who have no right to be present in US all the while making Plaintiff stand with his hands cuffed behind his back. At no time John DOE, I asked Plaintiff to know if Plaintiff was a US

citizen or otherwise had the right to be present in US. Plaintiff again asked for APD officers and Wal-Mart employees for their identification. All except Moseley refused to provide their identification. Again prompted by Miller both DOEs responded in a chorus that "it was against APD policy to give out business card. All three APD officers refused to otherwise identify themselves. Additionally, Miller not only failed to provide his identification, he moved in front of Plaintiff and blocked his view preventing Plaintiff to read DOE II's Name tag and badge number affixed on his uniform. Plaintiff did not observe such information on DOE I. In this Detention room, Plaintiff heard Defendant Miller played back a call on his radio saying, "I have a Hispanic male." Plaintiff asked for paper and pen to make a note of their identification. Plaintiff responded that he was not a Hispanic. Plaintiff is classified as Asian and is of brown skin color.

Miller wrote a citation for disorderly conduct on fabricated and untrue charges, and gave Plaintiff to sign it. Plaintiff attempted to read the citation issued before signing it. Miller, however, was adamant about having Plaintiff sign the citation without reading it first. Plaintiff was hesitant. However, Plaintiff sensed trouble from Miller if he insisted on reading the citation first. As a result, Plaintiff signed the citation and Miller allowed Plaintiff to leave. John Doe I opened the door to let Plaintiff exit. John Doe I followed until Plaintiff was off the Wal-Mart property all he while chanting Ph.D. this way, Ph.D. this way over estimated 35-40 times to provoke and make fun of Plaintiff.

During his prosecution in the Austin Municipal Court Plaintiff was given a copy of his citation as part of discovery. Plaintiff discovered that the citation had been tampered with in that some of the information that was present at the time Plaintiff had gone missing. Plaintiff asked for the original of the citation to be produced for in-camera review. But that never occurred. The

Municipal Court in August 2016, dismissed the case for lack of evidence on City's attorney office motion.

B: Proceedings

Summary of pertinent proceedings are as follows:

Plaintiff commenced this action on November 27, 2017 asserting claims under 42 U.S.C. §§1981, 1983, 1985(b)(3) and 1988 for violation of his rights guaranteed under US constitution and law as well as claims under Texas state law. On March 15, 2018 City Defendants moved the court for dismissal of the case in its entirety claiming untimeliness. Miller also claimed Qualified Immunity". (Dkt #18). On May, 2, 2018 Wal-Mart Defendants moved to join City Defendant's in their motion to dismiss. (Dkt. #32). On December 18, 2018 Judge Lane denied Wal-Mart Defendants' motion as improper in a text only order.

On March 25, 2019, the Dist. Court issued its ORDER granting City Defendants' motion in part and denying in part. Plaintiff timely filed a notice of appeal of the part of the Order dismissing Miller, Acevedo and DOE I with prejudice. Plaintiff also appealed dismissal of his claim for defamation under Texas law. Subsequently, the Court of Appeals dismissed the appeal for want of jurisdiction. There after Plaintiff and City Defendants continue to litigate the matter privately.

On August 22, 2019 City Defendants served on Wal-Mart a discovery request seeking information about Wal-Mart's contractual relationship with Defendant Miller forming the basis of Miller's employment with Wal-Mart on the day of the incident giving rise to this action. Plaintiff is entitled to receive within thirty (30) days said information. Wal-Mart has not provided said information to Plaintiff to this day – that is over three hundred and thirty-five (335) days past the due date. On February 20, 2020, Plaintiff file a notice to Wal-Mart seeking certain disclosures.

(Dkt. # 63). Wal-Mart completely ignored the notice. On June 25, 2020 Plaintiff moved the Court asking the Court to direct Wal-Mart Defendants to comply with disclosures requested (Dkt. #77). On July 15, 2020 Judge Lane did not rule on Plaintiff's request to compel, because that request to compel was not filed in a stand-alone motion – it was joined with Plaintiff's request to extension of time to answer City defendants' motion to compel. Instead, in a foot note Judge Lane directed that Plaintiff "must file a separate motion" to compel (Dkt. #83). On August 17, 2020 Plaintiff filed a Second Motion to Compel against both Wal-Mart and City of Austin defendants. (Dkt.#95). Before that Wal-Mart moved the court present motion to dismiss and sanctions alleging erroneously Plaintiff's failure to prosecute and non-compliance with court orders

II. SUMMARY OF ARGUMENTS

A: Circuit precedence does not support dismissal and in fact counsels against it and Defendants' argument for dismissal with prejudice is wholly devoid of merits.

Fifth Circuit has consistently held that, **where a plaintiff has failed only to comply with a few court orders or rules, we have held that the district court abused its discretion in dismissing the suit with prejudice**. See, e.g., Morris v. Ocean Systems, 730 F.2d 248, 252 (5th Cir. 1984) (no clear record of delay or contumacious conduct where counsel failed twice to comply with court-imposed deadlines requiring counsel to notify court of plaintiff's rejection of settlement offers). Burden v. Yates, 644 F.2d 503, 504-05 (5th Cir. 1981) (no clear record of delay or contumacious conduct where counsel failed to file three documents on time); McGowan v. Faulkner Concrete Pipe Co., 659 F.2d 554, 556-58 (5th Cir. 1981) (no clear record of delay or contumacious conduct where counsel failed to comply with scheduling and other pretrial orders); Silas v. Sears, Roebuck Co., 586 F.2d 382, 384-85 (5th Cir. 1978) (**no clear record of delay or contumacious conduct where counsel failed to answer interrogatories, failed to confer with defendant on pretrial order, and failed to appear at a pretrial conference**).

On the other hand, where a plaintiff has failed to comply with several court orders or court

rules, we have held that the district court did not abuse its discretion in involuntarily dismissing the plaintiffs suit with prejudice. See, e.g., Price v. McGlathery, 792 F.2d 472, 474-75 (5th Cir. 1986) (clear record of delay and contumacious conduct where counsel failed to file pretrial order, failed to appear at a pretrial conference, and failed for almost a year to certify that he would comply with the district court's order); Callip v. Harris County Child Welfare Dept., 757 F.2d 1513, 1515-17, 1521 (5th Cir. 1985) (**clear record of delay or contumacious conduct where counsel failed to comply with nine deadlines imposed by the rules of procedure or by orders of the court**).

> Here Wal-Mart defendants urge the Court to dismiss the case with prejudice:
>
> "In the instant case, Plaintiff failed to serve discovery responses to defendant's request for the same which were served on Plaintiff a year ago as detailed in Austin defendants' Motion to dismiss (Dkt. 86). Plaintiff has neither prosecuted this case – either by responding to discovery or timely propounding discovery to defendant – not it has complied with the Court's order in this matter. (Dkt. 75 and 83). Furthermore, Defendants prepared for and were present at the properly noticed deposition of Plaintiff, however, Plaintiff failed to appear for deposition. (Dkt. 62)to discovery Based on foregoing statutory and case law, Defendants are entitled to dismissal with prejudice." (Dkt. #92, Page 4, sec 3.1)
>
> Now, the Defendants are no better prepared to engage in meaningful settlement negotiation or trial than before the suit was filed. The parties are unable to engage in meaningful settlement negotiations in advance of trial because Defendants have not been provided any records or testimony to aid in an evaluation of Plaintiff's claims in the more than two and a half years this case has been in litigation. Defendants have made a good faith effort to comply with the Court's orders. However, Plaintiff's inability to confer with parties, comply with Court's discovery deadlines and signed orders, or comply with defendant's discovery (including Plaintiff's deposition) have irreparably harmed Title and prejudiced Defendants. See Williams, 828 F.2d at 328-329. Therefore, dismissal with prejudice is warranted." (Dkt. 92, at p 3-4)

Wal-Mart defendants' reliance on Williams is not on point. ***Williams* was a Title VII claim, the court dismissed the case for failure to prosecute without prejudice expressly based on local court rule which allows the court to summarily dismiss an action if a plaintiff fails to move for a default judgment after a defendant is in default for sixty days.** In the instant case, Wal-Mart defendant do not point to any similarly applicable rule requiring dismissal in the instant case. Additionally, in that case William did not advise the Court that the statute of limitations had run on his Title VII claim, thereby

effectively converting the dismissal of that claim without prejudice into a dismissal with prejudice. The district court denied the motion reinstate on the ground that Williams' inadvertent failure to move for default did not constitute "good cause" and was therefore insufficient to merit reinstatement. The court relied by analogy on case law applying Federal Rule of Civil Procedure 4(j), which requires dismissal without prejudice for failure to serve a defendant within 120 days if a plaintiff cannot show good cause for lack of service. See Fed. R. Civ. P. 4(j). In the order denying reinstatement, the district court restated its earlier finding that Local Rule 13(B) authorized the dismissal and concluded that Williams failed to show sufficient excuse to warrant relief. Moreover, *Williams* did not file a notice of appeal until approximately five months after the order of dismissal. The 5th Cir. dismissed the appeal for want of jurisdiction.

In the instant case it is clear that Wal-Mart defendants claim to entitlement for alleged failure to prosecute is wholly without merit. First, there is no evidence that Plaintiff has failed to prosecute this case. Court should review the docket listing that indicate that there is no large period of inactivity attributable solely to Plaintiff. Furthermore, while Wal-Mart defendants keep harping that Plaintiff failed to comply with discover order of Court, the court should take note that Wal-Mart never filed any discover request on Plaintiff – not ever. Wal-Mart defendants, simply cannot latch on to City Defendants' request to seek dismissal when they themselves never served any discovery request on Plaintiff. Even assuming, that they may latch on to City of Austin, the Court should note that City defendants on August 22, 2019 served on Wal-Mart defendants a request to produce. That consisted of a request to produce all documents relating to Defendant Miller's employment relationship with Wal-Mart. To this day, Wal-Mart defendant have not produced said document – as a party Plaintiff was entitled to them. That was over a year ago. Plaintiff fully complied with the request as of August 17, 2020 when appeal of the Order at issue became final on August 3, 2020 and Plaintiff received a copy of the order via USPA on August 7, 2020. This delay does not warrant dismissal with prejudice. Furthermore, the June 10, 2020 Order at issue may not be valid given the fact that it requires Plaintiff to perform an act – answer request to admit – in future

that Plaintiff has already performed on March 18, 2020 (Dkt. 69)– well before June 10, 2020 when Judge Lane signed that order. Clearly, there is no justification for dismissal. Wal-Mart defendants' request should be denied.

B: Wal-Mart Defendants contention that Plaintiff has failed to comply with their discovery request is MOOT because they have never served any discovery request on Plaintiff.

Wal-Mart brings this motion to dismiss alleging that they are entitled to dismissal because Plaintiff has failed to comply with their discovery request:

> **"In the instant case Plaintiff failed to serve discovery responses to defendants' request for same which were served on Plaintiff one year ago."** See (Dkt. # 92, Page 3).

Above contention is without basis in fact because to-date Wal-Mart defendants have not served a never served any discovery request on Plaintiff. Court should ask Wal-Mart defendants for evidence of all the discovery they claim to have served on Plaintiff a year ago.

C: Docket listing shows that Plaintiff has not failed to prosecute and it is the Wal-Mart defendants content but it is the Wal-Mart defendants who have impeded prosecution by their failure to respond to Plaintiff's disclosure and City defendants request for production.

Record indicates that Wal-Mart defendants have shown a history of willful failure to respond to Plaintiff's request for disclosure, and City of Austin defendants' request for production of documents related to employment relationship between defendant Miller and Wal-Mart. First, on August 22, 2019 – that is over a year ago – City defendant served on Wal-Mart a request for production asking for all documents pertaining to Wal-Mart's contract with Defendant Miller's employment with. It has been one year since the request. But Wal-Mart has not produced those documents yet. Court should note that City of Austin/Austin Police Department off-duty employment policy requires them to have a valid contract for Miller to work for Wal-Mart and Wal-Mart to hire Miller. Policy also requires Wal-Mart to waive any and all liability and hold City

of Austin harmless arising out of Miller's employment with Wal-Mart. See Dkt. #84; APPENDIX APD General Order 949 and City of Austin Charter Chapter 4-10 attached.). Second, Wal-Mart has refused to answer Plaintiff's requests for disclosure despite Plaintiff's multiple reminder and should be appropriately sanctioned for making frivolous arguments in bad faith. As set forth earlier, the record shows that Plaintiff served notices on defendants' multiple times. First on February 20, 2020 Plaintiff sent a notice to Wal-Mart defendants reminding them that they have not provided Plaintiff with information concerning Wal-Mart's employment relationship with defendant Miller. (Dkt. #63). Plaintiff was entitled to receive this information as a party pursuant to City of Austin defendants request for same on August 22, 2019. Now it has been over a year since the request. Wal-Mart defendants' reply is over three-hundred and thirty days (330) past due date. Second, On June 25, 2020 Plaintiff moved the Court asking it to direct Wal-Mart Defendants (and City of Austin defendants) to comply with disclosures requested (Dkt. #77). Defendants made false stipulation with the court that "they have either complied or working on complying with" the disclosure request. They have not complied with disclosure request despite their stipulation. As a result, Plaintiff filed a Second Motion to Compel on August 17, 2020 (Dkt. # 95). Wal-Mart defendants claim they sent Plaintiff twenty (20) pages of information. Plaintiff contends, and has informed Wal-Mart defendants that said information was knowingly provided to mislead the court and Plaintiff because it is not relevant to Plaintiff's disclosure request. The twenty-page information referred to by Wal-Mart defendants consists of ten-year old contract between Wal-Mart and some private security services supplier in Tennessee. It sets forth Wal-Mart's precondition for the supplier. In the instant case at bar it is the City of Austin that sets the pre-condition for employment of its officers. City requires waiver from Wal-Mart and proper insurance. It is hard to see how Mr. Payne in good faith could believe that the document he sent to

Plaintiff constituted proper response to Plaintiff's disclosure request. It is clear that Mr. Payne just intends to mislead the Court and Plaintiff by throwing around irrelevant papers to create an appearance of compliance without actually complying with it. Plaintiff notes that Mr. Payne advertises himself loudly as a "Super Lawyer". It is time for Wal-Mart to stop playing games and act in good faith as a responsible corporate citizen that they claim to be.

The uncontroverted fact is that both Wal-Mart and City defendants have failed to provide critical information pertinent to this case: (1) Information concerning Wal-Mart and City of Austin agreement to employ Miller; (2) Information concerning Wal-Mart's assumption of risk and release of City of Austin from liability – a precondition for Miller's employment with Wal-Mart and (3) Wal-Mart's surveillance video concerning the incident among others as set forth in Plaintiff's Second Motion to Compel currently pending with the Court Wal-Mart must provide this information without delay and not wait for an order – eleven months (i.e. 335 days) is long enough. Court should apply same standard it applied in the Plaintiff's when it gave Plaintiff a mere ten days in which to comply and denied his request for extension of time even upon timely request.

D: Defendant Wal-Mart's Claim of Prejudice suffered is another example of bad faith and its propensity to blame Plaintiff for its own willful failure to engage in discovery.

Here Wal-Mart defendants claim that they have been prejudiced as a result of Plaintiff's failure to engage them in discovery:

> "The parties are unable to engage in meaningful settlement negotiations in advance of trial because defendants have not been provided with any records or testimony to aid in an evaluation of Plaintiff's claims in the more than two and a half years this case has been in litigation. Defendants have made a good faith effort to comply with Court's orders. However, Plaintiff's inability to confer with parties, comply with Court's discovery deadlines and signed orders, or comply with Defendants request for discovery (including Plaintiff's deposition) have irreparably harmed and prejudiced Defendants. Therefore, dismissal with prejudice is warranted." (Dkt. #92 at p 4) (citation omitted)

From the foregoing argument it is clear that Wal-Mart contents in essence that it has been prejudiced by two and a half-years of delay caused entirely by Plaintiff, and that Wal-Mart's conduct has been exemplary. This contention combines bad mathematics, bad faith and outright lies: Let us consider the facts:

(1) Case was filed on November 27, 2017.

(2) Defendants has not moved the Court properly to dismiss the case, which had an opportunity and right to do. But it made a choice not to do so. Instead it improperly, decided to piggy back on City of Austin's motion to dismiss. The Court disallowed that.

(3) The Court issued its order on City of Austin's Motion to dismiss on March 25, 2029. That is one year and four months. Court should ask how that is Plaintiff's failure to act.

(4) Wal-Mart defendants to this day have not served a single discover request on Plaintiff.

Again Wal-Mart need to explain how is it Plaintiff's failure to act.

It is Pertinent consider Plaintiff's efforts Plaintiff took to move the litigation forward. Wal-Mart apparently did not review the docket activities initiated by Plaintiff in this regard. Had it done so, in good faith it would not be making the arguments it does about suffering prejudice. Clearly prejudice argument is in bad faith.

(5) Wal-Mart continues to resist discovery.

Plaintiff has clearly notified Defendants Wal-Mart and City of Austin his proposed plan to move forward in this matter:

DISCOVERY:

PHASE I: Parties complete disclosures.

PHASE II: Parties complete Production, Interrogatories and request to Admit.

PHASE III: Parties complete discovery of entity wide policies and practices

PHASE IV: Parties complete oral examination

We are still in the FIRST PHASE as Wal-Mart stubbornly refused to cooperate. Plaintiff has a Second Motion to Compel disclosure pending with Court (Dkt.95). It's time for Wal-Mart defendants to cooperate and move the process forward in a time-bound manner properly instead of making excuses. Don't throw around irrelevant information to mislead the court and Plaintiff. In the light of above it is plainly absurd for Wal-Mart to claim undue prejudice due to Plaintiff's failure to cooperate. The case is in very initial stages.

.

From the foregoing it is clear that Plaintiff has continued to prosecute this case in the Court and also privately and Wal-Mart defendants' contention to the contrary is wholly without merit. The volume of Plaintiff's initiated filings fully support that Plaintiff has continued to prosecute this case. A review of docket listing would show that Wal-Mart does nothing to advance the litigation and at time of its choice latches on to work done by the City of Austin. For example, when City Defendants moved for dismissal under Rule 12(b)(6) expending resourced to file the motion (Dkt.15) Wal-Mart moved the Court to improperly join with, and adopt City's reasons and to claim dismissal. The Court saw through it, and denied its motion. In the instant case, Wal-Mart repeats the old pattern. First let the codefendants City of Austin do the necessary work and adopt their reasoning to claim dismissals for themselves in effect shifting the cost on to the tax-paying citizens of the City of Austin. Wal-Mart defendants' motion clearly seems to make no distinction between them and the City of Austin defendants. The problem with Wal-Mart's approach is that while the City defendants served their discovery request on Plaintiff, Wal-Mart Defendants did not. Wal-Mart defendants' assertion that "In the instant case, Plaintiff failed to serve discovery responses to Defendants' request for the same which were served on Plaintiff one year ago, as detailed in Austin Defendants' Motion to Dismiss. (Dkt. #86) is utterly false. In sum, never answered Plaintiff's

disclosure request and they never propounded any request of their own to Plaintiff. Under this standard invoked by Wal-Mart in their motion for dismissal, there can be only one conclusion – Wal-Mart failed to prosecute. Evidence is in the docket listing. There is no significant activity initiated by Wal-Mart to move the litigation forward. In contrast, there is "no significant period of total inactivity" attributable solely to Plaintiff. As the Fifth Circuit has consistently held, there is "no clear record of delay or contumacious conduct where, as here Plaintiff/counsel failed twice to comply with court-imposed deadlines" even if Plaintiff failed to comply with June 10, 2020 order, it does not justify dismissal under our circuit precedence.

WHEREFOE, Plaintiff Ravindra Singh, Ph.D. respectfully request that the Hon. Court deny Wal-Mart Defendants' motion to dismiss.

Dated: August 24, 2020

By: _____
RAVINDRA SINGH, PH.D.
Plaintiff, Pro Se

P. O. BOX 10526
Austin, Texas, 78766
(512)293-7646
excion_2000@yahoo.com

CERTIFICATE OF SERVICE

I, Ravindra Singh, Ph.D. certify that on this 24th Day of August, 2020 I served a true and correct copy of foregoing document via email on the following:

Robert Icenhauer-Ramirez
1103 Nueces St.
Austin, Texas 78701
rirlawyer@gmail.com

Brett Payne
WB&C
GREAT HILLS CORP. CTR.
9020 N. CAPITAL OF TEXAS HWY.
BLDG I STE 175
AUSTIN, TX, 78759
paynevfax@wbclawfirm.com

/s/ Ravindra Singh, Ph.D.

_____

RAVINDRA SINGH, PH.D.

United States Court of Appeals for the Fifth Circuit

No. 20-50637

Certified as a true copy and issued as the mandate on Nov 10, 2020

Attest: Lyle W. Cayce

Clerk, U.S. Court of Appeals, Fifth C

RAVINDRA SINGH, PH.D.,

Plaintiff—Appellant,

versus

CITY OF AUSTIN; EX-POLICE CHIEF ART ACEVEDO, IN HIS OFFICIAL CAPACITY; OFFICER JOHN DOE, I, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY,

Defendants—Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:17-CV-1120

CLERK'S OFFICE:

Under 5TH CIR. R. 42.3, the appeal is dismissed as of November 10, 2020, for want of prosecution. The appellant failed to timely pay the fiing and docketing fee.

LYLE W. CAYCE
Clerk of the United States Court
of Appeals for the Fifth Circuit

By: _____
Melissa B. Courseault, Deputy Clerk

ENTERED AT THE DIRECTION OF THE COURT

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

November 10, 2020

Ms. Jeannette Clack
Western District of Texas, Austin
United States District Court
501 W. 5th Street
Austin, TX 78701-0000

No. 20-50637 Ravindra Singh v. Wal-Mart Stores, Inc., et al
USDC No. 1:17-CV-1120

Dear Ms. Clack,

Enclosed is a copy of the judgment issued as the mandate.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Melissa B. Courseault, Deputy Clerk
504-310-7701

cc w/encl:
Mr. Katherine Icenhauer-Ramirez
Mr. Robert E. Icenhauer-Ramirez
Mr. Ravindra Singh

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RAVINDRA SINGH, PH.D.,	§	
	§	
Plaintiff,	§	
v.	§	
	§	**No. 1:17-CV-1120-RP-ML**
WAL-MART STORES INC., WAL-MART STORES TEXAS LLC, ALAN MARTINDALE, EVA MARIE MOSELEY, CITY OF AUSTIN, AND RICHARD W. MILLER,	§	
Defendants.	§	

ORDER AND
REPORT AND RECOMMENDATION OF
THE UNITED STATES MAGISTRATE JUDGE

TO THE HONORABLE ROBERT PITMAN
UNITED STATES DISTRICT JUDGE:

Before the court are Defendant Richard W. Miller and the City of Austin's (the "City Defendants") Motion to Sanction and Dismiss Case for Plaintiff Ravindra Singh's Failure to Cooperate in Discovery and Comply with Court's Order (Dkt. #86), Defendant Wal-Mart Stores Texas LLC, Wal-Mart Stores Inc., Alan Martindale, and Eva Marie Moseley's (the "Wal-Mart Defendants") Motion to Dismiss for Plaintiff Ravindra Singh's Failure to Cooperate in Discovery and Failure to Comply with the Court's Order (Dkt. #92), Plaintiff's Second Motion to Compel Disclosure (Dkt. #95), and related briefings. *See* Dkt. #99, #100, #101.[1] After reviewing the pleadings, relevant case law, the entire record, and having held a hearing on January 15, 2021, the undersigned issues the following Order and Report and Recommendation to the District Court.

[1] The dispositive motions were referred to the undersigned for a report and recommendation and the nondispositive motions were referred for disposition pursuant to 28 U.S.C. § 636(b), Rule 72 of the Federal Rules of Civil Procedure, and Rule 1 of Appendix C of the Local Rules of the United States District Court for the Western District of Texas.

I. BACKGROUND

This suit arises out of an altercation occurring at a Wal-Mart where Singh, suspected of shoplifting, was detained, searched, and arrested by off-duty police officers. Dkt. #1. Singh alleges various civil rights violations under 42 U.S.C. §§ 1981, 1983, 1985(b)(3), the U.S. Constitution, and Texas state laws.

A. Factual Background

The factual background of this case is well known by all parties and has been repeatedly articulated in the court's previous filings. That said, the following serves as a brief summary of this case's history.

- On November 27, 2017, Plaintiff Dr. Ravindra Singh, Ph.D. ("Singh"), proceeding pro se, filed his Complaint. Dkt. #1. At the time of this report and recommendation's filing, very limited discovery has taken place despite this case's over three-year existence.

- The City Defendants sent requests for production and interrogatories to Singh via certified mail on June 28, 2019. Dkt. #62-2. On August 22, 2019, the City Defendants sent Singh via certified mail their Requests for Admission. Dkt. #62-3. Singh signed for both deliveries. Dkt. #62-3; Dkt. #62-5. The City Defendants argue Singh, to date, has not complied with any discovery.

- In October 2019, the City Defendants attempted to schedule the deposition of Singh, eventually sending him a notice of deposition via certified mail on October 24, 2019. Dkt. #62-7. Singh signed the receipt of delivery, but failed to attend the deposition. Dkt. #62-10. To date, no depositions have taken place in this suit.

- The City Defendants contend Singh has failed to cooperate with subsequent discovery attempts and, more generally, the discovery process as a whole.

- Largely citing to the City Defendants' discovery requests, the Wal-Mart Defendants argue that Singh has failed to respond to discovery requests, sit for deposition, or cooperate with the parties during the discovery process.

- The undersigned ordered Singh to comply with specific discovery requests on June 10, 2020. Dkt. #75. Specifically, the undersigned ordered Singh to (1) answer the City Defendants' interrogatories by June 25, 2020, (2) respond to the City Defendants' requests for production by June 25, 2020, and (3) appear for a deposition at a reasonable time set by Defendants. *Id.* The court warned Singh that future dilatory tactics or meritless excuses

could lead to sanctions and his case being dismissed with prejudice. *Id.* To date, the City Defendants contend this Order has not been complied with. Dkt. #108 (Minutes Entry).

- On July 15, 2020, the undersigned issued another order. Dkt. #83. Noting Singh had not complied with its June 10, 2020 Order, the court again warned Singh that "[c]ontinued failure to comply with the discovery process will likely be met with this case being dismissed for failure to prosecute." *Id.* at 2. To date, Defendants argue Singh has still not complied with the discovery process.

- Over Defendants' objections, Singh argues he has complied with discovery and the court's orders. Moreover, Singh argues Defendants have acted improperly and failed to cooperate in the discovery process. Specifically, Singh alleges Defendants have doctored their discovery responses and not complied with his discovery requests. *See* Dkt. #96 at 3-6. Defendants dispute these assertions.

- On August 3, 2020, the District Judge filed a Scheduling Order, setting a July 30, 2021 discovery deadline. Dkt. #90.

B. Pending Motions

On July 29, 2020, the City Defendants filed their pending Motion to Sanction and Dismiss Case for Plaintiff's Failure to Cooperate in Discovery and Comply with Court's Order. Dkt. #86. The City Defendants contend that at the time of their Motions filing – over a month after the court's June 10, 2020 Order – Singh had "still not complied" with the court's order or the parties' discovery requests. The City Defendants argue that Singh "has also steadfastly refused to confer via telephone with defense counsel" and "[d]espite extensive email correspondence, [has] [refused] to provide the discovery that was Ordered by the Court in June, 2020." Dkt. #86 at 2. Moreover, the City Defendants posit that "Singh has indicated that he has no intention of abiding by the Court's Order," as evident by his assertion that "[a]s I indicated to [the City Defendants] . . . I will respond to interrogatories and production request promptly after I have taken care of the Notice of Appeal requirements. It might require a motion to sever part of the order of the order. That means it will take time." *Id.*

The City Defendants ask the court to sanction Singh in the form of attorneys' fees for their work in seeking to compel Singh to respond to discovery. *Id*. at 2-3. Additionally, the City Defendants move to dismiss Singh's lawsuit based on the fact that (1) Singh "has unwaveringly refused to participate in the discovery process"; (2) Singh has failed to produce a single response to interrogatories or requests for production despite nearly a year having passed since discovery was first sent to Singh; and (3) Singh has blatantly refused to comply with the undersigned's Order. *Id*. at 3

In his untimely response,[2] Singh – in a bold effort to blame the court and opposing counsel for his conduct – contends the City Defendants' Motion to Sanction and Dismiss "arose out of a discovery dispute and a confusing order by Hon. Mark Lane and defense counsel Ramirez's gamesmanship." Dkt. #96 at 1. In short, Singh argues that despite the City Defendants' vehement contentions to the contrary, sanctions are inappropriate because he "is in full compliance" with the undersigned's June 10, 2020 Order. *See* Dkt. #96 at 2, 7. More specifically, Singh contends that sanctions are unwarranted because (1) the majority of the discovery problems are the result of "inaction" on the City Defendants' part; (2) he is not "solely responsible for" the alleged discovery delay; (3) he had already answered the City Defendants' Request for Admission "in full" on March 18, 2020; (4) he "promptly answered the remaining discovery request completely and fully on August 17, 2020," (5) the City Defendants "themselves continue to resist discovery while thy [sic] lay blame on [Singh]," as evident by their "ninety-five percent failure rate and a miserable compliance rate indeed – five percent"; and (6) the City Defendants have committed fraud by tampering with discovery evidence sent to Singh. *See* Dkt. #96 at 3-6.

[2] The City Defendants' Motion to Sanction and Dismiss was filed on July 29, 2020. Dkt. #86. Per local rules, Singh's Response was due on August 12, 2020. LOC. R. CV-7(e). Singh filed his Response on August 19, 2020. Nonetheless, in an abundance of caution, the undersigned will fully consider Singh's Response.

On August 3, 2020, the Wal-Mart Defendants filed their Motion to Dismiss for Singh's failure to Cooperate in Discovery and Failure to Comply with the Court's Orders. Dkt. #92. Mirroring the City Defendants' argument, the Wal-Mart Defendants contend the above-styled case should be dismissed with prejudice pursuant to Federal Rule of Civil Procedure 37 and 41(b) because Singh has failed to comply with discovery served on him over a year ago and has "neither prosecuted his case – either by responding to discovery or timely propounding discovery to Defendants – nor . . . complied with the Court's orders in this matter." Dkt. #92 at 3 (citing Dkt. #75, #83). Additionally, the Wal-Mart Defendants argue the case should be dismissed because Singh failed to appear for his deposition. *Id*. In conclusion, the Wal-Mart Defendants argue they are "no better prepared to evaluate this case for settlement or trial than before [the] suit was filed," are unable to engage in settlement negotiations because Defendants have not been provided any records or testimony to aid their evaluation of Singh's claims, and have been irreparably harmed and prejudiced by Singh's inability to confer, failure to comply with court deadlines and orders, and failure to cooperate in discovery. Dkt. #92 at 3-4.

In another untimely response,[3] Singh again argues dismissal is unwarranted. Dkt. #101. Singh argues he has never received discovery requests from the Wal-Mart Defendants. *Id*. Additionally, Singh argues it is the Wal-Mart Defendants, not himself, that has failed to comply with discovery. *Id*. Contending "[t]he case is in very initial stages" and warning the Wal-Mart Defendants to not "throw around irrelevant information to mislead the court and Plaintiff," Singh argues the Wal-Mart Defendants have failed to prosecute due to their lack of activity in this litigation. *See id*. at 13-14.

[3] The Wal-Mart Defendants filed their Motion to Dismiss on August 3, 2020. Although Singh's Response was due on August 17, 2020, it was filed on August 24, 2020. Again, the court will still fully consider Singh's Response despite its untimely submission.

Also pending before the court is Singh's Second Motion to Compel Disclosure, filed on August 17, 2020. Dkt. #95. Singh argues that Defendants have not complied with discovery and, consequently, he seeks an order to compel the disclosures depicted within his Motion. Dkt. #95. Additionally, Singh requests sanctions against Defendants for his "time and effort spent in bringing this motion." *Id*. at 6.

The Wal-Mart Defendants filed their response on August 21, 2020, and the City Defendants filed their response on August 24, 2020. Dkt. #99; Dkt. #100. The Wal-Mart Defendants argue they have never received discovery requests from Singh unless the list of items included in his June 29, 2020 Request for Initial Disclosure and Motion for Extension of Time, Dkt. #77, constitutes a discovery request. *See* Dkt. #99. If it does, the Wal-Mart Defendants contend they have repeatedly informed Singh that they have complied with or are complying with such requests. *Id*. Additionally, the Wal-Mart Defendants argue Singh's contention that he attempted to confer before filing his motion "is false and meritless." *Id*. at 4. Arguing Singh's behavior "is at a minimum improper," the Wal-Mart Defendants seek the cost for the time spent preparing their Response – totaling $720.00. *Id*. at 4.

The City Defendants argue Singh's Motion should be denied because they have already produced the underlying documents despite the fact that Singh "did not properly request them." Dkt. #100. The City Defendants support this assertion by providing the court with Singh's signed receipt of their discovery mailing. *See* Dkt. #100-1. Additionally, the City Defendants argue that Singh has "continuously abused the judicial system." *Id* at 4. One such example of this abuse, the City Defendants contend, is Singh's false assertion that they have withheld 95% of the items that he requested and his assertion that "Defendants had never, or have never advised [Singh] how they are working on complying with [his] longstanding requests." *Id*.; Dkt. #95 at 2. The City

Defendants assert these assertions are belied by their certified letter in which they produced documents and indicated that the provided answers to Singh's requests would be supplemented if, and when, additional information was found. Dkt. #100 at 4. Arguing that "Singh's abuse of the judicial process is expensive for parties" and that the "[c]ourt has indulged [Singh] long enough," the City Defendants request an award of costs for their time spent responding to Singh's Motion to Compel. *Id*. at 4-5.

C. January 15, 2021 Hearing

The undersigned held a hearing on January 15, 2021. Dkt. #108. Anticipating problems with Singh, the undersigned had the Clerk's Office both email and send via certified mail a copy of the hearing setting to Singh at his listed contact information. Additionally, the Clerk's Office called Singh at his provided phone number; Singh did not answer. Singh has subsequently affirmed the contact information's accuracy. Dkt. #109.

Singh responded via email and requested to attend the hearing in person.[4] Singh also noted he was not sure he could access Zoom in time for the hearing. The Clerk's Office articulated that in-person hearings are currently not permitted in the Austin Courthouse due to the Covid-19 pandemic. Additionally, the Clerk's Office explained that Zoom is an easy platform to use, stated they would be happy to walk Singh through the process of installing Zoom on his computer, and stated that as a last resort Singh could call a provided phone number and participate in Zoom via his phone as if it were a conference call. Singh continued to email the Clerk's Office requesting an in-person hearing and articulating a multitude of excuses as to why he could not participate in

[4] The court notes that various orders clearly visible on the Western District of Texas's website explain that the courthouse is closed for most hearing and trials in light of the Covid-19 pandemic. *See* U.S. District Court Western District of Texas, Coronavirus Guidance (January 19, 2021), https://www.txwd.uscourts.gov/coronavirus-covid-19-guidance/.

Zoom. The Clerk's Office again offered to walk Singh through Zoom, noted he could call in using his phone if Zoom was not an option for him, and stated an in-person hearing was not an option.

On the day of the hearing, Singh emailed the Clerk's Office stating he would not be able to attend the hearing. The Clerk's Office informed Singh the hearing was mandatory. Singh then attempted to argue he never received the Clerk's Office's email providing the phone number needed to call into the hearing. This assertion was made despite the fact that Singh had responded to the email containing the phone number. It was only after a phone call with the Clerk's Office – in which Singh's phone worked fine – that Singh agreed to call into the previously listed phone number and attend the Zoom hearing via conference call.

When Singh joined the Zoom hearing, he declined to unmute his cellphone. The Clerk's Office sent Singh various emails asking Singh to unmute his phone. When he did not do so, the undersigned repeatedly asked Singh to unmute his phone. Singh failed to do so. The undersigned noted this on the record and proceeded to conduct the hearing with Singh only listening in. During the hearing, Singh repeatedly emailed the Clerk's Office with opinions on the hearing's proceedings, indicating he could hear the court's instructions and the hearing's proceedings.

II. APPLICABLE LAW

Federal Rule of Civil Procedure 16(f)(1) provides for the imposition of sanctions, including sanctions authorized under Rule 37(b)(2)(A)(i)-(vii), if a party fails to obey a discovery/scheduling order. Relatedly, Rule 37(d) provides for sanctions under Rule 37(b)(2)(A)(i)-(vii) if a party fails to attend his own deposition, fails to answer interrogatories, or fails to respond to a request for inspection. Rule 37(b)(2)(A)(v) specifically includes in such sanctions: "dismissing the action or proceeding in whole or in part." FED. R. CIV. P. 37(b)(2)(A)(ii)(iii)(v).

Dismissal is authorized in whole or in part when the failure to comply with the court's order results from willfulness or bad faith, accompanied by a clear record of delay or contumacious conduct, and not from the inability to comply. *Romero v. ABC Ins. Co.*, 320 F.R.D. 36, 41 (W.D. La. 2017) (citing *Batson v. Neal Spelce Associates, Inc.*, 765 F.2d 511, 514 (5th Cir. 1985)). Stated differently, dismissal is appropriate where a party's failure to comply with discovery has involved either repeated refusals or an indication of full understanding of discovery obligations coupled with a bad faith refusal to comply. *Id*. (citing *Griffin v. ALCOA*, 564 F.2d 1171, 1172 (5th Cir. 1977)). Dismissal is proper in situations where the deterrent value of Rule 37 cannot be substantially achieved by the use of less drastic sanctions. *Id*. (citing *Batson*, 765 F.2d at 514). Additionally, the misconduct must substantially prejudice the other party's preparation for trial. *Id*. Dismissal is inappropriate when neglect is plainly attributable to the attorney rather than the client, or when a party's simple negligence is grounded in confusion or *sincere* misunderstanding of the court's orders. *Id*.

In addition, "[u]nder Rule 41(b) of the Federal Rules of Civil Procedure, a district court may dismiss an action based on the failure of the plaintiff to prosecute or to comply with any order of the court." *Beard v. Experian Information Solutions Inc.*, 214 F. App'x 459, 462 (5th Cir. 2007) (citing FED. R. CIV. P. 41(b)1 and *Lopez v. Aransas County Indep. Sch. Dist.*, 570 F.2d 541, 544 (5th Cir. 1978)). "Pro se litigants are not exempt from compliance with the rules of procedure." *Id*. (citing *Birl v. Estelle*, 660 F.2d 592, 593 (5th Cir. 1981)). Thus, "regardless of whether an individual represents himself, all parties have the responsibility to comply with court orders." *Romero*, 320 F.R.D. at 40. While dismissal under either rule is a harsh sanction, it is nonetheless appropriate if a "clear record of delay or contumacious conduct by the plaintiff exists and lesser sanctions would not serve the best interests of justice." *Price v. McGlathery*, 792 F.2d 472, 474

(5th Cir. 1986). Ultimately, exercise of the power to dismiss is committed to the sound discretion of the district courts. *Lopez*, 570 F.2d at 544.

The Fifth Circuit has made clear "[a] dismissal with prejudice 'is an extreme sanction that deprives the litigant of the opportunity to pursue his claim.'" *Berry v. CIGNA/RSI–CIGNA*, 975 F.2d 1188, 1191 (5th Cir. 1992) (citing *Callip v. Harris County Child Welfare Dept.*, 757 F.2d 1513, 1519 (5th Cir. 1985)). Thus, the Fifth Circuit has limited the court's discretion in dismissing cases with prejudice. *Berry*, 975 F.2d at 1191 (citing *Price*, 792 F.2d at 474). The Fifth Circuit affirms dismissals with prejudice for failure to prosecute only when "(1) there is a clear record of delay or contumacious conduct by the plaintiff, and (2) the district court has expressly determined that lesser sanctions would not prompt diligent prosecution, or . . . the district court employed lesser sanctions that proved to be futile." *Woods v. Soc. Sec. Admin.*, 313 F. App'x 720, 721 (5th Cir. 2009) (per curiam); *see also Berry*, 975 F.2d at 1191. Additionally, in most cases where the Fifth Circuit has affirmed dismissals with prejudice, the appellate court found at least one of three aggravating factors: "(1) delay caused by [the] plaintiff himself and not his attorney; (2) actual prejudice to the defendant; or (3) delay caused by intentional conduct." *Price*, 792 F.2d at 474.

In making this determination, courts frequently take into account previous, unheeded warnings of dismissal. *See Mutuba v. Halliburton Co.*, 949 F. Supp. 2d 677, 688 (S.D. Tex. 2013) ("The Court's orders have been explicit that Plaintiff's failure to prosecute would result in a dismissal of his case without further notice. Accordingly, in light of Plaintiff's failure to abide by the Court's previous orders, the Court finds that Defendants' motion to dismiss is appropriate as an independent ground for dismissal with prejudice, and it is granted.").

III. ANALYSIS

A. Motion to Sanction and Dismiss

This case has now been pending for over three years. *See* Dkt. #1. Despite its old age, the parties have not concluded discovery. In fact, discovery has barely begun. This is not because this case exhibits a complicated, vast universe of facts or documents or because it involves convoluted or nuanced legal arguments that must be applied with care. Rather, put as plainly as possible, it is because pro se Plaintiff Singh – who has frequently reminded the court he holds a Ph.D. – has repeatedly, intentionally, and blatantly refused to cooperate with either opposing counsel or the court. When Defendants attempt to confer with Singh, he is uncooperative. When Defendants serve Singh with discovery requests or attempt to schedule a deposition, he is unresponsive. When Defendants send Singh a notice of deposition and hold said deposition, Singh ignores the communication and fails to attend. When the undersigned orders Singh to comply with discovery, he refuses. When the undersigned orders Singh to attend a Zoom hearing related to his noncompliance, he makes misrepresentations to the court regarding what emails he received. Moreover, he attends the hearing telephonically but alleges unbelievably that he can only listen to the hearing because his phone is stuck on mute, despite the fact that he had a phone conversation with the Clerk's Office moments before the hearing. This conduct shows contempt and disrespect for the court and, more generally, the legal process as a whole.

As justification for these repeated instances of evasion, Singh has asserted a myriad of excuses. These excuses, akin to "the dog ate my homework," reflect an individual who appears allergic to the truth and dead set against cooperating with opposing counsel or the court. For example, Singh argued he could not comply with the court's June 10, 2020 Order – ordering Singh to comply with months-old discovery requests – in the set ten day deadline because he lacked

"proficiency with the keyboard." Dkt. #77 at 6. Singh made this excuse despite the fact that he had previously filed a plethora of typed motions and briefings with the court, including the motion this excuse was included in – 13 pages of briefing – and a separate Motion to Reconsider – 17 pages of briefing – that was filed on the same day. *See* Dkt. #77, #78.[5] In short, Singh's justifications for his conduct are at best unpersuasive and at worst direct misrepresentations to the court.

Despite Singh's dilatory and contumacious conduct, dismissal of his case, at least for the moment, is not the most prudent course of action. It is clear that Singh has failed to cooperate in discovery, confer appropriately with Defendants, and has missed his scheduled deposition. *See* Dkt. #75; Dkt. #83. Additionally, it is clear that, to date, Singh has failed to comply with the undersigned's previous orders. *See* Dkt. #75; Dkt. #83. However, Defendants have not pursued discovery with the requisite diligence needed to allow the undersigned to dismiss Singh's claims with prejudice. First, Defendants have not attempted to reschedule the deposition after Singh's initial no-show. This is problematic, as the undersigned ordered Singh to "appear for a [second scheduled] deposition [as] set by Discovery Defendants at a reasonable time." Dkt. #75 at 13. It was incumbent on Defendants to reschedule Singh's deposition after the undersigned's June 10, 2020 Order. Dkt. #75.[6] Second, despite the City Defendants' diligence in pursuing discovery, the Wal-Mart Defendants conceded that they have yet to seek any discovery from Singh. Dkt. #108. It was incumbent on the Wal-Mart Defendants to seek discovery if they wished to later argue Singh's claims should be dismissed for failure to comply with discovery. While Defendants may

[5] Singh's most recent showing of evasion and excuses was his conduct during and preceding the January 15, 2021 hearing. *See* Dkt. #108 (Minute Entry).

[6] To be clear, this is not to say that Defendants have failed to comply with this court's order. Rather, Singh's failure to sit for deposition and failure to comply with the undersigned's order as it relates to his deposition cannot be grounds for dismissal given that Defendants have not yet rescheduled his deposition. *See* Dkt. #75 at 13. The reason the court must make this clear is because Singh has shown an inclination to play fast and loose with the orders of the court and a propensity to misrepresent others. *See* Dkt. #96 at 1 (attempting to blame the court for his failure to comply with court orders by arguing the City Defendants' Motion to Sanction and Dismiss "arose out of a discovery dispute and a confusing order by Hon. Mark Lane and defense counsel Ramirez's gamesmanship.").

be correct that such discovery and deposition requests were likely pointless given Singh's displayed contempt for the judiciary process, they are nonetheless necessary given that "[a] dismissal with prejudice 'is an extreme sanction that deprives the litigant of the opportunity to pursue his claim.'" *Berry*, 975 F.2d at 1191. Because dismissal with prejudice is an exceedingly high bar and because Defendants have not yet made the requisite showings, the undersigned recommends that the City Defendants' Motion to Sanction and Dismiss Case for Plaintiff Ravindra Singh's Failure to Cooperate in Discovery and Comply with Court's Order (Dkt. #86) and the Wal-Mart Defendants' Motion to Dismiss for Plaintiff Ravindra Singh's Failure to Cooperate in Discovery and Failure to Comply with the Court's Order (Dkt. #92) be, for now, **DENIED**.

This is not to say that Singh is off the hook. It is unclear what Singh attempts to accomplish with his gamesmanship. He may think that he is being clever. He is not. He may think he has won the day. To this, the court issues the following **ORDER** and **WARNINGS**.

- **First**, the court **WARNS** Singh that any further improper conduct will result in the undersigned recommending that his claims be dismissed with prejudice. If Singh fails to comply with this court's order as detailed herein, the undersigned will recommend dismissal of Singh's above-styled case with prejudice. Any excuses Singh offers for noncompliance will be denied. Any requests for additional time to comply with this court's order will be denied. To put as plainly as possible, the undersigned will recommend the dismissal of Singh's case if he fails to comply with the orders clearly depicted below.
- **Second**, the court **WARNS** Singh that sanctions are not limited to the dismissal of a case. If Singh again fails to comply with the undersigned's order or again attempts to evade the efficient resolution of this case, the court will evaluate whether additional sanctions are warranted under federal law. *See* FED. R. CIV. P. 16(f)(2); *see also* FED. R. CIV. P.

37(b)(2)(A)(i)-(vii); FED. R. CIV. P. FED. R. CIV. P. 41(b); *Nottingham v. Warden, Bill Clements Unit*, 837 F.3d 438, 440 (5th Cir. 2016) (noting that additional sanctions may "'include assessments of fines, costs, or damages against the plaintiff, conditional dismissal, dismissal without prejudice, and explicit warnings'" (quoting *Thrasher v. City of Amarillo*, 709 F.3d 509, 514 (5th Cir. 2013)).

- **Third**, the court **WARNS** Singh that he has used up any leniency his pro se status may have afforded him.
- **Fourth**, Defendants' requests for admission remain admitted and are in no way affected by this Order and Report and Recommendation. *See* Dkt. #83.
- **Fifth**, the court notes Singh has affirmed that his email address and phone number on file with the Clerk's Office are accurate. Dkt. #109. This contact information is the same that Singh has included in his filings. Singh has conceded he "seldom misses his daily email check." *Id.*
- **Sixth,** Singh is **ORDERED** to comply with federal and local rules when filing documents to the court. Any documents that are filed in a manner not proscribed by federal and local rules will not be considered.
- **Seventh,** the court **ORDERS** the following[7]:

    1. Defendants are **ORDERED** to notify Singh of a deposition date **no later than 5:00 p.m. on January 29, 2021**. It is further **ORDERED** that this deposition date be scheduled sometime before Friday, February 26, 2021.

[7] The undersigned articulated this same order during the January 15, 2021 hearing. Dkt. #108. It is clear that Singh heard the court's unambiguous orders because he repeatedly emailed the Clerk's Office "I am listening" during the hearing. *See* Dkt. #108. This was noted during the hearing by the undersigned. *Id.*

2. Singh is **ORDERED** to sit for a deposition at the time set by Defendants. Failure to comply with this order will result in the undersigned recommending the case be dismissed with prejudice.
3. Singh is **ORDERED** to respond to the City Defendants' interrogatories and requests for production **by 5:00 p.m. on Friday, February 26, 2021**. Failure to comply with this order will result in the undersigned recommending the case be dismissed with prejudice.
4. Singh is **ORDERED** to respond to all discovery requests within 30 days of receipt. Failure to comply with this order will result in the undersigned recommending the case be dismissed with prejudice.

B. Second Motion to Compel

To date, Singh has not properly served any discovery on Defendants in accordance with federal rules. The extent of Singh's attempted discovery requests appear to be contained in Dkt. #77, Singh's already adjudicated Motion to Compel. *See* Dkt. #77. Defendants stipulate they have been laboring under the impression that Dkt. #77 is the only discovery request that Singh has lodged. The record supports this assertion. The City Defendants contend, and the court accepts as true, that they have responded sufficiently to the discovery request. *See* Dkt. #108. The Wal-Mart Defendants stipulate they have largely complied and will more fully comply within the coming days. *Id.* Based on the foregoing, Singh's Second Motion to Compel Disclosure is **GRANTED in part and DENIED in part**. Dkt. #95. Singh's Motion is **GRANTED** so far as the court **ORDERS** the Wal-Mart Defendants to fully comply with Singh's Dkt. #77 discovery request **by 5:00 p.m. on Friday, February 26, 2021**. *Id.* Singh's Motion is **DENIED** in all other respects. *Id.* Similarly, Defendants' requests for sanctions contained within their responses are **DENIED**. Dkt. #99, #100.

IV. ORDER AND RECOMMENDATIONS

In light of the foregoing, it is **ORDERED** that Singh's Second Motion to Compel Disclosure (Dkt. #95) be **GRANTED in part and DENIED in part**. Singh's Motion is **GRANTED** so far as the court **ORDERS** the Wal-Mart Defendants to fully comply with Singh's Dkt. #77 discovery request in accordance with federal law **by 5:00 p.m. on Friday, February 26, 2021**. *Id.* Singh's Motion is **DENIED** in all other respects. *Id.* Similarly, Defendants' requests for sanctions in response (Dkt. #99; Dkt. #100) are **DENIED**.

Additionally:

- Defendants are **ORDERED** to notify Singh of a deposition date and time **no later than 5:00 p.m. on January 29, 2021**. It is further **ORDERED** that this deposition date be scheduled sometime before Friday, February 26, 2021.
- Singh is **ORDERED** to sit for a deposition at the time set by Defendants.
- Singh is **ORDERED** to respond to the City Defendants' interrogatories and requests for production **by 5:00 p.m. on Friday, February 26, 2021**.
- Singh is **ORDERED** to respond to any discovery requests within 30 days of their receipt.
- Singh is **ORDERED** to comply with federal and local rules when filing documents to the court. Any documents that are filed in a manner not proscribed by federal and local rules will not be considered.

IT IS RECOMMENDED that the City Defendants' Motion to Sanction and Dismiss Case for Plaintiff Ravindra Singh's Failure to Cooperate in Discovery and Comply with Court's Order (Dkt. #86) and the Wal-Mart Defendants' Motion to Dismiss for Plaintiff Ravindra Singh's Failure to Cooperate in Discovery and Failure to Comply with the Court's Order (Dkt. #92) be **DENIED**.

Additionally, the Clerk's Office is **ORDERED** to send a courtesy copy of this Order and Report and Recommendation to Singh via his email address and send a copy via certified mail to Singh's physical address.

V. WARNING

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battles v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 150-53 (1985); *Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415 (5th Cir. 1996)(en banc).

SIGNED January 20, 2021.

MARK LANE
UNITED STATES MAGISTRATE JUDGE

FILED
February 03, 2021
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY: LRT
DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RAVINDRA SINGH, PH.D.	§	
Plaintiff,	§	
	§	
v.	§	CAUSE NO.1:17-cv-01120-RP
	§	
WAL-MART STORES INC,	§	
WAL-MART STORES OF TEXAS L.L.C.	§	
ALAN MARTINDALE,	§	
EVA MARIE MOSELEY,	§	
CITY OF AUSTIN,	§	
AUSTIN POLICE DEPARTMENT,	§	
EX-CHIEF OF POLICE ART ACEVEDO,	§	
RICHARD W MILLER,	§	
JOHN DOE I,	§	
Defendants.	§	

PLAINTIFF'S OBJECTIONS TO ORDER AND REPORT AND RECOMMENDATION OF JUDGE MARK LANE ISSUED JANUARY 21ST, , 2021

To: Hon. Robert Pitman
District Judge

Plaintiff Ravindra Singh, Ph.D., pro se, hereby submits his Objection to Magistrate Judge Hon. Mark Lane's ORDER and Report and Recommendation issued on January 21st, 2020 in above styled and number cause and assert as follows:

NOTICE

PLEASE TAKE NOTICE that Plaintiff remains extremely concerned about the continued pattern of unjustified criticism and warnings being levelled against him. Plaintiff has brought attention to this Hon. Court's attention.

It is amply apparent from the instant Order, Report and Recommendations and earlier Order/s that the Magistrate Judge in this case, has reserved his "electron-microscope like focus" to unfairly magnify, harp, rehash, probe and perpetuate a narrative while he has ignored egregious conduct by City Defends' especially Defendant Miller and attorney Ramirez – their attorney who represented them before attorney David May as their lead counsel. Plaintiff would rather avoid not making a point by point rebuttal – there is ample reasons to do to distract from the matter of hand. However, Plaintiff would note that the it appears that the magistrate judge has either not recognized the core-problems in the manner so far discovery has been allowed or for reasons known to him has decided not to address them. There may be multiple reasons for it including Plaintiff's pro se status and unfamiliarity with the Court's processes and number of defendants with their divergent interest involved making it more challenging for the court than it would have been otherwise. In Plaintiff's view, the adverse effect of lack of Rule 26(f) pre-discovery conference is obvious. Had there been a phase-wise discovery plan in effect as proposed by Plaintiff long ago most of the problem could have been avoided. It may not be too late for the Court to Order parties to a time-bound phase-wise discovery plan. Not too late, because complexion of the case has just changed after the January 15th, 2021 hearing. During the hearing – after full three years of deliberate silence on part of Defendants City of Austin, Miller and Wal-Mart Defendants Wal-Mart Defendants revealed that another party Security Management Services of Tennessee (SMS) is a party of real interest as the employer of off-duty officer Miller pursuant to a contract between City of Austin and the SMS. Immediate effect of this revelation - that parties hid from Plaintiff and the Court for three years - is that Defendant Miller is not shielded by the Texas Civ. Prac. & Rem. Code Sec. 101.106 as the City of Austin claimed. The City's motion under which the District Court dismissed Miller was improper and therefore warrants reversal Miller's dismissal from the case. At present

Plaintiff has been conferring with counsel for City Defendants Mr. May for more information on City's contract with SMC. Plaintiff will soon move the Court for reversal of Miller's dismissal.

Plaintiff expects fierce fight ahead in his discovery battle based on Wal-Mart's litigation history in other jurisdictions while he attempts discovery he is entitled to. Plaintiff has been respectful towards every one and continue to do so. However, he retains his rights to voice his concerns when he has them. He also expects the Court to address his concerns in a fair and impartial manner and not just dismiss them. As the U.S. 5th Circuit in its freshly minted opinion in Miller v. University of Houston et al stated:

> "[Plaintiff] Miller, like every litigant, is entitled to a full and fair opportunity to make her case in a fair and impartial forum. See United States v. Jordan, 49 F.3d 153, 155 (5th Cir. 1995). Beyond that, "fundamental to the judiciary is the public's confidence in the impartiality of our judges and the proceedings over which they preside." Id. "[J]ustice must satisfy the appearance of justice." Offutt, 348 U.S. at 14.
>
> We REVERSE the district court's judgments, including its sua sponte Rule 12(b)(6) dismissal of TSUS and UHS and summary judgment in favor of SHSU and UHD, and REMAND for further proceedings. On remand, we further direct the Chief Judge of the Southern District of Texas to REASSIGN these cases."

Audrey K. **Miller**, Plaintiff—Appellant, **v. Sam Houston State University**; Texas State University System, Defendants—Appellees, U.S. Court of Appeals Fifth Circuit, No. 19-20752, FILED January 29, 202

Like Plaintiff in aforementioned case, Plaintiff is entitled to a full and fair opportunity to make her case in a fair and impartial forum. Plaintiff means no disrespect the Court when he objects to the Order, Report and Recommendations Hon. Mark Lane issued in this case but feels like he is being accused falsely of shoplifting all over again by Jude Lane as he was falsely accused by Defendant Miller when the report clearly makes inference in favor of Defendants and against Plaintiff by

presuming Defendant's false assertion as true and disregarding Plaintiff's assertion even when are true.

Plaintiff RESERVES HIS RIGHTS TO SUPPLEMENT HIS OBJECTION AND WILL SUPPLEMENT AFTER REVIEWING THE HEARING TAPE. Plaintiff has ordered and paid for. Plaintiff has placed the order last week and will mail the payment to the Clerk's office on this Day 1st, of February 2021.

I. **I:Plaintiff Objects to Judge Lane's Recommendation that All Discovery requests to the City Defendants Should be denied**

First, Plaintiff agrees with Hon. Judge Lane's observation that this case is not an inordinately complex case. Plaintiff believes so because facts of the case are relatively undisputed. The difficulty arises directly as a result Defendants refusal to comply with Plaintiff's proper and reasonable requests and the magistrate judge's in ability or unwillingness to hold them accountable as a fair arbiter. Here Conduct of officer Miller's is particularly disturbing because he has throughout the proceeding lied about his conduct, and misused the authority conferred on him by the "Badge" to suppress and tamper with key evidence obstructing justice. A few examples are in order. First he accused Plaintiff of shoplifting by concealment of store items on his person. When he failed to discover any shoplifted item after the search, he misused the power of the "Badge" to cover up his misconduct by physically blocking Plaintiff for purpose of suppressing cellphone recording evidence of his misconduct. He also blocked Plaintiff physically and prevented Plaintiff from securing witnesses and direct evidence of his misconduct. What is even more disturbing is that Officer Miller flatly lied when he responded that "he was unaware of any surveillance video" when he knew full well that the entire incident was captured by the store surveillance system – the incident occurred in an area that has redundant surveillance cameras to ensure that in the unlikely event of failure of one camera does not leave the area without surveillance coverage. The incident was not only captured by the surveillance – system, it was broadcast to the public on the store

video monitors – Plaintiff saw the images being broadcast with his own eyes. Officer Miller approached, stopped, searched and found no shoplifted right under the video monitors. He physically blocked Plaintiff from re-entering the store, to purchase a pen right under the video monitor, he violently grabbed Plaintiff by his hands and arms and twisted them behind his back and inflicted severe injuries. This incident was also captured by the surveillance system. Wal-Mart has stated that the area of interest was not covered by the surveillance system. Miller simple claims that "he is not aware of any surveillance video". Another example relating to officer Miller is also pertinent. Miller provided Plaintiff with a copy of the citation that has been clearly altered. Plaintiff requested for a copy of the original citation so that it may be reviewed by the Court "in-camera". Plaintiff is entitled to the disclosure requested. Plaintiff Original complaint (Dkt 1) has two claims of spoliation of evidence specifically: (1) Store surveillance video and (2) Tampering with the citation at issue.

Judge Lane by recommending that Plaintiff be denied such information from the City Defendants, all future interrogatories, request to produce and request to admit is shielding bad cops and promoting bad behavior – plain and simple. Judge lane makes false claim and attribute them to defendant. He should have enquired further and established the veracity of each parties' contentions he did not. Had he done so, he would have found that Defendants had not complied with Plaintiff's disclosure request. He would have also found, that more than six months ago Plaintiff has complied. Attorney David May during the hearing that as far as he knew there were no outstanding discovery due from Plaintiff. Contrary to these facts, Judge Lane continue to assert Plaintiff has failed – Plaintiff feels like he is being accused of shoplifting all over again just like Defendant Miller – without any factual basis. Plaintiff has placed an order for the tape recording of the hearing and reserves his right to supplement his objection

(2) Continued Criticism of Plaintiff for Not Attending Oral Deposition is unfair and Unjustified

Rule 26(f) discovery conferences are the foundation of discovery practice in federal litigation. Rule 26(f) requires parties in litigation to meet and "confer as soon as practicable . . . [to] . . . consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures . . .; discuss any issues about preserving discoverable information; and develop a proposed discovery plan." Fed. R. Civ. P 26(f)(1) and (2).

City defendants scheduled Plaintiff to for oral deposition and paper-bombed him with written discovery request without ever holding a Rule 26(f) conference. To date no Rule 26 (f) conference has occurred. Even seasoned attorneys representing Wal-Mart are confused as evident by their recent attempt to invoke that rule, although in bad faith.

Yet City Defendants harp and hash and rehash what may fairly be considered insignificant under the circumstances. Judge Lane continue to perpetuate City Defendants' Plaintiff false narrative. Here, Plaintiff was made to face obstacle in prosecuting this matter he should not have. A fair review of the underlying cause would clearly indicate the reasons: resource asymmetry, litigation practices of Defendants and certainly the well-known and documented institutional biases against pro se litigants – and Plaintiff is a pro se litigant in this case. However, fair-minded judges s are generally mindful of such disparities and institutional biases and make a conscious effort to level the playing field by providing a fair process – it takes a conscious effort; it does not happen automatically all the time even though it makes a judge's job a little harder, and can be frustrating at times. But judges are not the only ones who have to deal with frustration. Litigants deal with frustration as well, and a lot more of it when they find themselves pitted against entrenched biases.

Plaintiff also notes that he devotes a great deal of time and energy in prosecuting this case. He need to learn more about the procedural aspects of it – not easy. But he will learn.

II. PLAINTIFF OBJECTS TO JUDGE LANE'S WARNINGS IN THEIR ENTIRETY BECAUSE THEY ARE LARGELY UNDESERVED AND THUS UNWARRANTED

Plaintiff does not think it's appropriate to make personal comments like "Plaintiff often reminds that he has a Ph.D." or "he thinks he is being clever. At no time Plaintiff did anything to suggest he was being clever or to remind him that Plaintiff has a Ph.D. Plaintiff would request Judge Lane from attacking his character. He keeps harping about Plaintiff's assertion about his typing abilities. Judge Lane knows nothing about Plaintiff's that skill set. He makes false conclusion based on Plaintiff's submission for many reasons. (1) Plaintiff a great deal of time working on them– that is one reason Plaintiff's submission are not always timely as he has noted in this Report and recommendation. (2) If he paid a little more attention he would note a large part of Plaintiff's submissions involves direct quotes for cases he spends lot of time researching – doing cut and paste does not involve same keyboarding proficiency. Judge Lane should know that Plaintiff cannot type without looking at the keyboard at all. He types only with two fingers – you cannot be a great typist, not even a good typist when you type like this Plaintiff.

SPECIFIC OBJECTION

A. INCORRECT FACTUAL STATEMENTS

Because Judge Lane's Order Report and recommendation is dated January 20, 2021 Plaintiff presumes that the statement contained is intended to be true representation of facts as of January 20, 2021.

STATEMENT NO. 1: "The City Defendants argue Singh, to-date, has not complied with any discovery. ORDER R &R on pg. 2.

OBJECTION: **STATEMENT 1, is patently false**.

During the January 15, 2021 hearing the attorney for the City of Austin, Mr. David May, upon Judge Lane's questioning testified that "as far as he knows all discovery requests have been complied with." Attorney May is correct. Plaintiff has complied fully with his discovery obligation. Has answered City Defendants' Request for Production, Interrogatories and Request to Admit in full to the extent information is in his control or custody. Plaintiff has Ordered the Tape of that hearing and will further verify Attorney May's aforementioned statement after the tape is received.

As a matter of fact, Plaintiff complied with Request to Admit even Mr. Icenhauer raised the motion for sanction. Judge Lane himself granted Plaintiff Request for Leave to Amend or Withdraw them. Mr. Icenhauer and Mr. Payne each were provided with a true and correct copy of Plaintiff's Reply to Motion to Admit each even before Plaintiff listened to the entire hearing. Subsequently Judge Lane spewed a lot of venom on Plaintiff based upon his incorrect assumption. Built in bias? Facts speak for themselves.

STATEMENT NO. 2: In October 1019, the City Defendants attempted to schedule the deposition of Singh [.] [Singh] failed to attend the deposition. Dkt. #62-10. To date no deposition has taken place in this suit.

OBJECTION: This is grossly misleading. It implies that to-date no deposition has taken place because of Plaintiff's first missed deposition over six months ago. That is not the case. No deposition has taken place because Court agreed with Plaintiff that Plaintiff's Oral deposition be scheduled only after Defendants have complied with Plaintiff's initial disclosure request. Since, as of writing of this report Defendants' have not met their disclosure obligation, they were reluctant to schedule oral deposition.

Defendants have not schedule deposition after Plaintiff's objection that this Court sustained. Plaintiff proposed that oral deposition be taken after all parties have complied with their written discovery obligations. Based on Plaintiff's objection Judge Lane agreed that he will issue a new Order in the future to fix time table for oral deposition, presumably after all parties have complied with their written discovery obligations. No new Order for oral deposition was issued, and rightly because unlike Plaintiff neither Defendants have complied with Plaintiff's initial disclosure. For example, for three years Defendants City of Austin, Richard Miller, Wal-Mart, Alan Martindale and Moseley withheld from Plaintiff a critical fact that has potentially changed the complexion of this lawsuit.

More specifically Defendants – the City of Austin, Richard Miller, Wal-Mart, Alan Martindale and Eva Marie Moseley knew that Miller was not employed by Wal-Mart pursuant to Austin Police Department (APD) Off-Duty Employment Policy 949 but hid from Plaintiff for three years that

City of Austin's Badge for Hire program provides off-duty APD officers to third party contractors who then supply the APD officer to entities like Wal-Mart to work as security guards in full APD uniform and gear while all the while Austin Police Department for public purposes maintain an off-duty policy that makes no mention of such practices. Defendant Miller never disclosed that he was an employee of a third party contractor while he worked as a security guard at the time of incident. Likewise, nether Alan Martindale or Eva Marie Moseley ever disclosed that Miller was an employee of some Tennessee contractor in APD uniform.

While Plaintiff met his written discover obligations almost six months ago, both the City, and Wal-Mart Defendants refused to meet even the most of basic disclosures. It is interesting to note that while Judge Lane required Plaintiff to comply with City's discovery request within ten days but permitted defendant infinite amount of time as he stipulated with defendant without ever addressing Plaintiff's concerns and wrote in his order that "defendants have either complied or working towards complying "with Plaintiff's requests for initial disclosure as stated in Plaintiff's initial motion to compel.

It was only during the hearing that Wal-Mart, and not Defendant Miller or City of Austin disclosed that Miller was working for Wal-Mart through some subcontractor Security Management Services (SMS) of Tennessee and not pursuant to contract with Wal-Mart as required by APD Off-Duty Employment Policy No. 949. For three full years the City, Officer Miller and attorney Ramirez withheld this information from the Court and Plaintiff. Yet magistrate judge held them as paragons of truth and honesty throughout I all its proceedings. Plaintiff has asked the City for a Copy of the Contract between City of Austin/APD with the Tennessee contractor SMS but has not received any response.

STATEMENT No.3: **The City Defendants contend, Singh has <u>failed to cooperate with subsequent discovery attempts</u>** and**, more generally, the discovery process as a whole.**

OBJECTION: Plaintiff objects to Statement No. 4 for several reasons. First, report does not identify which "subsequent discovery attempts" were made by City Defendants. It is not an accident that the report does not identify the "subsequent discovery effort that were made". No subsequent discovery effort was made by City Defendants and accusation that Plaintiff failed to co-operate with subsequent discovery attempt is utterly false and malicious. There was never any Second Request for Production or Second Set of Interrogatories or Second Set of Request to Admit. Plaintiff has met his discovery obligations whereas the City Defendants continue to resist. Here is what City Defendants provided to Plaintiff to date: (1) a copy of the citation Miller issue to Plaintiff for false Disorderly conduct that has been tampered with and (2) an offense report by Miller alleging Disorderly conduct on part of Plaintiff that was dismissed by the municipal court for lack of evidence on City's motion. He did not provide requested copy of his contract between himself and Wal-Mart; he did not provide a copy of his job description while he was employed at Wal-Mart. He never disclosed what his duties were and what his authority. He refuses to provide even his business card or name his supervisor.

STATEMENT NO.4: "The undersigned ordered Singh to comply with specific discovery requests on June 10, 2020. Dkt. 75. Specifically the undersigned ordered Singh to (1) answer the City Defendants' Interrogatories by June 25, 2020, (respond to the City Defendants Request for production by June 25, 2020, and (3) appear for a deposition at a reasonable time set by Defendant. Id The Court warned Singh that future dilatory tactics or meritless excuses could lead to sanctions and his case being dismissed, with prejudice. Id. To date, the City Defendants contend this Order has not been complied with. (Dkt. # 108) (Minutes Entry).

OBJECTION: Plaintiff objects to the statement that this Order has not been complied with because it is utterly false and malicious. First, because Judge Lane refers to Dkt # 108, it appears that Judge Lane based that statement on any statement City attorney Mr. David May have during the hearing on January 15, 2021 and not based on statement by the City on paper filed with the Court clerk. Plaintiff has found none. However, Plaintiff is certain that Attorney David May the only person appearing at the January 15, 2021 ZOOM-hearing on behalf of the City never made any statement contending the Order has not been complied with. To the contrary Attorney May testified that "as far as he knew" there was no outstanding discovery request. This is disturbing because it goes to the heart of not only fairness of the process itself but motivation behind the fabrication. Because this is extremely serious matter Plaintiff will await arrival of the audio tape of the ZOOM-hearing review and supplement his objection.

STATEMENT NO. 5: On July 15, 2020 the undersigned issued another order. Dkt #83. Noting Singh had not complied with its June 10, 2020. Id at 2. Order, the court again warned Singh that "[c]ontinued failure to comply with the discovery process will likely be met with case being dismissed for failure to prosecute". To date, Defendants argue Singh has still not complied with the discovery process.

OBJECTION:

Plaintiff objects to the statement because he complied with the request over six months ago. Attorney May stated during the January 15 , 2021 hearing that there were no outstanding discovery response due.

STATEMENT NO 6: Over Defendants' objections Singh argues he has complied with discovery and court's orders. Moreover, Singh argues that Defendants have acted improperly and failed to cooperate in discovery process. Specifically, Singh alleges Defendants have doctored their discovery responses and not complied with his discovery requests. See Dkt. #96 at 3-6. Defendants dispute these assertions**.**

OBJECTION: Judge Lane made no effort to determine the veracity of Defendants contention and presume them to be true. Had he dug a little deeper he would have made opposite conclusion. Merely repeating Defendants assertion that they dispute without evaluating their truth or falsity perpetuates a false narrative. Effort. On the other hand, he has an electron-microprobe like focus on what is Plaintiff's character and disregards Plaintiff 's. These days, public companies are concerned about such behavior on part of their employees and mandate specific training to deal with such issues.

OBJECTIONS TO ORDER AND RECOMMENDATION : SECTION IV

(1) In light of foregoing, it is **ORDERED** that Singh's Second Motion to Compel Disclosure (Dkt #95) be **GRANTED** in part. […] Singh' s Motion is DENIED in all respects. (Emphasis original) pg. 16.

OBJECTION: Here Plaintiff's filed a Second Motion to Compel Disclosure - the disclosure sought constitute "initial disclosure". Rule 26 of FRCP governs City Defendants' duty to disclose the disclosure requested. Rule 26 (a) in pertinent part provides:

(a) REQUIRED DISCLOSURES.

(1) *Initial Disclosure.*

(A) *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

First, Plaintiff in this regard notes that the initial disclosure sough does not constitute the full extent of written discovery Plaintiff intends and is entitled. Through the disclose requested, Plaintiff seeks information that he intends to use to propound written discovery consisting of Interrogatories, Request for Production and Request to Admit to City Defendants. Courts denial of requested "Initial Disclosures" works prejudices against Plaintiff because he is denied use of the disclosure information to craft his written discovery request - Interrogatories, Request for production and Request to Admit - aimed at City Defendant efficiently and completely.

Second, the requested disclosure is squarely within the scope of Required Disclosure under the Rule (26)(a). Defendants have not alleged, and Court has not made specific findings that disclosures are sought are exempt under Rule (26) (a)(1)(B). Plaintiff is entitled to disclosure sought and should not be denied.

(2) Singh is **ORDERED** to respond to the City Defendants' interrogatories and request for production by **5:00 p.m. Friday, February 26, 2021. (Emphasis original) pg. 15-16**

OBJECTION:

Plaintiff objects on the ground that he has already complied with this part of the ORDER. Court's order issued on June 10, 2020 governs. First, there can be no dispute that Plaintiff responded to Request to Admit on March 18, 2020 by serving a copy of his response on account of his Motion for Leave to Amend Admissions Deemed Admitted it self - well before Judge Lane issued his Order of June 10, 2020. Judge Lane granted Plaintiff leave to amend. Second, there can be no dispute that Plaintiff has served his responses on City defendants/Mr. Ramirez almost six months prior to instant Order of January 20, 2021 on August 17, 2020.

Even City Defendants' counsel May during the January 15, 2021 hearing, in response to Judge Lane's question stated that "as far as he knew there were no outstanding discovery requests". Clearly, there are no outstanding discovery request due to City Defendants and the ORDER is MOOT to the extent it requires Plaintiff to respond to City Defendants' interrogatories and request for production.

Plaintiff has placed an Order for a copy of the hearing tape and will re-verify attorney May's response.

(3) Singh is ORDERED to respond to any discovery requests within thirty days of their receipt. pg. 16.

OBJECTION: There are no outstanding discovery requests from City Defendants. Plaintiff answered as explained above.

OBJECTIONS TO ORDER and WARNINGS: SECTION III

(4) "Defendants' request for admission remain admitted and are in no way affected by this Order and Report and Recommendation. See Dkt. #83" pg, 14-15

OBJECTION: By his Order Judge Lane already granted Plaintiff Leave to Amend the deemed admission to issue here almost nine months ago. First, "Defendant's request for admission cannot

remain admitted, because Judge Lane has already by his Order of rendered said request to admit withdrawn or amended in its entirety. Ordered it withdrawn or amended t is improper for him to, in effect rescind that order now.

First, as the record shows on or around March 18, 2020 move the Court for Leave to Amend the subject deemed admissions. Judge Lane granted Plaintiff' Motion for Leave to Amend and entered an order on Second, since the "defendants' request for admission are "in no way affected" an amended or withdrawn admission must remain as it was at the time of this Order January 20, 2021.

Further, request to admit was not part of Court's order granted pursuant to Defendants' motion for discovery sanction. Despite this, by this instant ORDER, Judge Lane in effect, vacates his previous Order granting Plaintiff leave to amend deemed admission Plaintiff relied on for over nine months. There is no reason given. There is no authority cited. Furthermore, Plaintiff notes that in that Request to Admit Defendant Miller/Mr. Ramirez requested Plaintiff to admit most egregious and patently false statements: one statement is particularly egregious - admit that you were handcuffed because you attempted to flee. This request borders on bizarre as at no time Plaintiff made any movement that can be even remotely be construed as an attempt to flee. The response to some of the request to admit shows the oppose it. Instead of fleeing he remained on the scene in an effort to collect eyewitness information and cellphone video. Plaintiff's effort to do this was one of the reasons for Miller to issue citation - citation that was dismissed for lack of evidence by the Municipal Court.

Plaintiff has taken up this matter with Mr. Ramirez and has made multiple request to provide the supporting evidence - the surveillance video at the store. Defendant Miller/Mr. Ramirez have willfully failed to respond.

As is clear from Plaintiff's amended responses on file in this case, the overall the request to admit is utterly devoid of factual basis. Plaintiff intends to address them with City Defendants in coming days when he serves his written discovery requests.

Clearly, Plaintiff's responses to admit should not be disturbed and remain as amended.

Judge Lane's ambiguous Recommendation and Order does not find a place in his final Order and Recommendation does not make this recommendation related to request to admit in his final

CONCLUSION:

Plaintiff agrees with Judge Lanes recommendation that the case should not be dismissed. However, Plaintiff, disagrees with Judge Lane's Report & Recommendation to the extent it seeks to deny Plaintiff's opportunities for discovery. Plaintiff objects to Judge Lane warning because it perpetuate a false narrative by dismissing Plaintiff contentions even when then true and makes

inferences in favor of City of Austin and Officer Miller even when they are not justified. Plaintiff requests that Judge Lane refrain from making personal attack as they are untrue. His characterization of problems in attending hearting via ZOOM is entirely inaccurate. Plaintiff rented the facilities of a service provide, even then he could not connect. Plaintiff could not make conference call with his cell phone he could only listen. That does not equate to Plaintiff did not unmute as Judge Lane states in his report.

The amended deemed request to amend should stay as amended. They were amended by Judge Lane's own Order for Leave to Amend, months before even motion for sanction was filed. Defendants made request that were truly bizarre for which Miller provided no factual basis despite repeated request.

Plaintiff need s to learn about the procedural rules and he will. But accepting perfection would be unreasonable. And finally, because SMS has been revealed to a new party of interest, discovery will get lot more complicated. Court should consider asking parties to do a Rule 26(f) like conference and provide a phase-wise, time-bound discovery plan.

Dated: February 3, 2021

Respectfully submitted,

/s/ Ravindra Singh, Ph.D.

By :_____

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CERTIFICATE OF SERVICE

I certify that on this 3rd Day of February 2021, I served a true and correct copy of foregoing document on the following via electronic mail:

David May
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Brett Payne
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RAVINDRA SINGH, PH.D., Plaintiff,	§	
v.	§	CIVIL ACTION NO. 1:17-CV-1120-RP-ML
WAL-MART STORES, INC., WAL-MART STORES TEXAS, LLC, ALAN MARTINDALE, EVA MARIE MOSELEY; AND CITY OF AUSTIN, AUSTIN POLICE DEPARTMENT, EX-POLICE CHIEF ART ACEVEDO, OFFICER RICHARD W. MILLER (AP3538), OFFICER JOHN DOE 1, Defendants.	§	

DEFENDANT WAL-MART STORES TEXAS, LLC, WAL-MART STORES INC., ALAN MARTIN, AND EVA MARIE MOSELEY'S BRIEF REGARDING PLAINTIFF'S OBJECTIONS TO ORDER AND REPORT AND RECOMMENDATION OF JUDGE MARK LANE ISSUED JANUARY 21ST, 2021

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, Wal-Mart Stores Texas, LLC, Wal-Mart Stores, Inc., Alan Martin, and Eva Marie Moseley (referred to herein as Wal-Mart Defendants), Defendants in the above entitled and numbered cause, and files this their Brief Regarding Plaintiff's Objections to Order and Report and Recommendation of Judge Mark Lane Issued January 21st, 2021, in support thereof would respectfully show the Court as follows:

I. BACKGROUND

Plaintiff claims in his Objections to Judge Lane's Order that there has been no attempt on the part of Defendants to confer with Plaintiff regarding discovery in this case. Plaintiff further indicates there is not a discovery plan in effect. Plaintiff is misrepresenting the history of this case to the Court. In fact, all Defendants attempted several times to confer with Plaintiff with regard to a discovery plan.

These attempts date back to April 2019 and continue most recently to July 23, 2020. (Exhibit "A": email correspondence between parties). Defendants collectively reached out to Plaintiff more than 5 times to discuss with Plaintiff a discovery plan; however, Plaintiff failed to respond to these attempts. Further, Judge Pittman signed the most recent Proposed Scheduling Order on August 3, 2020 (dkt. 90). Contrary to Plaintiff's assertions, everyone with the exception of Plaintiff attempted to comply with FRCP 26(f) and there currently is a discovery plan in effect.

Plaintiff also claims that Defendants "after full three years of deliberate silence" revealed another party ("SMS") as the "employer of…Miller". Wal-Mart Defendants are unsure to which entity Plaintiff is referring. The contract pertaining to off-duty officers and Wal-Mart in this case was produced to Plaintiff on February 19, 2020, and is attached hereto as Exhibit "B". Wal-Mart Defendants are unaware of an entity named "SMS" in this matter and can only assume that the entity to which Plaintiff refers is contained in the contract he has had for one year. Wal-Mart Defendants provided this contract to Plaintiff strictly as a courtesy as Plaintiff never propounded discovery requests to Defendants. This contract was again sent to Plaintiff on January 15, 2021, and in between those dates as an exhibit to filings served on Plaintiff. Further, Wal-Mart Defendants have not made any claim to Plaintiff that this entity is/was Miller's employer – Wal-Mart Defendants simply produced the contract for the first time one year ago. The information Plaintiff claims he received for the first time on January 15, 2021, has been in his possession for one year.

Plaintiff claims that Defendants failed to respond to Plaintiff's disclosure requests. This, too, is false. Importantly, Wal-Mart Defendants filed their Initial Disclosures and served the same on Plaintiff (Dkt. 97). Plaintiff never served any Defendant with his Initial Disclosures. If Plaintiff is referring to the list of items included in his "Motion to Compel" (Dkt. 77), Wal-Mart Defendants provided Plaintiff with responses to those items and advised Plaintiff that Wal-Mart Defendants would supplement with additional information/documentation, if possible. Wal-Mart Defendants again

provided responses to the same to Plaintiff on January 15, 2021, attached hereto as Exhibit "C". Wal-Mart Defendants requested that Plaintiff sign the Agreed Confidentiality and Protective Order contained therein so that Wal-Mart Defendants could then produce additional proprietary documentation to Plaintiff. Plaintiff failed to return the signed agreement and failed to provide an agreement with proposed alternative language for Defendants to consider.

Plaintiff has evaded every attempt by all Defendants to confer on a discovery plan yet argues to this Court that Defendants are impeding this process. Plaintiff has the burden of prosecuting his own case. That is not the responsibility of Defendants. Defendants, at this point, have provided documentation and information to Plaintiff without Plaintiff ever serving one discovery request to Defendants. Defendants properly noticed Plaintiff's deposition (now three times) without Plaintiff seeking the deposition of anyone. To date, Defendants are unaware of Plaintiff's claimed damages. Plaintiff claims in his "Objections" that Defendants (referring here to City) "paper-bombed him with written discovery" yet chastises Wal-Mart Defendants for not propounding discovery. This is in light of the fact that Wal-Mart Defendants intentionally did not do so initially to avoid the very scenario of which Plaintiff complains. Defendants are exhausted by this process and trying to read Plaintiff's mind as to what he is seeking in this lawsuit that is now in its third year of litigation.

WHEREFORE, PREMISES CONSIDERED, Wal-Mart Defendants pray that this Honorable Court take into consideration the information and evidence contained in this brief and for further relief to which Defendants are justly entitled and will ever pray.

Respectfully submitted,

WALTERS, BALIDO & CRAIN, L.L.P.

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ATTORNEY FOR WAL-MART DEFENDANTS

CERTIFICATE OF SERVICE

This is to certify that on this the 11th day of February, 2021, a true and correct copy of the foregoing has been forwarded to all counsel of record.

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/s/ Katie S. McLean
KATIE S. MCLEAN

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RAVINDRA SINGH, PH.D, Plaintiff, v. WAL-MART STORES, INC., et al., Defendants.	§ § § § § § § § §	1:17-cv-1120-RP

ORDER

Before the Court is the report and recommendation and order of United States Magistrate Judge Mark Lane concerning Defendant Richard W. Miller and the City of Austin's (the "City Defendants") Motion to Sanction and Dismiss Case for Plaintiff Ravindra Singh's ("Singh") Failure to Cooperate in Discovery and Comply with Court's Order, (Dkt. 86), Defendant Wal-Mart Stores Texas LLC, Wal-Mart Stores Inc., Alan Martindale, and Eva Marie Moseley's (the "Wal-Mart Defendants") Motion to Dismiss for Plaintiff Ravindra Singh's Failure to Cooperate in Discovery and Failure to Comply with the Court's Order, (Dkt. 92), and Singh's Second Motion to Compel Disclosure, (Dkt. 95). (R. & R., Dkt. 109). In his report and recommendation, Judge Lane recommends that the City Defendants' Motion to Sanction and Dismiss Case for Plaintiff Ravindra Singh's Failure to Cooperate in Discovery and Comply with Court's Order, (Dkt. 86), be denied and the Wal-Mart Defendants' Motion to Dismiss for Plaintiff Ravindra Singh's Failure to Cooperate in Discovery and Failure to Comply with the Court's Order, (Dkt. 92), be denied. (*Id.* at 16). In his order, Judge Lane granted in part and denied in part Singh's Second Motion to Compel Disclosure, (Dkt. 95), issued warnings to Singh, and issued orders to all parties related to discovery in this case. (*Id.*). Singh timely filed objections to the report and recommendation and appealed Judge Lane's orders. (Objs., Dkt. 112).

A party may serve and file specific, written objections to a magistrate judge's findings and recommendations within fourteen days after being served with a copy of the report and recommendation and, in doing so, secure *de novo* review by the district court. 28 U.S.C. § 636(b)(1)(C). Because Singh timely objected to the report and recommendation, the Court reviews the report and recommendation *de novo*. Having done so, the Court overrules Singh's objections and adopts the report and recommendation as its own order.

Regarding Judge Lane's orders, a district judge may reconsider any pretrial matter determined by a magistrate judge where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law. 28 U.S.C. § 636(b)(1)(A). District courts apply a "clearly erroneous" standard when reviewing a magistrate judge's ruling under the referral authority of that statute. *Castillo v. Frank*, 70 F.3d 382, 385 (5th Cir. 1995). The clearly erroneous or contrary to law standard of review is "highly deferential" and requires the court to affirm the decision of the magistrate judge unless, based on the entire evidence, the court reaches "a definite and firm conviction that a mistake has been committed." *Gomez v. Ford Motor Co.*, No. 5:15-CV-866-DAE, 2017 WL 5201797, at *2 (W.D. Tex. Apr. 27, 2017) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). The clearly erroneous standard "does not entitle the court to reverse or reconsider the order simply because it would or could decide the matter differently." *Id.* (citing *Guzman v. Hacienda Records & Recording Studio, Inc.*, 808 F.3d 1031, 1036 (5th Cir. 2015)).

Because Singh timely appealed from portions of Judge Lane's order, the Court reviews those portions of Judge Lane's order for clear error or for conclusions that are contrary to law. Having done so, the Court denies Singh's appeal. Upon its own review, this Court finds that Judge Lane's orders and warning were not clearly erroneous or contrary to law.

Accordingly, the Court **ORDERS** that the report and recommendation of United States Magistrate Judge Mark Lane, (R. & R., Dkt. 109), is **ADOPTED**. The City Defendants' Motion to

Sanction and Dismiss Case for Plaintiff Ravindra Singh's Failure to Cooperate in Discovery and Comply with Court's Order, (Dkt. 86), is **DENIED** and the Wal-Mart Defendants' Motion to Dismiss for Plaintiff Ravindra Singh's Failure to Cooperate in Discovery and Failure to Comply with the Court's Order, (Dkt. 92), is **DENIED**.

IT IS FURTHER ORDERED that the Court **DENIES** Singh's appeal, (Dkt. 112), and **AFFIRMS** Judge Lane's order granting in part and denying in part Singh's Second Motion to Compel Disclosure, (Order, Dkt. 109, at 16), Judge Lane's warnings to Singh, (*Id.* at 13–14), and Judge Lane's discovery-related orders, (*Id.* at 14–16).

SIGNED on February 23, 2021.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF TEXAS

RAVINDRA SINGH, PH.D., Plaintiff,	§	
v.	§	CIVIL ACTION NO. 1:17-CV-1120-RP
WAL-MART STORES, INC., WAL-MART STORES TEXAS, LLC, ALAN MARTINDALE, EVA MARIE MOSELEY; AND CITY OF AUSTIN, AUSTIN POLICE DEPARTMENT, EX-POLICE CHIEF ART ACEVEDO, OFFICER RICHARD W. MILLER (AP3538), OFFICER JOHN DOE 1, Defendants.	§	

DEFENDANT WAL-MART STORES TEXAS, LLC, WAL-MART STORES INC., ALAN MARTINDALE, AND EVA MARIE MOSELEY'S MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, Wal-Mart Stores Texas, LLC, Wal-Mart Stores, Inc., Alan Martindale, and Eva Marie Moseley (referred to herein as Wal-Mart Defendants), Defendants in the above entitled and numbered cause, and files this their Motion for Summary Judgment and in support thereof would respectfully represent and show unto the Court the following:

I. SUMMARY OF THE ARGUMENT

With respect to the Wal-Mart Defendants, this litigation arises from Plaintiff's intentional infliction of emotional distress claim, defamation claim, and constitutional claims asserted against them after a November 26, 2015 police interaction. Plaintiff complains that Defendant Officer Richard W. Miller (along with additional officers and allegedly in concert with Ms. Mosely – a Wal-Mart employee) unreasonably searched his person; retaliated against him for criticizing unwarranted police

action; and used unreasonable force without the presence of exigent circumstances which resulted in severe pain and lasting bodily injury, all in violation of 42 U.S.C. § 1983. Plaintiff further claims that he suffered severe emotional distress as a result of the intentional and reckless acts of all Defendants. Additionally, Plaintiff claims that the record of arrest by the APD officers resulted in his name being published on a list of arrested criminals, which is/was available to the public resulting in injury to his reputation. Plaintiff claims that Wal-Mart employed the APD officers and those officers further acted in concert with Ms. Mosely in causing Plaintiff's injuries.

Defendants are entitled to summary judgment as the undisputed evidence, even by Plaintiff's own testimony, establishes that Wal-Mart Defendants did not employ the involved APD officers nor did any person from Wal-Mart interact with, touch, or speak with Plaintiff at any time on the date of the incident. Most importantly, Plaintiff cannot overcome summary judgment as Plaintiff has not provided any evidence that would indicate any Wal-Mart Defendant acted under "color of law" or pursuant to any legal authority, statute, or ordinance that would trigger the application of 42 U.S.C. § 1983. As such, 42 U.S.C. § 1983 does not apply in any manner to Wal-Mart Defendants, individually or as a whole.

II. SUMMARY JUDGMENT EVIDENCE

All summary judgment evidence is incorporated by reference into this motion and is contained in the Appendix attached and incorporated in this motion.

III. STATEMENT OF MATERIAL FACTS

Plaintiff entered the Wal-Mart for the purpose of shopping the Thanksgiving sales on November 26, 2015. *Exhibit 1, Excerpt from the deposition of Plaintiff, p. 22:15 – 23:11.* As he was walking towards the exit of the store to leave he was approached by two APD officers who suspected him of shoplifting. *Exhibit 1, Excerpt from the deposition of Plaintiff, p. 23:21 – 24:1.* The officers questioned Plaintiff and asked him to raise his shirt. The conversation between Plaintiff and the APD

officers then escalated when Plaintiff becoming verbally agitated with the officers. *Exhibit 1, Excerpt from the deposition of Plaintiff, p. 29:23 – 30:9.* At that point, Officer Miller asked Plaintiff to leave the store. *Id.* Plaintiff testified that at no time during this time was any Wal-Mart employee present nor did any Wal-Mart employee approach Plaintiff or the officers. *Id.* Plaintiff refused to leave the store and turned towards the store, so as to go back in the store. *Exhibit 1, Excerpt from the deposition of Plaintiff, p. 30:19 – 31:2.* At that point, Plaintiff testified that Officer Miller again instructed him to leave or he would arrest him and Plaintiff responded by raising his voice to attract attention. *Exhibit 1, Excerpt from the deposition of Plaintiff, p. 31:18 – 32:15.* At that point, Officer Miller placed handcuffs on Plaintiff and took him to the asset protection room in Wal-Mart. *Exhibit 1, Excerpt from the deposition of Plaintiff, p. 33:15 – 25.* Plaintiff testified that Officer Miller asked him to leave the store at least a twice and possibly three times before handcuffing him. *Exhibit 1, Excerpt from the deposition of Plaintiff, p. 37:7 – 11.* In the asset protection room, Plaintiff was cited for disorderly conduct and released to leave the store. *Exhibit 1, Excerpt from the deposition of Plaintiff, p. 45:3 – 9 after "conduct."* During the entire time from when Plaintiff was approached by the APD officers to the time he exited the store, he did not speak with any Wal-Mart employee nor did any Wal-Mart employee ask him any questions, touch him, or engage with him at all. *Exhibit 1, Excerpt from the deposition of Plaintiff, p. 47:7 – 12, 72:13 – 24, 94:16 – 95:9.* Although Plaintiff repeatedly claims that the Wal-Mart Defendants were acting in concert with the APD officers, Plaintiff admitted that he never witnessed or heard a conversation between the Wal-Mart Defendants and any APD officers at any time on the date of the incident. *Exhibit 1, Excerpt from the deposition of Plaintiff, p. 72:25 – 73:3, 74:20 – 23.* Interestingly, Plaintiff testified that Officer Miller acted on behalf of Wal-Mart during the initial questioning and asking him to lift his shirt (without any physical contact) in his search pursuant to suspicion of shoplifting but from the point Officer Miller handcuffed Plaintiff until the

time he was released to exit the store Officer Miller was acting on behalf of the Austin Police Department. *Exhibit 1, Excerpt from the deposition of Plaintiff, p. 100:9 – 101:10.*

IV. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 56, the party moving for summary judgment has the initial burden of demonstrating that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). The movant may meet his burden by establishing that the other party has the burden of proof at trial and has failed to "make a showing sufficient to establish the existence of an element essential to [its] case." *Nebraska v. Wyoming*, 507 U.S. 584, 590 (1993), (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986)). In order to avoid summary judgment, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585–86 (1986). Federal Rule of Civil Procedure 56 requires that the non-moving party set forth specific facts showing that there is a genuine issue for trial. *Anderson*, 477 U.S. at 256. Only a genuine dispute over a material fact (a fact which might affect the outcome of the suit under the governing substantive law) will preclude summary judgment. *Anderson*, 477 U.S. at 248. The dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party on the issue. *Id.* Conclusory allegations, speculation and unsubstantiated assertions are not adequate to satisfy the non-movant's burden. *Douglas v. United Services Auto Association*, 79 F.3d 1415, 1429 (5th Cir. 1996).

IV. ARGUMENTS AND AUTHORITY

Plaintiff first four causes of action against Defendants include Wal-Mart Defendants' alleged violations of 42 U.S.C. § 1983; however, Plaintiff has not provided any authority to show that Wal-Mart Defendants were acting under the "color of law" or that this statute is at all applicable to Wal-Mart Defendants. 42 U.S.C. § 1983 requires a Plaintiff to show that a particular defendant was acting

pursuant to the authority of a specific statute that would give that defendant the right to act under "the color of law" which would then trigger Plaintiff's right to bring a 42 U.S.C. § 1983 claim against that defendant.

Plaintiff's baseless assertion that Officer Miller was in any way employed by Wal-Mart at the time of the incident is not supported by any evidence. More importantly, Plaintiff failed to identify the underlying statute that would provide Wal-Mart or its employees the authority to act under the "color of law" as required by the statute. This alone defeats Plaintiff's claims. Even more so, Plaintiff testified that Officer Miller acted on behalf of APD (and not Wal-Mart) from the time Officer Miller handcuffed Plaintiff, once Plaintiff refused to leave the store as instructed, until he was released to leave the store. By Plaintiff's own testimony, any alleged injury sustained by Plaintiff from that point forward, including the alleged physical damages, all constitutional claims, and his intentional infliction of emotional distress and defamation claims (as they stem from the constitutional claims) was not caused by any action of any Wal-Mart Defendant and those injuries were caused by Officer Miller's actions made on behalf of the Austin Police Department. Thus, Plaintiff's testimony denies causation as to Wal-Mart Defendants. Further, Plaintiff's claims of intentional infliction of emotional distress and defamation fail as to Wal-Mart Defendants as Plaintiff confirmed there was not one Wal-Mart Defendant who spoke to Plaintiff to cause these damages nor did Wal-Mart Defendants cause Plaintiff to be arrested or published his name on any criminal list.

A. **Plaintiff's claims under 42 U.S.C. § 1983 Fail**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a

judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. *42 U.S.C. § 1983.* "Traditionally, the requirements for relief under [§] 1983 have been articulated as: (1) a violation of rights protected by the Constitution or created by federal statute, (2) proximately caused (3) by conduct of a 'person' (4) acting under color of state law." *Crumpton v. Gates, 947 F.2d 1418, 1420 (9th Cir. 1991).* Or, more simply, courts have required plaintiffs to "plead that (1) the defendants acting under color of state law (2) deprived plaintiffs of rights secured by the Constitution or federal statutes." *Gibson v. United States, 781 F.2d 1334, 1338 (9th Cir. 1986); see also Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir. 2006); WMX Techs., Inc. v. Miller, 197 F.3d 367, 372 (9th Cir. 1999) (en banc); Ortez v. Washington County, Or., 88 F.3d 804, 810 (9th Cir. 1996).*

To succeed on a Section 1983 claim, a Plaintiff must prove that his constitutional rights were violated, and that the violation was caused by a person action under color of law. *West v. Atkins,* 487 U.S. 4242 (1988). A defendant has acted under color of state law where he or she has "exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *Id.* Plaintiff claims that Officer Miller and the Wal-Mart Defendants were acting in "concert" in their alleged injuries to Plaintiff. "To prove a conspiracy between the state and private parties under § 1983, the plaintiff must show an agreement or meeting of the minds to violate constitutional rights…" *United Steelworkers of Am. v. Phelps Dodge Corp., 865 F.2d 1539, 1540-41 (9th Cir. 1989) (en banc).* Conclusory allegations are insufficient to state a claim of conspiracy. *Simmons v. Sacramento County Superior Court, 318 F.3d 1156 (9th Cir. 2003); Radcliffe v. Rainbow Constr. Co., 254 F.3d 772 (9th Cir. 2001).* Plaintiff has not provided any evidence that any Wal-Mart Defendant was anywhere near him at the time of the underlying incident. Plaintiff has not presented

any evidence that any Wal-Mart Defendant ever spoke a word to Plaintiff on the date in question. Further, Plaintiff failed to present any evidence that any Wal-Mart Defendant acted under "color of law" in their interaction, if any, with Plaintiff. Additionally, Plaintiff failed to present any evidence, beyond a conclusory statement, that the Defendants were in any way acting in "concert" or were involved in a conspiracy that would impune the "color of law" to Wal-Mart Defendants. Accordingly, Plaintiff has not presented any evidence to support any element of his constitutional claims against Wal-Mart Defendants.

B. **Plaintiff's Claim of Infliction of Emotional Distress Fails**

In order to prevail as to an IIED claim, Plaintiff must prove the following elements: (1) Mosely or some other Wal-Mart Defendant acted intentionally or recklessly; (2) the emotional distress suffered by Plaintiff was severe; (3) the defendants' conduct was extreme and outrageous; and (4) defendants' conduct proximately caused Plaintiff's emotional distress. *Kroger Texas Ltd. P'ship v. Suberu*, 216 S.W.3d 788 (Tex. 2006). Extreme or outrageous conduct is conduct that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Tiller v. McLure*, 121 S.W.3d 709 (Tex. 2003) (citing *Twyman v. Twyman*, 855 S.W.2d 619 (Tex.1993)). However, "[c]onduct that is merely insensitive or rude is not extreme and outrageous, nor are 'mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.'" *Suberu*, 216 S.W.3d 788 (Tex. 2006). Moreover, a defendant's conduct is not extreme or outrageous merely because it is tortious or otherwise wrongful. *Bradford v. Vento*, 48 S.W.3d 749 (Tex. 2001) (citing *Brewerton v. Dalrymple*, 997 S.W.2d 212, 216 (Tex. 1999)). Whether conduct is extreme or outrageous is a question of law for the court to decide. *Bradford*, 48 S.W.3d at 758. Only when reasonable minds could differ is it for the jury, subject to the court's control, to determine whether conduct is extreme or outrageous. *Hoffmann-La Roche Inc. v. Zeltwanger*, 144 S.W.3d 438 (Tex. 2004).

Texas courts have described extreme and outrageous conduct as "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Tiller*, 121 S.W.3d at 713 (citing *Twyman*, 855 S.W.2d at 621). Mosely's alleged conduct (or any alleged conduct of any Wal-Mart employee), even if true, is not comparable to the conduct deemed extreme and outrageous by Texas courts. *Morgan v. Anthony*, 27 S.W.3d 928 (Tex. 2000).

Wal-Mart Defendants did not address Plaintiff in any manner nor did they exhibit any conduct, much less outrageous or extreme conduct, towards Plaintiff at all. Again, Plaintiff claims that Wal-Mart Defendants employed Officer Miller (and other officers) and further worked in concert with them when they falsely accused Plaintiff of shoplifting theft, detained and arrested him and put him in handcuffs. Plaintiff has not presented any evidence that: any APD officer was employed by Wal-Mart on the date of the incident; that Plaintiff had any conversation at all with any Wal-Mart Defendant; that any Wal-Mart associate or Wal-Mart Defendant arrested, detained, or handcuffed Plaintiff or had any "meeting of the mind" with the officers to accomplish this. There is no evidence, after almost three and a half years of litigation, to support any of Plaintiff's claims against Wal-Mart Defendants.

C. **Plaintiff's Claim of Defamation of Character Fails**

Defamatory statements are either defamatory *per se* or defamatory per quod. *Hancock v. Variyam*, 400 S.W.3d 59, 63 (Tex. 2013). To establish a defamation claim, a plaintiff must show: (1) the defendant published a statement of fact; (2) the statement was defamatory concerning the plaintiff; and (3) the defendant was negligent regarding the truth of the statement. *WFAA-TV v. McLemore*, 978 S.W.2d 568 (Tex. 1998); *see also Provencio v. Paradigm Media, Inc.*, 44 S.W.3d 677. (Tex. App.—El Paso 2001, no pet.). Additionally, fault is a prerequisite to establish liability for a defamation tort, and private plaintiffs must prove that the defendant was at least negligent. *WFAA-TV*, 978 S.W.2d at 571.

The Texas Supreme Court has adopted the Restatement's definition of "published" as a "communication intentionally or by negligent act to one other than the person defamed". *Kelley v. Rinkle*, 532 S.W.2d 947 (Tex. 1976). A statement is published negligently when a defendant's act creates an unreasonable risk that the statement will be communicated to a third party. *See Campbell v. Salazar*, 960 S.W.2d 719, 726 (Tex. App. —El Paso 1997, pet denied) (emphases added). Based on the foregoing case law, Texas courts require that there be an affirmative action on the part of a defendant to publish a statement in order to be liable for a defamation tort.

Plaintiff suggests that Ms. Mosely falsely accused Plaintiff of shoplifting and subjected him to body search in public view. Plaintiff failed to meet the elements to establish a defamation claim against Wal-Mart Defendants. Once again, Plaintiff failed to present any evidence of any nature that Ms. Mosely ever said one word to him or furthermore accused him of any crime or that she body searched him or arrested him/placed his name on a criminal arrest list. Plaintiff again suggests Wal-Mart employed the APD officers on the date of the incident. There is no evidence in this case to support that allegation. Because Plaintiff has not provided any evidence to support any element of his causes of action, he cannot prevail on those claims nor can he prevail on joint and several liability.

V. CONCLUSION

Wal-Mart Defendants now seek summary judgment on Plaintiff's claims. Plaintiff's claims are wholly inapplicable to Wal-Mart Defendants as they are comprised of private parties who did not touch or speak with Plaintiff nor did they direct any conduct towards Plaintiff nor were they acting under color of law in any action conducted towards Plaintiff by any party. Thus, Plaintiff has no evidence to support his claims against Wal-Mart, and Plaintiff's claims should be dismissed as a matter of law.

VI. PRAYER

WHEREFORE, PREMISES CONSIDERED, Wal-Mart Defendants respectfully request that the Court grant Wal-Mart Defendants Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56, and for all such other and further relief to which they may be justly entitled and will ever pray.

Dated: August 30, 2021.

Respectfully submitted,

WALTERS, BALIDO & CRAIN, L.L.P.

BY: */s/ Brett H. Payne*

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ATTORNEY FOR WAL-MART DEFENDANTS

CERTIFICATE OF SERVICE

This is to certify that on this the 31st day of August, 2021, a true and correct copy of the foregoing has been forwarded to all counsel of record:

Ravindra Singh
P.O. Box 10526
Austin, Texas 78766
Plaintiff

Via CMRRR:

David May
Assistant City Attorney
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P.O. Box 1546
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Fax: 512-974-1311
Co- Defense Counsel

***Via* Email**: david.may@austintexas.gov

/s/ Brett H. Payne
BRETT H. PAYNE

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF TEXAS

RAVINDRA SINGH, PH.D., Plaintiff,	§	
v.	§	CIVIL ACTION NO. 1:17-CV-1120-RP
WAL-MART STORES, INC., WAL-MART STORES TEXAS, LLC, ALAN MARTINDALE, EVA MARIE MOSELEY; AND CITY OF AUSTIN, AUSTIN POLICE DEPARTMENT, EX-POLICE CHIEF ART ACEVEDO, OFFICER RICHARD W. MILLER (AP3538), OFFICER JOHN DOE 1, Defendants.	§	

DEFENDANT WAL-MART STORES TEXAS, LLC, WAL-MART STORES INC., ALAN MARTINDALE, AND EVA MARIE MOSELEY'S MOTION TO ENTER ORDER GRANTING SAME DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, Wal-Mart Stores Texas, LLC, Wal-Mart Stores, Inc., Alan Martindale, and Eva Marie Moseley (referred to herein as Wal-Mart Defendants), Defendants in the above entitled and numbered cause, and files this their Motion to Enter Order Granting Same Defendants' Motion for Summary Judgment and in support thereof would respectfully represent and show unto the Court the following:

I. BACKGROUND

On August 31, 2021, Wal-Mart Defendants filed their Motion for Summary Judgment on each cause of action alleged against them by Plaintiff. (Dkt. 115). The same was served on

Plaintiff via mail (dated August 31, 2021) and via email (dated September 1, 2021). *See* Exhibit A and B, respectively. As of this date, Plaintiff has not filed a response to the same.

II. AUTHORITY AND ARGUMENT

Pursuant to the Local Rules for the Western District of Texas – Austin Division, Plaintiff must have filed his Response to Defendants' Motion for Summary Judgment 14 days after the filing of Defendants' Summary Judgment Motion. *See* Rule CV-7: Pleadings Allowed; Form of Motion. "A response to other motions [other than discovery or case management motions](sic) shall be filed not later than 14 days after the filing of the motion, except as provided by Rule CV-15 [this rule involves filing an amended pleading]. If there is no response filed within the time period prescribed by this rule, the court may grant the motion as unopposed." Accordingly, Plaintiff's deadline to file his Response was Tuesday, September 14, 2021. As Wal-Mart Defendants satisfied their summary judgment burden (pursuant to Rule 56 of the Federal Rules of Civil Procedure) and Plaintiff was provided an opportunity to file a Response as outlined in the Local Rules, but did not, Wal-Mart Defendants' Motion for Summary Judgment should be granted.

III. PRAYER

Wal-Mart Defendants now ask that the Court enter an order granting Wal-Mart Defendants' Motion for Summary Judgment on Plaintiff's claims, thus disposing of all of his claims against these Defendants. As previously included in Defendants' Motion for Summary Judgment, Plaintiff's claims are wholly inapplicable to Wal-Mart Defendants as they are comprised of private parties who did not touch or speak with Plaintiff nor did they direct any conduct towards Plaintiff nor were they acting under color of law in any action conducted towards Plaintiff by any party. Thus, Plaintiff has no evidence to support his claims against Wal-Mart, and Plaintiff's claims

should be dismissed as a matter of law as Wal-Mart Defendants met their summary judgment burden.

WHEREFORE, PREMISES CONSIDERED, Wal-Mart Defendants respectfully request that the Court enter an order granting Wal-Mart Defendants Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56 and Rule CV-7 of the Local Rules of the U.S. District Court Western District of Texas – Austin Division, and for all such other and further relief to which they may be justly entitled and will ever pray.

Dated: September 16, 2021.

Respectfully submitted,

WALTERS, BALIDO & CRAIN, L.L.P.

BY: */s/ Brett H. Payne*

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ATTORNEY FOR WAL-MART DEFENDANTS

CERTIFICATE OF SERVICE

This is to certify that on this the 16th day of September, 2021, a true and correct copy of the foregoing has been forwarded to all counsel of record:

Ravindra Singh
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Plaintiff

Via CMRRR:

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Phone: 512-974-2342
Fax: 512-974-1311
Co- Defense Counsel

***Via* Email**: david.may@austintexas.gov

/s/ Brett H. Payne
BRETT H. PAYNE

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF TEXAS

RAVINDRA SINGH, PH.D., Plaintiff,	§	
v.	§	CIVIL ACTION NO. 1:17-CV-1120-RP
WAL-MART STORES, INC., WAL-MART STORES TEXAS, LLC, ALAN MARTINDALE, EVA MARIE MOSELEY; AND CITY OF AUSTIN, AUSTIN POLICE DEPARTMENT, EX-POLICE CHIEF ART ACEVEDO, OFFICER RICHARD W. MILLER (AP3538), OFFICER JOHN DOE 1, Defendants.	§	

DEFENDANT WAL-MART STORES TEXAS, LLC, WAL-MART STORES INC., ALAN MARTINDALE, AND EVA MARIE MOSELEY'S SECOND MOTION TO DISMISS FOR PLAINTIFF RAVINDRA SINGH'S FAILURE TO COOPERATE IN DISCOVERY AND FAILURE TO COMPLY WITH THE COURT'S ORDERS

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, Wal-Mart Stores Texas, LLC, Wal-Mart Stores, Inc., Alan Martindale, and Eva Marie Moseley (referred to herein as Wal-Mart Defendants), Defendants in the above entitled and numbered cause, and files this their Second Motion to Dismiss for Plaintiff Ravindra Singh's Failure to Cooperate in Discovery and Failure to Comply with the Court's Orders, and in support thereof would respectfully represent and show unto the Court the following:

I. BACKGROUND

1.1 Ravindra Singh filed this lawsuit against the Wal-Mart Defendants stemming from an incident that occurred on November 26, 2015. Singh alleges various civil rights violations under 42 U.S.C. §§ 1981, 1983, 1985(b)(3) and rights under the Constitution and laws of the State of Texas. He also brought suit against the City of Austin, Austin Police Department, Art Acevedo, Richard Miller,

and Officer John Doe 1 (referred to herein as Austin Defendants). The Wal-Mart Defendants move for dismissal of Plaintiff's claims against them for Plaintiff's failure to prosecute his case and comply with the Court's orders. (Dkt. 109).

II. ARGUMENTS AND AUTHORITY

2.1 If the plaintiff does not actively pursue the lawsuit, the court may dismiss the case for failure to prosecute. *Id.*; *Link v. Wabash R.R.*, 370 U.S. 626, 630 (1962); *Larson v. Scott*, 157 F.3d 1030, 1031 (5th Cir. 1998); *Baker v. Latham Sparrowbrush Assocs.*, 72 F.3d 246, 252-53 (2d Cir. 1995); *see, e.g., Doe v. Megless*, 654 F.3d 404, 411 (3d Cir. 2011) (dismissal was appropriate because P's actions made adjudicating claim impossible when his motion to proceed anonymously was denied and he continued to refuse to proceed under his real name); s*ee also Chamorro v. Puerto Rican Cars, Inc.*, 304 F.3d 1, 4 (1st Cir. 2002) (court's inherent power to dismiss cases for failure to prosecute is reinforced and augmented by FRCP 41(b)). Dismissal for failure to prosecute is a harsh sanction that should be used only in extreme situations, such as when there is a clear record of delay or contempt or when less drastic sanctions are unavailable. *DiMercurio v. Malcom,* 716 F.3d 1138, 1140 (8th Cir. 2013).

2.2 Appellate courts require the district courts to consider certain factors when deciding whether to dismiss a case for failure to prosecute. *Berry v. CIGNA/RSI-CIGNA*, 975 F.2d 1188, 1191 (5th Cir. 1992) (two regular factors plus three aggravating factors). In *Williams v. Brown & Root, Inc.*, the Fifth Circuit discussed the standard imposed with regards to involuntary dismissals of a plaintiff's case with prejudice:

> "We will affirm only if a 'clear record of delay and contumacious conduct by the plaintiff' exists and "lesser sanctions would not serve the best interests of justice." Additionally, most courts affirming dismissals have found at least one of three aggravating factors: (1) delay caused by plaintiff himself and not his attorney; (2) actual prejudice to the defendant; or (3) delay caused by intentional conduct."

828 F.2d 325, 328-29 (5th Cir. 1987). "Where further litigation on the claim will be time-barred, a dismissal without prejudice is no less severe a sanction than a dismissal with prejudice, and the same standard of review is used. *McGowan v. Faulkner Concrete Pipe Co.*, 659 F.2d 554, 556 (5th Cir. Unit A Oct. 1981).

2.3 The district court may also dismiss a suit if a party does not comply with discovery. *See* FED. R. CIV. P. 37(b)(2), (c)(1). In these instances, the court should consider these factors: (1) the degree of actual prejudice to the defendant; (2) the amount of interference with the judicial process; (3) the culpability of the litigant; (4) whether the court warned the party in advance that dismissal would be a likely sanction for noncompliance; (5) the effectiveness of lesser sanctions; (6) the history of delay; (7) whether the conduct of the party or the attorney was willful or in bad faith; and, (8) the merit of the claim. *Bass v. Jostens, Inc.*, 71 F.3d 237, 241 (6th Cir. 1995); *Archibeque v. Atchinson, Topeka & Santa Fe Ry.*, 70 F.3d 1172, 1174 (10th Cir. 1995); *Harris v. City of Phila.*, 47 F.3d 1311, 1330 n.18 (3d Cir. 1995).

2.4 This is Wal-Mart Defendants' Second Motion to Dismiss wherein Defendants are seeking relief in response to Plaintiff's failure to comply with the Federal Rules of Civil Procedure and the Courts' prior Orders. In response to Defendants' last Motion to Dismiss, the Court gave Plaintiff his last chance to prosecute his case as Plaintiff refused to do so up to that point. (Dkt. 109). In the instant case, Plaintiff failed to timely serve discovery responses to Defendants' request for the same (in defiance of the Court's most recent Order)(Dkt. 109), which were served on Plaintiff on January 15, 2021. *See* Exhibit A. Plaintiff failed to timely respond to the requests, despite the deadline clearly contained in Rules 33 and 34 of the Federal Rules of Civil Procedure and despite the Court's Order, entered on January 20, 2021. (Dkt. 109). In the Order (p. 15, No. 4), it states that, "Singh is ORDERED to respond to all discovery requests within 30 days of receipt. Failure to comply with this

order will result in the undersigned recommending the case be dismissed with prejudice." This is one more example of Plaintiff's egregious disregard for the Court and the rules of discovery.

2.5 Plaintiff has not made any effort to conduct any depositions or formal discovery in the three and half years since he filed his Petition and his chance do so passed as the discovery deadline was July 30, 2021. (Dkt. 90). Plaintiff has never requested the deposition of any Wal-Mart Defendant, employee, or associate. Plaintiff failed to send any formal discovery requests to any Defendant, failed to timely respond to discovery requests sent to him, and failed to conduct any other discovery that one might do in seeking damages from another. As of July 30, 2021, Plaintiff cannot request any information, documentation, or testimony from anyone – party or non-party – to prosecute his case. His opportunity to do so passed.

2.6 Wal-Mart Defendants filed their Response to Plaintiff's "discovery requests" (those contained in one of his motions and not in compliance with the discovery rules) on February 26, 2021 and served the same on all parties. *See* Exhibit B. Wal-Mart Defendants did so by the deadline outlined in the Court's Order. (Dkt. 109, p. 15, part B.) Additionally, all Defendants timely noticed Plaintiff's deposition (as ordered by the Court in the aforementioned order) and the same took place on February 22, 2021. Accordingly, Wal-Mart Defendants timely and fully complied with the terms set out in the Court's Order. Defendants have made every effort to comply with the Court's orders and follow the applicable law. Plaintiff continues to blatantly ignore the Court's discovery deadlines and many signed orders in the past three and a half years that this case has been in litigation. Plaintiff's behavior has significantly delayed litigation in this case and prejudiced Defendants by forcing them to expend a great deal of time and expense in this very lengthy motion practice (as opposed to actual discovery litigation wherein parties develop their various cases with the exchange of information and documentation, witness testimony, expert discovery, etc.). At this point, there is no other recourse for Defendants given Plaintiff's utter defiance of any legal authority (be it the Court or the Federal Rules

of Civil Procedure and corresponding decades established case law) other than complete dismissal of all claims against Wal-Mart Defendants. Plaintiff has again confirmed that he is not interested in prosecuting his case, despite being ordered to, and will continue to conduct this same type of ineffective, unnecessary, erratic, and confusing behavior that we have seen since March 1, 2018. Therefore, dismissal with prejudice is warranted as Defendants have exhausted all other recourse.

III. CONCLUSION

2.7. Based on the foregoing statutory and case law, Defendants are entitled to dismissal with prejudice as to Plaintiffs' case against them.

WHEREFORE, PREMISES CONSIDERED, Wal-Mart Defendants respectfully request that the Court grant Wal-Mart Defendants Motion for Dismissal with Prejudice pursuant to Federal Rule of Civil Procedure 37 and 41(b) and pursuant to the Court's Order (Dkt. 109), and for all such other and further relief to which they may be justly entitled and will ever pray.

Dated: September 23, 2021.

Respectfully submitted,

WALTERS, BALIDO & CRAIN, L.L.P.

BY: */s/ Brett H. Payne*

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ATTORNEY FOR WAL-MART DEFENDANTS

CERTIFICATE OF SERVICE

This is to certify that on this the 23rd day of September, 2021, a true and correct copy of the foregoing has been forwarded to all counsel of record:

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Mark Kosanovich
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Via EM/ECF and email: mk@fitzkoslaw.com

/s/ Brett H. Payne

BRETT H. PAYNE

RECEIVED
October 21, 2021
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY: JMV
DEPUTY

FILED
October 21, 2021
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY: JMV
DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RAVINDRA SINGH, PH.D.	§	
Plaintiff,	§	CAUSE NO. 1:17-CV-01120-RP
	§	
V.	§	
WAL-MART STORES, INC.	§	
WAL-MART STORES TEXAS, LLC	§	
ALAN MARTINDALE,	§	
EVA MARIE MOSELEY,	§	
CITY OF AUSTIN,	§	
AUSTIN POLICE DEPARTMENT	§	
ART ACEVEDO	§	
RICHARD W. MILLER (AP3538),	§	
JOHN DOE I	§	
Defendants.	§	

PLAINTIFF RAVINDRA SINGH, PH.D.'S MOTION IN OPPOSITION TO DEFENDANTS WAL-MART STORES TEXAS, LLC, WAL-MART STORES, INC., ALAN MARTINDALE, AND EVA MOSELEY'S MOTION FOR SUMMARY JUDGEMENT AND APPLICATION FOR RELIEF UNDER RULE 56(d) AND

Plaintiff Ravindra Singh, Ph.D. proceeding pro se respectfully moves the Court the Hon. Court and submits his Motion in Opposition to Defendants Wal-Mart Stores Texas, LLC, Wal-Mart Stores, Inc., Alan Martindale and Eva Marie Moseley's Motion for Summary Judgement and this application for relief under the Rule 56(d) Fed. Rules of Civil Procedure and says:

I. INTRODUCTION

Defendants' Motion to Dismiss Plaintiffs' Original Complaint seeks Summary Judgment. ECF No. #115. A motion for summary judgment at this stage of the litigation premature, and should be denied, or in the alternative, deferred until Plaintiff is provided adequate discovery. Nothing in the

record in this case, establishes absence disputed material fact. To the contrary several key material facts remain in dispute. For example, the identity of defendant Richard Miller's employer on November 26, 2015 when he worked as security guard inside Defendants' store #3569 during its early Black Friday Sale protecting its property from theft. Defendant Wal-Mart claims that Richard Miller was an employee of a third-party contractor who was authorized to hire City of Austin police officer for placement at local businesses pursuant to a contract with the City of Austin. However, defendant has not provided anything to support its self-serving claim. There is no copy of the alleged contract attached anywhere with the Motion. There is no copy of any contract that Wal-Mart allegedly had with the third-party supplier – Central Defense Services, LLC. ("CDS") There is no affidavit attached either. Defendants have no evidence that on the Thanksgiving-Day November 26, 2015 defendant Richard was employed by any third-party supplier while worked off-duty at Defendants store #3569 where the incident giving rise to this action occurred.

Another example of key material fact in dispute concerns whether the action taken against Plaintiff in **initially** detaining and subjecting him (Plaintiff) to search of his person in public view by officer Richard Miller without probable cause or reasonable suspicion, and without warrant during the course of his employment as security guard were action taken on behalf of Wal-Mart alone or whether they were action taken by one or more Wal-Mart employees including Eva Marie Moseley working in concert with officer Richard W Miller and yet unidentified Austin police officer John Doe II – also employed off-duty as security guard at the store #3569. Clearly disputed issues remain for trial and summary judgement is not warranted.

While foregoing general statements are true, it is also true that under Rule 56 (c) an opposing party may not rely on his Complaint alone. Because Plaintiff has not yet had a meaningful opportunity to fully discover the facts required to respond to Defendants' Rule 56 motion, despite

his diligent, good faith efforts. Although Defendants have produced certain third-party security supplier-related documents, document production is far from complete. He must provide admissible evidence which requires sufficient discovery and oral deposition. Plaintiff has recently served Defendants with his first set of Interrogatory, Request for Production and request to admit and he is awaiting responses. Plaintiff next plans to depose Eva Moseley, Richard Miller Alan Martindale and Wal-Mart "Market Asset Protection Manager". Deposition of corporate representative may also be needed.

II. PROCEDURAL BACKGROUND

On August 31, 2021 Wal-Mart Defendants file a Motion for Summary Judgement. Plaintiff received a copy via US Postal service on the 15th of September – one day after the time to file response had expired. Plaintiff filed a Motion to Enlarge Time to Respond on September 21, 2021. The Court granted Plaintiff' request in a Text only order the same day. However, after Defendants raised an objection the Court reversed itself and on October 5, 2021 issued a new order requiring Plaintiff to respond by to Defendants Motion by October 19th, 2021. Because Plaintiff has not had an opportunity to conduct meaningful discovery, Plaintiff is not able to present sufficient facts to justify his opposition Plaintiff makes this application for relief under Rule 56(d).

III. ARGUMENTS

A: LEGAL STANDARD

Fed. R. Civ. P. 56(d) provides that "If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:(1) defer considering the motion or deny it;(2) allow time to obtain affidavits or declarations or to take

discovery; or (3) issue any other appropriate order.US fifth Circuit of Appeals has held that a party requesting discovery under Rule (56)(d)must provide an affidavit or declaration in support of the request: "To succeed on a Rule 56(d) motion, however, the party requesting discovery must provide an affidavit or declaration in support of the request that "state[s] with some precision the materials he hope[s] to obtain with further discovery, and exactly how he expect[s] those materials w[ill] assist him in opposing summary judgment." Krim v. BancTexas Grp., Inc., 989 F.2d 1435, 1443 (5th Cir. 1993)." Quoting *Whitener v. Pliva, Inc.*, 606 F. App'x 762 (5th Cir. 2015). The nonmovant "may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts." Raby, 600 F.3d at 561 (quoting SEC v. Spence & Green Chem. Co., 612 F.2d 896, 901 (5th Cir. 1980)). "Rather, a request to stay summary judgment under [Rule 56(d)] must 'set forth a plausible basis for believing that specified facts, susceptible of collection within a reasonable time frame, probably exist and indicate how the emergent facts, if adduced, will influence the outcome of the pending summary judgment motion.'" Id. (quoting C.B. Trucking, Inc. v. Waste Management Inc., 137 F.3d 41, 44 (1st Cir. 1998)) This rule is "designed to safeguard against a premature or improvident grant of summary judgment." Washington v. Allstate Ins. Co., 901 F.2d 1281, 1285 (5th Cir. 1990). To justify a continuance, the Rule 56(d) motion must demonstrate (1) why the movant needs additional discovery and (2) how the additional discovery will likely create a genuine issue of material fact. See Stearns Airport Equip. Co. v. FMC Corp., 170 F.3d 518, 534–35 (5th Cir. 1999) (construing former FED. R. CIV. P. 56(f)); accord Access Telecom, Inc. v. MCI Telecomm. Corp., 197 F.3d 694,720 (5th Cir. 1999) ("To obtain a continuance of a motion for summary judgment, a party must specifically explain both why it is currently unable to present evidence creating a genuine issue of fact and how a continuance would enable the party to present such evidence." (internal quotation marks omitted))

The U.S.5th Circuit has held that Rule 56(d) discovery motions are broadly favored and should be granted liberally: Rule 56(d) "discovery motions are broadly favored and should be liberally granted." Raby v. Livingston, 600 F.3d 552, 561 (5th Cir. 2010) . The Court generally should grant "a continuance for additional discovery if [the nonmovant]: (i) requested extended discovery prior to [the Court's] ruling on summary judgment; (ii) placed [the Court] on notice that further discovery pertaining to the summary judgment motion was being sought; and (iii) demonstrated to [the Court]with reasonable specificity how the requested discovery pertained to the pending motion." Enplanar, Inc. v. Marsh, 11 F.3d 1284, 1291 (5th Cir. 1994) (citations omitted) (construing former FED. R. CIV. P. 56(f))

B: Plaintiff has fully satisfied the Rule 56(d) Requirements.

As the attached declaration shows Plaintiff has been diligent in pursuing discovery and has met his obligations fully. That is not the case however, with Wal-Mart Defendants – it has produced some discovery material and has insisted on confidentially agreement before it can produce certain documents – even those documents it has produced in prior litigation. For example its policy called Detention and Investigation of Shoplifter (AP-09), or its Coaching for Improvement Policy regarding employee discipline or even its Employee Handbook which in hands of millions of workers nation-wide. It has never moved the Court for any order in this regard. Plaintiff has repeatedly advised Defendants that he has no objection although he believes it should be more limited in scope and not be general purpose order. Plaintiff would note that he has raised motion to compel at two sperate occasions without much success. Defendants have not produced all-important the CCTV surveillance footage either. The declaration attached herewith provides in detail what discovery Plaintiff is seeking. The requested materials do exist. Fishing expedition

it is not. The court is yet to rule on the motion. As such Plaintiff's request is timely.

IV. CONCLUSION

The Court generally should grant a continuance for additional discovery as Plaintiff has met the requirements. Plaintiff filed the application before the Court has rules on Defendant motion and placed the Court on notice. As set forth more fully in Plaintiff attached declaration requested discovery pertains to the pending motion. Requested material do exist. It is definitely not a fishing expedition. Discovery motions are broadly favored and should be liberally granted.

Dated: October 19, 202

Respectfully Submitted

By: */s/. Ravindra Singh, Ph.D.*
_____
RAVINDRA SINGH, PH.D.
Plaintiff Pro Se
P.O. BOX 10526
Austin Texas 78766
excion_2000@yahoo.com
(512)293-7646

CERTIFICATE OF CONFERENCE

I, Ravindra Singh, Ph.D. certify that that I conferred with counsels of record for Defendants via email past week did not receive any response.

/s/Ravindra Singh, Ph.D.
_____
RAVINDRA SINGH, PH.D

CERTIFICATE OF SERVICE

I, Ravindra Singh, certify that on October 19, 2021 I forwarded a true and correct copy of the foregoing Rule 56(d) motion and supporting declaration via electronic mail and a copy via United States Postal Service as follows:

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paynevfax@wabclaw.com
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IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF TEXAS

RAVINDRA SINGH, PH.D., Plaintiff,	§	
v.	§	CIVIL ACTION NO. 1:17-CV-1120
WAL-MART STORES, INC., WAL-MART STORES TEXAS, LLC, ALAN MARTINDALE, EVA MARIE MOSELEY; AND CITY OF AUSTIN, AUSTIN POLICE DEPARTMENT, EX-POLICE CHIEF ART ACEVEDO, OFFICER RICHARD W. MILLER (AP3538), OFFICER JOHN DOE 1, Defendants.	§	

DEFENDANT WAL-MART STORES TEXAS, LLC, WAL-MART STORES INC., ALAN MARTIN, AND EVA MARIE MOSELEY'S OBJECTION TO PLAINTIFF'S DECLARATION IN SUPPORT APPLICATION FOR STAY OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' SUMMARY JUDGMENT AND DEFENDANTS' REPLY TO PLAINTIFF'S MOTION IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND APPLICATION FOR RELIEF UNDER RULE 56(d)

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, Wal-Mart Stores Texas, LLC, Wal-Mart Stores, Inc., Alan Martin, and Eva Marie Moseley (referred to herein as Wal-Mart Defendants), Defendants in the above entitled and numbered cause, and files this their Objection to Plaintiff's Declaration in Support Application for Stay of Plaintiff's Opposition to Defendants' Summary Judgment and Defendants' Reply to Plaintiff's Motion in Opposition to Defendants' Motion for Summary Judgment and Application for Relief Under Rule 56(d), and in support thereof would respectfully show the Court as follows:

I. OBJECTION TO DECLARATION

Plaintiff filed his Declaration in Support Application for Stay of Plaintiff's Opposition to Wal-Mart Defendants' Summary Judgment Pending Completion of Additional Discovery on October 21,

2021 (Dkt. 137-1). Plaintiff's declaration is, in actuality, a discovery motion under FRCP 56(d), as stated in Plaintiff's declaration. (Dkt. 137-1). Plaintiff is seeking time to conduct additional discovery in this declaration in light of the many opportunities the Court previously provided to Plaintiff to do the same in the nearly four years since Plaintiff filed his Petition and after the discovery deadline passed.

Plaintiff produced no admissible evidence in his declaration for the Court's consideration of Wal-Mart Defendants' Motion for Summary Judgment, which is required to overcome Summary Judgment pursuant to FRCP 56. Further, the assertions included in Plaintiff's declaration, should the Court consider it as supporting documentation to what seems to be Plaintiff's Response to Wal-Mart Defendants' Motion for Summary Judgment and not as an independent discovery motion pursuant to FRCP 56(d) wherein Plaintiff is again seeking a continuance, cannot be presented in a form that would be admissible evidence. *See* FRCP 56(c)(2). Plaintiff's statements are mere assertions and not supported by admissible evidence – for example: Plaintiff claims that Officer Miller was an employee of Wal-Mart at the time of the underlying incident; however, there is not any evidence supplied by Plaintiff or in the record for the Court to consider that would support this assertion. Plaintiff even references the third-party contract regarding the police officers employment (produced to Plaintiff at least 4 times in the last three years), which wholly negates his contention that the officers were employed by Wal-Mart. Plaintiff could have conducted additional discovery to answer/address the many issues/questions he has; however, he refused to do so and the time to do so passed.

Plaintiff continues in his declaration to explain to the Court the information and documentation he needs in order to respond to Wal-Mart Defendants' Motion for Summary Judgment, which is not evidence that will overcome summary judgment but is merely Plaintiff's request for relief. For these reasons, Wal-Mart Defendants object to the declaration as it contains evidence that cannot be presented in admissible form and further objects to the declaration as not supportive of a "response" to Wal-

Mart Defendants' Motion for Summary Judgment in that the declaration is essentially a discovery motion. A discovery motion is appropriate in a situation when the facts Plaintiff suggests he needs to file a proper response are unavailable to him. This is clearly not the case given the years Plaintiff had to conduct discovery and completely and wholly failed to do so within the timeframe ordered by the Court. (Dkt. 90).

II. BACKGROUND

Wal-Mart Defendants timely filed their Motion for Summary Judgment on August 31, 2021 (Dkt. 115) per the current Agreed Scheduling Order entered by Judge Pittman on August 3, 2020 (Dkt. 90). Plaintiff's deadline to respond to the same was September 14, 2021 (also included in Judge Pittman's Scheduling Order). The Court subsequently granted Plaintiff an extension to file Plaintiff's Response to Wal-Mart Defendants' Motion for Summary Judgment, which placed his new deadline to file his Response on October 19, 2021 (14 days from the date of the Court's order, dated October 5, 2021). (Dkt. 134). Although Plaintiff emailed his Motion in Opposition to counsel on October 19, 2021, Plaintiff did not file his Motion in Opposition to Wal-Mart Defendants' Motion for Summary Judgment until October 21, 2021 (two days after the Court's deadline)(Dkt. 134). Pursuant to Local Rule CV-7(e)(2), Plaintiff's "response" was to be filed with the Court and the Court further held Wal-Mart Defendants to the filing standard with regard to Defendants' deadline to file their Reply, as noted in the Court's Order, dated October 5, 2021. (Dkt. 134). Wal-Mart Defendants timely file this Reply within 7 days of Plaintiff's deadline to file his Response.

III. ARUGMENT AND AUTHORITY

Plaintiff initially requested an extension of time to respond to Wal-Mart Defendants' Motion for Summary Judgment on September 17, 2021. (Dkt. 120). Plaintiff did not move for leave to conduct additional discovery. The discovery period ended on July 30, 2021, per the Order signed by the Court.

(Dkt. 90). Plaintiff's opportunity to conduct discovery is barred by the Court's Order. The Court can only consider the admissible evidence up to this point and Plaintiff has not provided a single document or bit of information that supports any of his causes of action against Wal-Mart Defendants. Plaintiff falsely states that he "has been diligent in pursuing discovery and has met his obligations fully"; however, by this time the Court has enough information to know this is untrue. There is no legal basis to allow Plaintiff any additional time to conduct discovery. To do so would be extremely prejudicial to all Defendants.

Plaintiff has not made any effort to conduct any depositions or formal discovery in the years since he filed his Petition and his chance do so passed as the discovery deadline was July 30, 2021. (Dkt. 90). Plaintiff has never requested the deposition of any Wal-Mart Defendant, employee, or associate. Plaintiff failed to send any formal discovery requests to any Defendant (prior to the discovery deadline), failed to timely respond to discovery requests sent to him, and failed to conduct any other discovery that one might do in seeking damages from another. As of July 30, 2021, Plaintiff cannot request any information, documentation, or testimony from anyone – party or non-party – to prosecute his case. His opportunity to do so passed. Plaintiff's "response" is, again, merely a request for a continuance to conduct additional discovery and wrought with excuses as to why he cannot file a "response". There is not one piece of admissible evidence contained in that "response" that overcomes summary judgment. As we sit here today, we do not have any admissible evidence from Plaintiff, which puts Wal-Mart Defendants in the same place they were prior to filing their Motion for Summary Judgment. Plaintiff failed to file a timely, proper response to Wal-Mart Defendants' Motion for Summary Judgment, as ordered by the Court, which should result in Plaintiff's claims against Wal-Mart Defendants being dismissed with prejudice, as also ordered by the Court. (Dkt. 134). The Court further warned Plaintiff that "any excuses Singh offers for noncompliance will be denied. Any requests for additional time to comply with this court's order will be denied." Plaintiff only included requests

for continuances in his declaration and "response" and reasons for non-compliance but failed to submit a response as outlined by FRCP 56 and corresponding case law and as further ordered by the Court. FRCP 56(a) states: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Wal-Mart Defendants established the same. For the reasons stated herein, Wal-Mart Defendants respectfully request that the Court grant their Motion for Summary Judgment in its entirety.

WHEREFORE, PREMISES CONSIDERED, Wal-Mart Defendants pray that this Honorable Court take into consideration the legal arguments, factual grounds, and evidence submitted and issue an ordering granting Wal-Mart Stores, Texas, LLC, Wal-Mart Stores, Inc, Alan Martindale, and Eva Marie Moseley's Motion for Summary Judgment and for further relief to which Defendants are justly entitled and will ever pray.

Dated: October 26, 2021.

Respectfully submitted,

WALTERS, BALIDO & CRAIN, L.L.P.

BY: */s/ Brett H. Payne*

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ATTORNEY FOR WAL-MART DEFENDANTS

CERTIFICATE OF SERVICE

This is to certify that on this the 26th day of October, 2021, a true and correct copy of the foregoing has been forwarded to all counsel of record:

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/s/ Brett H. Payne
BRETT H. PAYNE

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RAVINDRA SINGH, *Plaintiff*,	§ §	
v.	§ §	1:17-CV-1120-RP-ML
WAL-MART STORES, INC.; WAL-MART STORES, LLC; ALAN MARTINDALE EVA MARIE MOSELEY; CITY OF AUSTIN; AND RICHARD W. MILLER *Defendants,*	§ § § § § §	

DEFENDANT THE CITY OF AUSTIN AND RICHARD W. MILLER'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(c) AND/OR MOTION FOR SUMMARY JUDGMENT PURSUANT TO FED. R. CIV. P. 56

TO THE HONORABLE MARK LANE:

NOW COME Defendants the City of Austin and Richard W. Miller and file this *Motion to Dismiss Pursuant to FED. R. CIV. P. 12(c) and/or Motion for Summary Judgment Pursuant to FED. R. CIV. P. 56*. Defendants will respectfully show the following:

I. PROCEDURAL BACKGROUND

Plaintiff, Ravindra Singh, filed this suit on November 27, 2017. **Dkt. #1.** Singh named the following as Defendants: Wal-Mart Stores, Inc.; Mal-Mart (sic) Stores LLC; Alan Martindale; Eva Marie Moseley; City of Austin; Richard W. Miller (in both his individual and official capacities); John Doe I (in both his individual and official capacities), and; Police Chief Art Aceveo (in his official capacity). **Id., pp. 3-4, para. 4-11.** Singh also identified the Austin Police Department as a Defendant (APD). **Id., p. 1.**

Singh claims that on November 26, 2015, while at Wal-Mart Store #3569 in Austin, Texas, he was prevented from leaving the store when he was confronted by Officer Miller and Officer Doe near the exit of the store and asked if he was hiding something under his shirt. **Id., p. 5, para. 15; pp. 6-7, para. 19-20; p. 7, para. 21.** Sing avers that Officer Miller was fully armed with his APD issued weapons and communication equipment and that Officer Miller was the one who made the accusation of him shoplifting. **Id., p. 7, para. 22.** Singh claims that Officer Miller insisted on a body search to recover alleged stolen merchandise and commanded Singh to lift his shirt and pull his pants low to expose his mid-section and groin areas. **Id., p. 8, para. 24.** Singh alleges he complied because of the intimidation and threat of physical violence by Officer Miller. **Id.** Singh claims that search revealed no stolen merchandise. **Id., p. 8, para. 25.**

According to Singh, Officer Miller ordered him to leave the store, but Singh refused and said he would leave as soon as he gathered witness information at the scene. **Id., p. 11, para. 32.** Singh alleges that Officer Miller refused to provide him his name and contact information. **Id., p. 12, para. 33-34.** Sing claims he attempted to have Officer Miller write down his identifying information on a store circular which he refused to do. **Id.** Singh alleges that Officer Miller then refused to allow Singh to borrow his pen to write down the identifying information and told him to leave the store or he would take him to jail. **Id., p. 13, para. 35.** According to Singh, he then attempted to turn to go back and purchase a pen, but was blocked by Officer Miller. **Id., p. 13, para. 37-38.** Singh claims that he said, "I cannot believe this is happening! This is America. Is it a Police State?" **Id., p. 14, para. 40.** Sing claims that after he made the statement, Officer Miller retaliated against him and placed him in handcuffs and took him to a detention room where he was cited for "Disorderly Conduct Language" by Officer Miller. **Id. p. 14, para. 41; p. 15, para. 42; p. 17, para. 44.**

Singh's *Complaint* contains five causes of action. **Id., p. 21-30, para. 57-90.** The claims are as follows against the City Defendants: 1) a §1983 Fourth Amendment claim against Officer Miller and the APD; 2) a §1983 municipal liability claim against the City for First Amendment retaliation. Singh asserts this cause of action is being brought against Officer Miller, Officer Doe I, the City, APD and Acevedo; 3) a §1982 violation of property rights claim against Officer Miller; 4) a conspiracy claim under §1983 against the City and Wal-Mart, through Eva Mosely and Officer Miller, for the denial of rights under the Equal Protection Clause pursuant to the Fourteenth Amendment; 5) an intentional infliction of emotional distress claim under §1983 against the City through the conduct of Officer Miller and John Doe I, and; 6) a defamation claim under both §1983 and Texas State law against the City and Officer Miller. **Id.** In response to City Defendants *Motion to Dismiss* (Dkt. #18), the Court entered an order on March 25, 2019, granting in part, and denying in part, the Magistrate's *Report and Recommendation* related to Officer Miller and the City's *Motion to Dismiss*. **Dkt. #41.** The Court held as follows: 1) Sing's claims against the APD, Acevedo and Defendant Doe I were dismissed with prejudice; 2) Singh's §1983 defamation claims were dismissed without prejudice as to the City and Officer Miller and the claims for defamation arising under Texas law were dismissed as to both the City and Officer Miller; 3) Singh's intentional infliction of emotional distress claims against Officer Miller were dismissed with prejudice; 4) Singh's intentional infliction of emotional distress claims against the City were not dismissed; 5) Singh's §1983 claims under the U.S. Constitution against both the City and Officer Miller were not dismissed. **Dkt. #41, pp. 10-11.**

II. FACTUAL BACKGROUND

On November 26, 2015, Officer Miller was working as an independent contractor at the Wal-Mart located on IH-35 in Austin, Texas. **Ex. A.** He was working there as a police officer in

an off-duty capacity in his APD uniform providing store security and looking for individuals committing theft. **Id.** While he was standing near the entrance/exit area of the store, he noticed and individual, later identified as Singh, go around the check-out area of the store after having been in the store. **Id.** Officer Miller noticed Singh's shirt and that it had an outline of a square shape on it that looked as if a box of some type was under the shirt. **Id.** Singh was heading toward the door. **Id.** Based on what he saw, Officer Miller approached Singh and stopped him near the door and asked him what he had under his shirt. **Id.** Singh told Miller that he did not have anything under his shirt and voluntarily lifted his shirt to show he did not have anything. **Id.** Singh also cursed loudly. **Id.** Officer Miller did not ask Singh to raise his shirt. **Id.** Mr. Singh then wanted Officer Miller's name which was clearly on Officer Miller's shirt along with his badge number in plain view to Singh. **Id.** Singh then wanted Officer Miller to write down his name for him. **Id.** During this time, Singh was becoming increasingly loud and verbally abusive. **Id.** Singh was yelling obscenities. **Id.** Officer Miller observed Wal-Mart patrons looking on and could tell by their reactions that they were taken aback by Singh's conduct. **Id.** Officer Miller warned Singh to stop using the obscenities. **Id.** Eva Marie Moseley, Wal-Mart's loss/prevention officer, came to the area. **Id.** Singh was yelling obscenities while Ms. Moseley was there. **Id.** Ms. Mosely told Officer Miller that she was offended by Singh's conduct. **Id.**

Officer Mosely placed Singh in handcuffs and took him to the loss/prevention office where Singh was given a citation for Disorderly Conduct – Language. **Id.** Singh was taken out of the handcuffs and released. **Id.** Nothing prevented Singh from returning into the store after he was released by Officer Miller. **Id.** Officer Miller turned the citation over to the police department for processing which was standard protocol. **Id.**

III. STANDARDS OF REVIEW

A. FED. R. CIV. P. 12(c)

Federal Rule of Civil Procedure 12(c) provides that "[a]fter the pleadings are closed-but early enough not to delay trial-a party may move for judgment on the pleadings." FED. R. CIV. P. 12(c). A motion under Rule 12(c) is designed to dispose of cases where the material facts are not in dispute and a judgment can be rendered by looking to the substance of the pleadings and any judicially noticed facts. *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 312 (5th Cir. 2002). The standard of review under a Rule 12(c) motion is the same as under a Rule 12(b)(6) motion. *Id.*

Under Rule 12(b)(6), a plaintiff must state a claim upon which relief can be granted, or the complaint may be dismissed with prejudice as a matter of law. FED. R. CIV. P. 12(b)(6). When considering whether to dismiss under Rule 12(b)(6), the court must "accept 'all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.'" *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007). A court, though, is not bound to accept legal conclusions couched as factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Dismissal is appropriate unless the complaint alleges enough facts "to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. That standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* at 556; *see also id.* at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level[.]"). Under *Twombly* and *Iqbal*, Rule 12(b)(6) is read in conjunction with Rule 8(a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a). "[T]he pleading standard Rule 8 announces

does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 677; *see also id.* at 678 (Rule 8 demands more than "labels and conclusions," and "a formulaic recitation of the elements of a cause of action will not do."). In short, the complaint must supply facts that "plausibly establish each required element for each legal claim." *Coleman v. Sweetin*, 745 F.3d 756, 763-64 (5th Cir. 2014).

B. Fed. R. Civ. P. 56(c)

Summary judgment is appropriate if there is no genuine issue of material fact and the non-moving party is entitled to judgment as a matter of law. ***EMASCO Ins. Co. v. American Inter. Specialty Lines Ins. Co.***, 438 F.3d 519, 523 (5th Cir. 2006). The party moving for summary judgment must demonstrate the absence of a genuine issue of material fact, but they need not negate the elements of the nonmovants case. ***Little v. Liquid Air Corp.***, 37 F.3d 1069, 1074 (5th Cir. 1994). If the moving party fails to meet its burden, the motion must be denied regardless of the nonmovant's response. ***Id.*** If the movant's burden is satisfied, then the nonmovant must identify specific facts in the summary judgment record demonstrating that there is a material fact issue concerning the essential elements of its case for which it will bear the burden of proof at trial. ***Bazan v. Hidalgo County***, 246 F.3d 481, 489 (5th Cir. 2001). The evidence is viewed in the light most favorable to the non-moving party. ***Id***. To avoid summary judgment, the nonmoving party must go beyond the pleadings and come forward with specific facts indicating a genuine issue for trial. ***Celotex Corp. v. Catrett***, 477 U.S. 317, 324 (1986). Conclusory allegations, unsubstantiated assertions, casting doubt on material facts or a scintilla of evidence do not satisfy the nonmovant's burden. ***Little***, 37 F.3d at 1075. A genuine issue of material fact exists when the evidence is such that a reasonable jury could return a verdict for the non-moving party. ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 248 (1986). However, summary judgment is appropriate if the nonmoving

party fails to make a showing sufficient to establish an element essential to that party's case. ***Celotex***, 477 U.S. at 322-323. In the absence of proof from the nonmovant, the trial court is not required to assume that the nonmoving party could or would have proven the necessary facts. ***Id.***

IV. ARGUMENT

A. Claims Against Officer Miller

1. Qualified Immunity

Officer Miller who was acting as a peace officer, is entitled to qualified immunity.[1] Government officials performing discretionary functions generally are shielded from liability for civil damages to the extent that their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. ***Harlow v. Fitzgerald***, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982). Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action assessed in light of the legal rules that were "clearly established" at the time it was taken. ***Anderson v. Creighton***, 483 U.S. 635, 639, 107 S.Ct. 3034, 3038 (1987); ***see also Harlow***, 102 S.Ct. at 2727. A constitutional right must be implicated, and "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." ***Streetman v. Jordan***, 918 F.2d 555, 556 (5th Cir. 1990). An official will be immune if "the law with respect to [his] actions was unclear at the time the cause of action arose" or if "'a reasonable [official] *could have believed* . . . [his actions] to be lawful, in light of clearly established law and the information . . . [the official] possessed.'" ***Edwards v. Gilbert***, 867 F.2d 1271, 1273 (11th Cir. 1989) *quoting* ***Clark v. Evans***, 840 F.2d 876, 879 (11th Cir. 1988).

[1] Police officers are entitled to qualified immunity as public officials even when they are off duty. ***See Defrates v. Podany***, 2018 WL 9561796 at *3 (N.D. Tex. Aug. 6, 2018).

2. Fourth Amendment Search & Seizure

Warrantless searches and seizures are *per se* unreasonable under the Fourth Amendment and are subject to only a few specifically established and delineated exceptions. ***Alexander v. City of Round Rock***, 854 F.3d 298, 303 (5th Cir. 2017). The Supreme Court carved out one of the narrow exceptions in *Terry v. Ohio*, 392 U.S. 1 (1968). ***Id.*** Under a *Terry* type stop, police officers may stop and briefly detain an individual for investigative purposes if they have reasonable suspicion that criminal activity is afoot. ***Terry v. Ohio***, 392 U.S. 1, 30 (1968). The Fourth Amendment requires only some minimum level of objective justification for the officers' actions, but more than a hunch, measured in light of the totality of the circumstances. ***U.S. v. Michelletti***, 13 F.3d 838, 840 (5th Cir. 1994). The reasonable suspicion standard is less than the probable cause standard. ***United States v. Sanders***, 994 F.2d 200, 203 (5th Cir. 1993). Additional facts that develop after a legal stop may create probable cause necessary to effectuate an arrest. ***United States v. Hall***, 557 F.2d 1114, 1117 (5th Cir. 1977).

In relation to an arrest, the right to be free from false an arrest without probable cause is a clearly established constitutional right. ***Mangieri v. Clifton***, 29 F.3d 1012, 1016 (5th Cir. 1994). The existence of probable cause for an arrest, however, is a bar to a claim under §1983 for unlawful arrest or imprisonment. ***Pfannstiel v. City of Marion***, 918 F.2d 1178, 1183 (5th Cir. 1990). Probable cause exists where the facts and circumstances within an officer's knowledge and of which he had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed and that evidence bearing on that offense will be found in the place to be searched. ***United States v. Pack***, 612 F.3d 341, 352 n. 7 (5th Cir. 2010).

A person commits the offense of theft if he unlawfully appropriates property with intent to deprive the owner of property. **Tex. Penal Code §31.03(a).** The appropriation is unlawful if it is without the owner's effective consent. **Tex. Penal Code §31.03(b).** A person commits the offense of disorderly conduct if he intentionally or knowingly uses abusive, indecent, profane of vulgar language in a public place and the language by its very utterance tends to incite an immediate breach of the peace. **Tex. Penal Code §42.01(a)(1).** A person also commits the offense of disorderly conduct if he intentionally or knowingly makes unreasonable noise in a public place other than a sport shooting range or in or near a private residence that he has no right to occupy. **Tex. Penal Code §42.01(a)(5).**

In this case, Officer Miller had reasonable suspicion to approach and detain Singh. Singh was in a large retail store on one of the busiest shopping days of the year. **Ex. A.** Officer Miller observed Singh avoid going through the check-out area after he had been in the store and was heading towards the exit of the store. **Id.** When Officer Miller observed Singh, Officer Miller observed Singh's shirt with the outline of a square object underneath the shirt that looked like a box. **Id.** Based on Officer Miller's knowledge and experience of working in the Wal-Mart Store, he had seen individuals attempt to steal items by concealing them under their clothing and at times the items would create a bulge in their clothing. **Id.** As he was about to exit the store, Officer Miller stopped Singh and inquired if he had anything under his shirt. **Id.** Singh said he did not and voluntarily raised his shirt. **Id.** Singh also cursed loudly. **Id.**

The initial stopping and detention of Singh did not violate Singh's Fourth Amendment right to be free from unreasonable search and seizure. The objective facts demonstrate that Officer Miller had reasonable suspicion to believe criminal activity was afoot. Singh was observed by Officer Miller in the Wal-Mart store on one of the busiest shopping days of the year and avoiding

going through the check-out line and heading toward the door. Coupled with this, Officer Miller saw what appeared to be the outline of a box under Singh's shirt. While it was clear that Singh did not possess anything under his shirt after Singh raised his shirt, this fact does not lessen what Officer Miller observed prior to stopping Singh. Singh voluntarily raised his shirt. Officer Miller did not search him. Therefore, Singh's Fourth Amendment rights were not violated by Officer Miller when he was stopped.

In relation to Singh being placed in handcuffs and issued the citation, Officer Miller had probable cause for the detention and issuance of the citation for disorderly conduct. When Singh was stopped near the exit, he began to yell and use profane language. **Id.** Singh's profane laced language was loud enough that other shoppers were taken aback by his conduct. **Id.** The loss prevention officer for Wal-Mart, Ms. Moseley, arrived at the place where Singh and Officer Miller were located. **Id.** After her arrival, she informed Officer Miller that she was offended by Singh's yelling of obscenities. **Id.** Officer Miller did not solicit this information from Ms. Moseley. **Id.** Singh refused to stop yelling the obscenities. **Id.** Officer Miller placed Singh in handcuffs and took him to the loss prevention office where Singh was issued a citation for Disorderly Conduct. **Id.** Singh was released from the handcuffs and left the store. **Id.** The totality of the circumstances, which included Singh yelling obscenities in a store that offended Ms. Moseley and yelling which caused other shoppers to be taken aback by his conduct, were sufficient for a reasonable person like Officer Miller to conclude that Singh was committing the offense of Disorderly Conduct. ***See Harris v. Wal-Mart Stores Texas, LLC***, 2020 WL 4726757 at *7 (S.D. Tex. May 6, 2020)(*totality of the facts and circumstances established probable cause for police officer to arrest plaintiff for disorderly conduct where plaintiff's curse words offended individual*). Since probable cause

existed for the detention and citation to Singh, his Fourth Amendment rights were not violated by Officer Miller.

3. First Amendment Retaliation

As a general matter, the First Amendment prohibits government officials from subjecting an individual to retaliatory action for engaging in protected speech. ***Nieves v. Bartlett***, 139 S.Ct. 1715, 1722 (2019). To establish a First Amendment retaliation claim, the plaintiff must establish a causal connection between the government defendant's retaliatory animus and the plaintiff's subsequent injury. ***Id.*** It is not enough that the official acted with retaliatory motive and that the plaintiff was injured. ***Id.*** The motive must cause the injury. ***Id.*** Specifically, it must be a "but-for" cause, meaning that the adverse action taken against the plaintiff would not have been taken absent the retaliatory motive. ***Id.*** However, if probable cause exists for the arrest, as a matter of law the retaliatory arrest claim fails. ***Id.*** at 1728.

Singh claims that he was arrested because he stated, "*I cannot believe it's happening! This is America. Is it a Police State?*" **Dkt. #1, p. 25, para. 68.** Even if Singh made this comment for purposes of argument only, any adverse actions that Singh may be attempting to claim were done for retaliatory purposes by Officer Miller fail as a matter of law. As fully set forth above, the evidence shows that Singh's detention and citation were supported by probable cause. Therefore, any First Amendment retaliation claim that Singh is attempting to pursue has to be dismissed because of the existence of probable cause.

4. Property Rights Under §1982

Title 42 U.S.C. §1982 protects the right of United States citizens to purchase personal property without regard to race. **Title 42 U.S.C. §1982.** A cause of action based on §1982 requires an intentional act of racial discrimination by a defendant. ***Vaughner v. Pulito***, 804 F.2d 873, 877

(5th Cir. 1986). Singh's §1982 claims against Office Miller fail for several reasons. First, Singh has no evidence that any of Officer Miller's actions were based on his race. Second, Officer Miller's testimony demonstrates that Singh was stopped, detained and given the citation for Disorderly Conduct based on Singh's actions – not his race or national origin. Third, Officer Miller's testimony demonstrates that Singh was not precluded from going into the store after he was released and after having been given the citation. **Ex. A.** After his release, Singh was free to enter the store and purchase whatever items he wanted. Therefore, any claims Singh is pursuing under §1982 are subject to dismissal.

5. Equal Protection Claim Under §1983

The Fourteenth Amendment prohibits a state from denying to any person within its jurisdiction the equal protection of the laws. **Club Retro, L.L.C. v. Hilton**, 568 F.3d 181, 212 (5th Cir. 2009). The Equal Protection Clause is essentially a direction that all persons similarly situated should be treated alike. ***Id.*** To maintain an equal protection claim, an individual must allege and prove he received treatment different from that received by similarly situated individuals and that the unequal treatment stemmed from discriminatory intent. ***Taylor v. Johnson***, 257 F.3d 470, 473 (5th Cir. 2001). Discriminatory purpose in an equal protection context implies that the decisionmaker selected a particular course of action at least in part because of, and not simply in spite of, the adverse impact it would have on an identifiable group. ***Woods v. Edwards***, 51 F.3d 577, 580 (5th Cir. 1995). A plaintiff cannot rest only on his personal belief that discrimination played a part in the conduct. ***Id.*** Vague and conclusory allegations of discrimination fail to state an equal protection claim. ***Pedraza v. Meyer***, 919 F.2d 317, 318 n. 1 (1990).

Singh's allegations under his cause of action for a violation of his equal rights is conclusory. Singh alleges that Wal-Mart and the City, thought its employees, representative and agents working in concert conspired to deny him equal treatment by their action of performing acts of violation in the course of their duties. **Dkt. #1, p. 28, para. 85.** In this section of his *Complaint*, Singh's conclusory allegations fail to sufficiently allege what Officer Miller did to deny him equal protection. Thus, the claim should be dismissed for failing to state a claim against Officer Miller.

At best, Singh alleges elsewhere in his *Complaint* that Officer Miller referred to him as being Hispanic and that when Singh corrected Officer Miller, Officer Miller responded by saying "I have twenty years of experience." **Dkt. #1, p. 15, para. 42.** Assuming for purposes of argument only that this statement was said, it does not demonstrate that any decision made by Officer Miller was done because of Singh's race. As such, Singh has failed to state a claim upon which relief can be granted.

Even if Singh did state a claim, which Officer Miller does not concede, Singh has no evidence that any decision made by Officer Miller was done because of his race. Further, Officer Miller's testimony demonstrates that Singh's race or national origin played no role in his decision to detain Singh and issue him the citation. Therefore, summary judgment should be granted for any claim being asserted against Officer Miller for a violation of Singh's equal rights under §1983.

6. Malicious Prosecution

Singh has made a general reference to malicious prosecution. **Dkt. #1, p. 24, para. F.** To the extent he is attempting to pursue this claim, it is subject to dismissal. A freestanding claim under 42 U.S.C. §1983 for malicious prosecution fails to state a claim. ***See Castellano v. Fragozo***, 352 F.3d 939, 953 (5th Cir. 2003); ***Cuadra v. Houston Independent School Dist.***, 626 F.3d 808, 813 (5th Cir. 2010). If Singh is attempting to pursue a wrongful institution of legal process claim,

this claim would be subject to dismissal as well. In *Wallace v. Kato*, the United States Supreme made clear that false imprisonment consists of detention without legal process and that it ends once the victim becomes held pursuant to such process – for example by being bound over by a magistrate or arraigned on charges. ***Wallace v. Kato***, 549 U.S. 384, 389 (2007). Thereafter, unlawful detention forms part of the damages for the "entirely distinct" tort malicious prosecution which remedies detention accompanied, not by the absence of legal process, but by the wrongful institution of legal process. ***Id.*** at 390. In this case, Singh does not have any evidence that he was detained after information was provided to a judge or magistrate. To the extent Singh is claiming that Officer Miller provided false information to the prosecutor, the prosecutor is not the magistrate who would have continued the detention. This is assuming detention actually occurred which there is no evidence of. Further, as Officer Miller testified, he did not communicate with the prosecutor. **Ex. A.** He turned the citation into the police department. **Ex. A.** Therefore, any wrongful institution of legal process claim would be subject to dismissal as well.

B. Claims Against the City of Austin

1. Municipal Liability

The Supreme Court has held that a governmental entity can be found liable under § 1983 only if the entity itself causes the constitutional violation at issue. ***Monell v. Dept. of Social Serv.***, 436 U.S. 658, 694-5 (1978). *Respondeat superior* or vicarious liability is not a basis for recovery under § 1983. ***Id.*** at 691-94. A local government may not be sued under §1983 for an injury inflicted solely by its employees. ***Id.*** at 694. Instead, it is when the execution of the government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the governmental entity is responsible under §1983. ***Id.*** Municipal liability under §1983 requires proof of three elements: 1) a policymaker; 2)

an official policy or custom; and, 3) a violation of constitutional rights whose 'moving force' is the policy or custom. ***Piotrowski v. City of Houston***, 237 F.3d 567, 578 (5th Cir. 2001). In addition to culpability, there must be a *direct causal* link between the municipal policy and the constitutional deprivation. ***Id.*** at 580.(*emphasis added*). Liability only attaches where the municipality *itself* causes the constitutional violation which is at issue. ***City of Canton v. Harris***, 489 U.S. 378, 385 (1989)(*emphasis in original*).

Municipal policy, as defined by the Fifth Circuit, is as follows: "1) A policy statement, ordinance, regulation or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policymaking authority; or 2) a persistent widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body had delegated policymaking authority." ***Johnson v. Deep East Tex. Regional Narcotics Trafficking Task Force***, 379 F.3d 293, 309 (5th Cir. 2004); ***quoting Johnson v. Moore***, 958 F.2d 92, 94 (5th Cir. 1992). The official policy requirement may be met in at least three different ways. ***Burge v. Parrish of Tammany***, 187 F.3d 452, 471 (5th Cir. 1999). They are: 1) when the appropriate officer or entity promulgates a generally applicable statement of policy and the subsequent act complained of is simply an implementation of that policy; 2) where no "official policy" was announced or promulgated but the action of the policymaker itself violated a constitutional right; or 3) even when the policymaker fails to act affirmatively at all, if the need to take some action to control the employees of the local governmental entity is so obvious and the

inadequacy of the existing practice is so likely to result in a violation of constitutional rights, that the policymaker can be said to have been deliberately indifferent to the need. ***Id.***

Allegations of an isolated incident are not sufficient to show the existence of a custom or policy. ***Fraire v. City of Arlington***, 957 F.2d 1268, 1278 (5th Cir. 1992). Isolated violations are not the persistent, often repeated constant violations that constitute a custom and policy. ***Id.*** In the Fifth Circuit, a single unconstitutional act by a local governmental entity's final policymaker may subject that governmental entity to liability under §1983. ***Bennett v. Pippin***, 74 F.3d 578, 586 (5th Cir. 1996). However, that act must reflect an intentional, deliberate, decision by a final policymaker and, where the act or omission of the final policy-maker personally did not directly cause the violation of a constitutional right, only decisions of the final municipal policymaker which constitute a conscious disregard for a high risk of unconstitutional conduct by others can give rise to municipal liability. ***Board of County Commissioners v. Brown***, 520 U.S. 397, 404-05 (1997). The Fifth Circuit has also held that claims against municipalities based on a single instance of improper conduct by a municipal official such as "episodic claims," must be supported by a showing the official acted with deliberate indifference to the plaintiff's rights. ***Flores v. County of Hardeman***, 124 F.3d 736, 738 (5th Cir. 1997)(*in an episodic act case, the plaintiff must show an officer whose act or omission is challenged acted with deliberate indifference*).

2. <u>Fourth Amendment Search & Seizure</u>

To the extent Singh is attempting to pursue a claim against the City for his search, detention and issuance of a citation, his claim fails as a matter of law. Singh has failed to plead that the City has a custom, policy or practice of illegal searches and seizures. Further, as set forth above, in order find liability against the City, one of the elements that must be established is a violation of constitutional rights whose 'moving force' is the policy or custom. A failure to prove the

underlying violation is fatal to the §1983 claim. ***City of Los Angeles v. Heller***, 475 U.S. 796, 799 (1986)(*noting that no damages against the municipality possible when jury found that the officer had not inflicted constitutional harm*). Since Officer Miller did not violate Singh's constitutional rights, the City cannot be held liable under any allegation that the City violated his constitutional rights. As such, his claims for any constitutional violation should be dismissed including those under the Fourth Amendment for search and seizure.

Even if Singh had made such an allegation, he has no evidence of such a custom, policy or practice of officer's violating individuals Fourth Amendment rights. Singh has no evidence that a custom, policy or practice of the City directly caused him to suffer a deprivation of his Fourth Amendment rights. Singh also has no evidence that a policymaker knew of a an unlawful custom, policy or practice, but then acted with deliberate indifference and did not correct the unconstitutional policy which was violating individual's Fourth Amendment rights.

Additionally, the competent summary judgment evidence shows that the APD provides its officers with guidelines (General Orders) on how to conduct searches, seizures and arrests. **Ex. B – General Order 306 & 319.** These policies are not unconstitutional and demonstrate that the APD does not have unconstitutional policies, customs or practices regarding searches, seizures or arrests. Therefore, any claim Singh is attempting to pursue against the City for a violation of his Fourth Amendment rights should be dismissed.

3. <u>First Amendment Retaliation</u>

Singh has made allegations that the City violated his First Amendment rights by retaliating against him. **Dkt. #1, p. 24, para. F.** This claim is subject to dismissal. For the same reasons discussed above, since there was probable cause for Singh's detention and citation and because Officer Miller did not violate his constitutional rights, the City cannot be held liable.

Additional grounds exist for the dismissal of this claim. Singh alleges that the City is liable because it failed to properly train its officers regarding free-speech and constitutionally protected rights, it failed to supervise and discipline its officers despite repeated complaints and because Chief Acevedo's policies and procedures failed to "remedy the situation" as a result of their deliberate indifference. **Id., p. 26-27, para. 74.**

The elements necessary to establish a failure to train claim are as follow: 1) the official failed to train or supervise the officers involved; 2) there is a causal connection between the alleged failure to supervise or train and the alleged violation of the plaintiff's rights; and 3) the failure to train or supervise constituted deliberate indifference to the plaintiff's constitutional rights. ***Burge v. St. Tammany Parish***, 336 F.3d 363, 370 (5th Cir. 2003). To satisfy the deliberate indifference prong, a plaintiff usually must demonstrate a pattern of violations and that the inadequacy of the training is obvious and obviously likely to result in a constitutional violation. ***Estate of Davis v. City of North Richland Hills***, 406 F.3d 375, 381 (5th Cir. 2005); ***Peterson v. City of Fort Worth***, 588 F.3d 838, 849 (5th Cir. 2009)(*to hold a municipality liable for the failure to train an officer, it must have been obvious that the highly predictable consequence of not training its officers was that they would apply force in such a way that the Fourth Amendment rights of its citizens were at risk*). However, if a law enforcement entity meets the state standards for training, there can be no liability unless the plaintiff shows that the legal minimum of training was inadequate. ***Benavides v. County of Wilson***, 955 F.2d 969, 973 (5th Cir. 1992); ***Sanders-Burns v. City of Plano***, 594 F.3d 366, 381-82 (5th Cir. 2010)(*holding that when officers have received training required by Texas law, the plaintiff must show that the legal minimum of training was inadequate*); ***Gonzales v. Westbrook***, 118 F.Supp.2d 728, 737 (W.D. Tex. 2000)(*holding that if a law enforcement entity*

meets that state standards for training its law enforcement officers, a plaintiff cannot sustain a failure to train claim under §1983).

The "single incident" method of proving deliberate indifference in a failure to train claim is generally reserved for cases in which the policymaker provided no training whatsoever with respect to the relevant constitutional duty. ***Littell v. Houston Indep. Sch. Dist.***, 894 F.3d 616, 625 n. 5 (5th Cir. 2018). The Fifth Circuit has rarely found municipal liability for a failure to train claim on the basis of a single incident. ***Valle v. City of Houston***, 613 F.3d 536, 549 (5th Cir. 2010)(*holding that the Court was wary of finding municipal liability on the basis of a single incident so as not to run afoul of the Supreme Court's consistent rejection of respondeat superior liability*).

Officer Miller met the State of Texas standards for training as is required for all officers with the APD. **Ex. A; Ex. B.** Since Singh cannot demonstrate that the State standards are inadequate, the City is entitled to judgment for any failure to train claim. To the extent Singh has alleged a failure to discipline or supervise, these claims fail as well. Singh has no evidence that a failure to discipline or supervise Officer Miller, or any other APD officer, directly caused him to have his constitutional rights violated. Specifically, Singh has no evidence that Officer Miller had previously engaged in conduct for which he should have been disciplined, but was not, and that this caused him to suffer a constitutional injury. Similarly, Singh has no evidence that supervision by someone over Officer Miller would have prevented him from suffering a constitutional harm. Last, Singh has no evidence that a policymaker had knowledge of a need to discipline or supervise Officer Miller, but he or she consciously chose not to either discipline or supervise Officer Miller and that this failure caused Singh to suffer a constitutional injury. Therefore, any failure to train, discipline or supervise claim Singh is pursuing should be dismissed.

4. Equal Protection Claim Under §1983

Singh has asserted a conclusory allegation regarding equal protection and claims that Wal-Mart employees and City employees conspired to deny him equal treatment in the course of their official duties. **Dkt. #1, p. 28, para. 85.** This claim fails as a matter of law against the City. Singh's conclusory allegations fail to plead sufficient facts about this alleged conspiracy. More importantly Singh has failed to allege this was a custom, policy or practice in his claims section where he sets forth this claim. Regardless of this failure, the claim is also subject to dismissal because, as set forth above, Officer Miller did not violate Singh's equal protection rights because none of Officer Miller's actions were done because of Singh's race or national origin.

Additionally, the City has a policy which clearly prohibits taking action because of someone's race or national origin. **Ex. B.** The APD specifically directs its officers, through the APD's General Orders, that employees are to act professionally and treat all persons equally. **Ex. B – General Order 301.** Austin Police Department's Policy 301.2 specifically informs employees that the department expects them to perform their duties impartially, objectively and equitably without regard to creed, color or race. **Id.** Further, the APD expressly prohibits the use of race or nationality in enforcing the law. **Id. – General Order 328.2.** Since the City specifically prohibits the use of race or national original by its officers in enforcing the law, Singh's equal protection claim against the City should be dismissed.

5. §1983 Intentional Infliction of Emotional Distress

Singh has asserted a claim under §1983 for the intentional infliction of emotional distress. However, a plaintiff does not have a cognizable claim under federal law for the intentional infliction of emotional distress. ***Stuckey v. Mississippi Dept. of Trans.***, 2008 WL 1868421 at *3 (S.D. Miss. Apr. 24, 2008); ***citing Voyticky v. Village of Timberlake, Ohio***, 412 F.3d 669, 678 (6th

Cir. 2005). Since there is no cognizable claim under §1983 for the intentional infliction of emotional distress, the claim should be dismissed under Rule 12(c) for failing to state a claim.[2]

6. Malicious Prosecution

To the extent Singh has asserted a claim against the City for malicious prosecution, it is subject to dismissal. As discussed above, malicious prosecution is not a freestanding tort. Further, Singh has failed to plead, or prove, that the actions of the any employee were done pursuant to a custom, policy or practice which directly caused him to suffer a constitutional injury. Further, since Officer Miller did not violate his rights, as has been pled above, the City cannot be held responsible for the tort of malicious prosecution.

WHEREFORE PREMISES CONSIDERED, Defendants moves that the Court grant their *Motion to Dismiss Pursuant to FED. R. CIV. P. 12(c) and/or Motion for Summary Judgment Pursuant to FED. R. CIV. P. 56* and grant them any and all further relief that they may be entitled to whether in law or equity.

Respectfully Submitted,

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[2] To the extent Singh may attempt to claim he is asserting a claim for intentional infliction of emotional distress under Texas law, this claim would be barred by TEX. CIV. PRAC. & REM. CODE §101.057. Therefore, this claim is subject to dismissal.

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of November 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notice to the following:

Brett H. Payne Walters, Balido & Crain, L.L.P. Great Hills Corporate Center 9020 N. Capital of Texas Hwy. Building 1, Ste. 170 Austin, Texas 78759 paynevfax@wbclawfirm.com	/s/ MARK KOSANOVICH

I also certify that on the 8th day of November 2021, the foregoing has been served to the following interested person by U.S. Mail:

Ravindra Singh P.O. Box 10526 Austin, Texas 78766	/s/ MARK KOSANOVICH

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RAVINDRA SINGH, *Plaintiff*,	§ § §	
v.	§ § §	1:17-CV-1120-RP-ML
WAL-MART STORES, INC.; WAL-MART STORES, LLC; ALAN MARTINDALE EVA MARIE MOSELEY; CITY OF AUSTIN; AND RICHARD W. MILLER *Defendants,*	§ § § § § §	

ORDER

CAME ON THIS DAY TO BE HEARD **Defendant the City of Austin and Richard W. Miller's Motion to Dismiss Pursuant to FED. R. CIV. P. 12(c) and/or Motion for Summary Judgment Pursuant to FED. R. CIV. P. 56** and upon consideration of said Motion, the papers in this cause and the relevant law, it being deemed that good cause exists for granting same;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that **Defendant the City of Austin and Richard W. Miller's Motion to Dismiss Pursuant to FED. R. CIV. P. 12(c) and/or Motion for Summary Judgment Pursuant to FED. R. CIV. P. 56** is GRANTED.

Signed this _____ day of _____, 2021.

_____
MARK LANE
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RAVINDRA SINGH, PH.D., Plaintiff, v. WAL-MART STORES INC., WAL-MART STORES TEXAS LLC, ALAN MARTINDALE, EVA MARIE MOSELEY, CITY OF AUSTIN, AND RICHARD W. MILLER, Defendants.	§ § § § § § § § § § § §	1:17-CV-1120-RP

ORDER

Before the Court are Defendants Wal-Mart Stores Texas, LLC, Wal-Mart Stores, Inc. ("Wal-Mart"), Alan Martindale, and Eva Marie Moseley's Motion for Summary Judgment, (Dkt. 115), Motion to Enter Order Granting Defendants' Motion for Summary Judgment, (Dkt. 118), Second Motion to Dismiss for Plaintiff's Failure to Cooperate in Discovery and Failure to Comply with the Court's Orders, (Dkt. 124), and Motion for Protective Order, (Dkt. 141); Plaintiff Ravindra Singh's Motion in Opposition to Defendants' Motion for Summary Judgment, (Dkt. 137), and Motion to Defer Consideration, (Dkt. 153); and Defendants City of Austin and Richard W. Miller's Motion for Summary Judgment, (Dkt. 140). Having considered the parties' briefs, the evidence, and the relevant law, the Court will grant Defendants Wal-Mart, Alan Martindale, and Eva Marie Moseley's Second Motion to Dismiss for Plaintiff's Failure to Cooperate in Discovery and Failure to Comply with the Court's Orders and impose a dismissal sanction against Singh.

I. BACKGROUND

This suit arises out of an altercation occurring at a Wal-Mart where Plaintiff Ravindra Singh ("Singh") was detained, searched, and arrested by off-duty police officers on suspicion of

shoplifting. (*See* Compl., Dkt. 1). Singh alleges various civil rights violations under 42 U.S.C. §§ 1981, 1983, 1985(b)(3), the U.S. Constitution, and Texas state laws stemming from the incident.

Because the factual background of this case is well known by all parties and has been repeatedly articulated in the Court's previous filings, the following serves as a summary of this case's history:

- On November 27, 2017, Plaintiff Dr. Ravindra Singh, Ph.D. ("Singh"), proceeding pro se, filed his Complaint alleging various causes of action accruing from an incident that purportedly occurred on November 26, 2015. (Compl., Dkt. 1).
- On March 25, 2019, the Court dismissed Singh's claims against the Austin Police Department and Art Acevedo with prejudice, dismissed Singh's defamation claims without prejudice, and dismissed Singh's IIED claims against Miller with prejudice. (Order, Dkt. 41).
- The City of Austin and Richard Miller (the "City Defendants") sent requests for production and interrogatories to Singh via certified mail on June 28, 2019. (Dkt. 62-2). On August 22, 2019, the City Defendants sent Singh via certified mail their Requests for Admission. (Dkt. 62-3). Singh signed for both deliveries. (Dkt. 62-3; Dkt. 62-5). According to the City Defendants, Singh has not complied with any discovery, including those requests that have been outstanding for over two years.
- In October 2019, the City Defendants attempted to schedule the deposition of Singh, eventually sending him a notice of deposition via certified mail on October 24, 2019. (Dkt. 62-7). Singh signed the receipt of delivery but did not appear for the deposition. (Dkt. 62-10). To date, no depositions have taken place in this suit.
- On June 10, 2020, the Court ordered Singh to comply with specific discovery requests. (Order, Dkt. 75). Specifically, the Court ordered Singh to (1) answer the City Defendants' interrogatories by June 25, 2020, (2) respond to the City Defendants' requests for production

by June 25, 2020, and (3) appear for a deposition at a reasonable time set by Defendants. (*Id.*). The Court warned Singh that future dilatory tactics or meritless excuses could lead to sanctions and his case being dismissed with prejudice. (*Id.*).

- On July 15, 2020, the Court issued another order. (Order, Dkt. 83). Noting Singh had not complied with its June 10, 2020 Order, the Court warned Singh that "[c]ontinued failure to comply with the discovery process will likely be met with this case being dismissed for failure to prosecute." (*Id.* at 2).
- On January 20, 2021, the United States Magistrate Judge Lane issued an order and report and recommendation, recommending that Defendants' motion to dismiss and sanctions be denied at that time. (R. & R., Dkt. 109). The Court further warned Singh again that further failure to comply with its orders would result in dismissal of the suit. (*Id.*).
- On August 31, 2021, the Wal-Mart Defendants filed their Motion for Summary Judgment. (Mot. Summ. J., Dkt. 115). On September 16, 2021, after the fourteen-day response period allotted by the Local Rules lapsed, the Wal-Mart Defendants filed a Motion to Enter Order Granting their Motion for Summary Judgment. (Dkt. 118).
- On September 23, 2021, the Wal-Mart Defendants filed their Second Motion to Dismiss for Plaintiff's Failure to Cooperate in Discovery and Failure to Comply with the Court's Orders. (Dkt. 124).
- On October 5, 2021, the Court ordered Singh to file his responses to the Wal-Mart Defendants' Motion for Summary Judgment, (Dkt. 115), Motion to Grant Summary Judgment, (Dkt. 118), and Second Motion to Dismiss, (Dkt. 124), no later than October 19, 2021. (Order, Dkt. 134). The Court's Order again warned Plaintiff that "any further improper conduct will result in the undersigned recommending that his claims be dismissed with prejudice. . . . To put as plainly as possible, the undersigned will recommend the

dismissal of Singh's case if he fails to comply with the orders clearly depicted above." (*Id.* at 2).

- On October 21, 2021, Singh filed his Motion in Opposition to the Wal-Mart Defendants' Motion for Summary Judgment, (Dkt. 137), which the Court interprets as his response. Singh does not provide any substantive arguments in response to the motion but rather asserts that the motion is premature and requires more discovery.
- The City Defendants filed their Motion for Summary Judgment and/or Motion to Dismiss on November 8, 2021. (Dkt. 140). Singh did not file a response.
- On November 12, 2021, the Wal-Mart Defendants filed a Motion for Protective Order, seeking protection from certain discovery requests Singh served on Defendants on October 14, 2021. (Dkt. 141). Singh did not file any response.
- On December 10, 2021, Singh filed a Motion to Defer Consideration of the Motions for Summary Judgment, asserting the pending dispositive motions were premature and claiming that further discovery was necessary. (Dkt. 153).
- Trial in the instant case is currently set for April 25, 2022. (Order, Dkt. 156).

II. DISCUSSION

Federal Rule of Civil Procedure 16(f)(1) provides for the imposition of sanctions, including sanctions authorized under Rule 37(b)(2)(A)(i)-(vii), if a party fails to obey a discovery/scheduling order. Relatedly, Rule 37(d) provides for sanctions under Rule 37(b)(2)(A)(i)-(vii) if a party fails to attend his own deposition, fails to answer interrogatories, or fails to respond to a request for inspection. Rule 37(b)(2)(A)(v) specifically includes in such sanctions: "dismissing the action or proceeding in whole or in part." Fed. R. Civ. P. 37(b)(2)(A)(ii)(iii)(v).

Dismissal is authorized in whole or in part when the failure to comply with a court's order results from willfulness or bad faith, accompanied by a clear record of delay or contumacious

conduct, and not from the inability to comply. *Romero v. ABC Ins. Co.*, 320 F.R.D. 36, 41 (W.D. La. 2017) (citing *Batson v. Neal Spelce Associates, Inc.*, 765 F.2d 511, 514 (5th Cir. 1985)). Stated differently, dismissal is appropriate where a party's failure to comply with discovery has involved either repeated refusals or an indication of full understanding of discovery obligations coupled with a bad faith refusal to comply. *Id.* (citing *Griffin v. ALCOA*, 564 F.2d 1171, 1172 (5th Cir. 1977)). Dismissal is proper in situations where the deterrent value of Rule 37 cannot be substantially achieved by the use of less drastic sanctions. *Id.* (citing *Batson*, 765 F.2d at 514).

Additionally, the misconduct must substantially prejudice the other party's preparation for trial. *Id.* Dismissal is inappropriate when neglect is plainly attributable to the attorney rather than the client, or when a party's simple negligence is grounded in confusion or sincere misunderstanding of the court's orders. *Id.* In addition, "[u]nder Rule 41(b) of the Federal Rules of Civil Procedure, a district court may dismiss an action based on the failure of the plaintiff to prosecute or to comply with any order of the court." *Beard v. Experian Information Solutions Inc.*, 214 F. App'x 459, 462 (5th Cir. 2007) (citing Fed. R. Civ. P. 41(b)1 and *Lopez v. Aransas County Indep. Sch. Dist.*, 570 F.2d 541, 544 (5th Cir. 1978)). "Pro se litigants are not exempt from compliance with the rules of procedure." *Id.* (citing *Birl v. Estelle*, 660 F.2d 592, 593 (5th Cir. 1981)). Thus, "regardless of whether an individual represents himself, all parties have the responsibility to comply with court orders." *Romero*, 320 F.R.D. at 40. While dismissal under either rule is a harsh sanction, it is nonetheless appropriate if a "clear record of delay or contumacious conduct by the plaintiff exists and lesser sanctions would not serve the best interests of justice." *Price v. McGlathery*, 792 F.2d 472, 474 (5th Cir. 1986). Ultimately, exercise of the power to dismiss is committed to the sound discretion of the district courts. *Lopez*, 570 F.2d at 544.

The Fifth Circuit has made clear "[a] dismissal with prejudice 'is an extreme sanction that deprives the litigant of the opportunity to pursue his claim.'" *Berry v. CIGNA/RSI–CIGNA*, 975

F.2d 1188, 1191 (5th Cir. 1992) (citing *Callip v. Harris County Child Welfare Dept.*, 757 F.2d 1513, 1519 (5th Cir. 1985)). Thus, the Fifth Circuit has limited the court's discretion in dismissing cases with prejudice. *Berry*, 975 F.2d at 1191 (citing *Price*, 792 F.2d at 474). The Fifth Circuit will affirm a dismissal with prejudice for failure to prosecute only when "(1) there is a clear record of delay or contumacious conduct by the plaintiff, and (2) the district court has expressly determined that lesser sanctions would not prompt diligent prosecution, or . . . the district court employed lesser sanctions that proved to be futile." *Woods v. Soc. Sec. Admin.*, 313 F. App'x 720, 721 (5th Cir. 2009) (per curiam); *see also Berry*, 975 F.2d at 1191. Additionally, in most cases where the Fifth Circuit has affirmed dismissals with prejudice, the appellate court found at least one of three aggravating factors: "(1) delay caused by [the] plaintiff himself and not his attorney; (2) actual prejudice to the defendant; or (3) delay caused by intentional conduct." *Price*, 792 F.2d at 474.

In making this determination, courts frequently take into account previous, unheeded warnings of dismissal. *See Mutuba v. Halliburton Co.,* 949 F. Supp. 2d 677, 688 (S.D. Tex. 2013) ("The Court's orders have been explicit that Plaintiff's failure to prosecute would result in a dismissal of his case without further notice. Accordingly, in light of Plaintiff's failure to abide by the Court's previous orders, the Court finds that Defendants' motion to dismiss is appropriate as an independent ground for dismissal with prejudice, and it is granted.").

This case has now been pending for over four years. Over the span of four years, the parties have not concluded discovery. Despite many requests and warnings from the Court, Singh has repeatedly, intentionally, and blatantly refused to cooperate with either opposing counsel or the Court. Singh has repeatedly failed to comply with the Court's orders, even after several chances to comply, including: (1) failure to comply with the Court's June 10, 2020 Order to answer the City Defendants' interrogatories and requests for productions, and to appear for a deposition, (Dkts. 75, 108); (2) failure to comply with the discovery requests as ordered in the Court's July 15, 2020 Order,

(Dkt. 83); (3) failure to comply with the Court's unambiguous orders issued during the January 15, 2021 hearing, (Dkt. 108); (4) failure to comply with the various explicit directives in the Court's January 20, 2021 Order, (Dkt. 109), including orders to respond to the City Defendants' interrogatories, requests for production, and deposition summons; and (5) failure to file timely responses to Defendants' dispositive motions as ordered in the Court's October 5, 2021 Order, (Dkt. 134).

In each of these instances, the Court has explicitly admonished Singh that if continued, his dilatory and contumacious conduct would result in dismissal of his case with prejudice. (*See, e.g.,* Dkt. 75 at 11 ("[T]he court warns Singh that future failure to comply with the deadlines above will result in sanctions under Rule 37(b)(2)."); Dkt. 83, at 2 (warning that "[c]ontinued failure to comply the discovery process will likely be met with this case being dismissed for failure to prosecute"); Dkt. 109 at 13 ("[A]ny further improper conduct will result in the undersigned recommending that his claims be dismissed with prejudice. If Singh fails to comply with this court's order as detailed herein, the undersigned will recommend dismissal of Singh's above-styled case with prejudice. Any excuses Singh offers for noncompliance will be denied. Any requests for additional time to comply with this court's order will be denied. To put as plainly as possible, the undersigned will recommend the dismissal of Singh's case if he fails to comply with the orders clearly depicted below."); and Dkt. 134, at 2 ("The court **WARNS** Singh that any further improper conduct will result in the undersigned recommending that his claims be dismissed with prejudice. If Singh fails to comply with this court's order as detailed herein, the undersigned will recommend dismissal of Singh's above-styled case with prejudice.").

Despite these repeated and explicit warnings, Singh continues to disregard Court orders and fail to cooperate with Defendants and the Court. After consideration of the record, this Court concludes that the delay in this case has been occasioned by Singh, and the delay caused by Singh

has prejudiced Defendants. The trial is less than a month away,[1] and Singh has failed to cooperate in discovery or give his deposition much less prepare for the upcoming trial. The Court concludes this case should be dismissed under Rule 37(d) for Singh's repeated failures to comply with discovery and court orders.

For similar reasons, dismissal under Rules 41(b) and 16(f) are also warranted. A dismissal under these rules should normally be accompanied by at least one of the following three aggravating circumstances: (1) delay caused by plaintiff himself and not his attorney; (2) actual prejudice to the defendant; or (3) delay caused by intentional conduct. *PHI*, 2009 WL 1658040 at *4. Although only one of these circumstances is needed, all three exist in this case. As found above, each of the delays have been caused by Singh himself. Likewise, Defendants have been highly prejudiced, as they have been obstructed from conducting any discovery whatsoever in this matter. Finally, the delays in this matter were caused entirely by Singh's intentional conduct.

The Court does not take the dismissal of a case in this context lightly. However, Singh's conduct has caused years of delay and Singh has not responded as required to multiple attempts at lesser sanctions (court orders) imposed by the Court. The Court's orders have been explicit that Singh's failure to prosecute would result in a dismissal of his case without further notice. Accordingly, in light of Singh's failure to abide by the Court's previous orders, the Court finds that dismissal of Singh's case with prejudice is appropriate pursuant to Federal Rules of Civil Procedure 37(d), 41(b) and/or 16(f).

III. CONCLUSION

For these reasons, Defendants Wal-Mart Stores Texas, LLC, Wal-Mart Stores, Inc., Alan Martindale, and Eva Marie Moseley's Second Motion to Dismiss for Plaintiff's Failure to Cooperate in Discovery and Failure to Comply with the Court's Orders, (Dkt. 124), is **GRANTED**.

[1] Notably, the trial date has already been continued by the Court twice. (*See* Dkt. 152; Dkt. 157).

IT IS FURTHER ORDERED that all other pending motions are **DENIED AS MOOT**.

IT IS FINALLY ORDERED that, pursuant to Federal Rules of Civil Procedure 37(d), 41(b) and/or 16(f), Singh's claims are **DISMISSED WITH PREJUDICE**.

SIGNED on March 25, 2022.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RAVINDRA SINGH, PH.D, Plaintiff, v. WAL-MART STORES, INC., et al., Defendants.	§ § § § § § § § §	1:17-cv-1120-RP

FINAL JUDGMENT

On March 25, 2022, the Court issued an order granting Defendants Wal-Mart Stores Texas, LLC, Wal-Mart Stores, Inc., Alan Martindale, and Eva Marie Moseley's Second Motion to Dismiss for Failure to Cooperate in Discovery and Failure to Comply with the Court's Order. (Dkt. 124). The Court dismissed with prejudice Plaintiff Ravindra Singh's claims against all defendants, including the moving defendants. As nothing remains to resolve, the Court renders Final Judgment pursuant to Federal Rule of Civil Procedure 58.

IT IS ORDERED that the case is **CLOSED**.

IT IS FURTHER ORDERED that each party bear its own costs.

SIGNED on March 28, 2022.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DIST. OF TEXAS
AUSTIN DIVISION

RAVINDRA SINGH, PH.D
V
WALMRT STORES, INC
WALMAR STORES TEXAS LLC
EVA MOSELEY
ALAN MARTINDALE
CITY OF AUSTIN
RICHARD D. W. MILLER

CASE NO. 1:17-CV-1121RP.

FILED
22 NOV -2 PM 2:55
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY [signature]
DEPUTY CLERK

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN TO THE COURT AND ALL PARTIES OF APPEAL OF THE FINAL JUGEMEN (DKT. #159 AND ALL ORDERS ASSOCIATED WITH THIS CASE.

DATED. NOV. 2022

Ravindra Singh. PhD.

BY. RAVINDRA SINGH, PH.D.
PLAINTIFF, PRO SE.

P.O. BOX 10526
AUSTIN, TX 78766
rxcion-2000@yahoo.com
(512) 293-7646.

NOTICE OF APPEAL

FROM FIAL JUDMENT

ISSUED ON MARCH 28, 2022

ORDER DENYING MOTION FOR RECON. under Rule 59(e) on october 2nd, 2022

and

all other Crt Orders.

By: Ramona A.S. PH.D.

PLAINTIFF PRO SE.

)

FILED
November 03, 2022
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY: CC
DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RAVINDRA SINGH, PH.D.	§	
Plaintiff,	§	
	§	
V.	§	CAUSE NO. 1:17-CV-01120-RP
	§	
WAL-MART STORES, INC.	§	
WAL-MART STORES TEXAS, LLC.	§	
ALAN MARTINDALE,	§	
EVA MARIE MOSELEY,	§	
CITY OF AUSTIN,	§	
AUSTIN POLICE DEPARTMENT	§	
ART ACEVEDO	§	
RICHARD W. MILLER (AP3538),	§	
JOHN DOE I	§	
	§	
Defendants.	§	

AMENDED NOTICE OF APPEAL

(A Notice of Appeal was filed with the Clerk on November 2, 2022 at 2:55 PM)

NOTICE IS HEREBY GIVEN that Plaintiff/Appellant Ravindra Singh, Ph.D. appeals to the U.S. Fifth Circuit this Court's following Judgement and Orders:

(1) Text Only Order issued **October 4, 2022** DENYING Motion to Amend/Correct request to reinstate the case (and amend/correct order issued on March 25, 2022); denying discovery sanctions and leave to file "supplemental" complaint.

(2) FINAL JUDGEMENT entered on March 28 dismissing the claims against **All** defendants.

(3) Order issued on **March 25, 2022** granting defendants Alan Martindale, Eva Marie Moseley, Wal-Mart Stores, Inc and Wal-Mart Stores Texas LLC Motion to Dismiss (Dkt 124) untimely and improper motion;

(4) District Court's entertainment/referral of Motion to Dismiss in violation of the operative scheduling order deadline for dispositive motion without amending the scheduling order;

(5) Order denying plaintiff motion to enter amended scheduling order denying opportunity to properly take additional discovery and amend complaint;

(6) Order denying **motion under Rule 56(d) motion for additional discovery to oppose motion for summary judgement** filed by defendants Wal-Mart Stores Texas, LLC., Wal-Mart Stores, Inc, Eva Marie Moseley and Alan Martindale;

(7) Order denying **motion under Rule 56(d) for additional discovery to oppose motion for summary judgement/motion to dismiss** by defendants City of Austin and Richard W. Miller.

(8) Order issued on 10/05/2022 requiring plaintiff to respond to the Motion for Summary Judgement (DKT 115) within 14 days negating its text only order to grant extension of time for the purpose on September 21, 2022.

(9) Order issued on **January 20, 2021** denying **Second Motion to Compel Disclosure/Discovery responses as to defendants City of Austin and Richard W. Miller** issued on January 20, 2021;

(10) Order issued **July 15, 2020 deeming admitted** defendants City of Austin/Richard Miller's Motion to Admit deemed admitted**.**

(11) Order issued **March 25, 2019 dismissing** defamation claim against each of the City Defendants is dismissed with prejudice to the extent it arises solely under Texas law.

(12) Order issued **March 25, 2018** dismissing IIED claims against defendant Richard Miller

(13) Order issued on **10/29/2019** denying motion for Leave to Conduct discovery for identification of defendant John Doe I ands eyewitness John Doe II (not a named defendant).

Dated: November 3, 2022

Respectfully submitted,

/s/*Ravindra Singh, Ph.D.*

By : _____

RAVINDRA SINGH, PH.D.
P.O BOX 10526
AUSTIN TX 78766
email: excion_2000@yahoo.com

CERTIFICATE OF SERVICE

I certify that this 3rd day of November, 2022, I electronically filed the foregoing AMENDED NOTICE OF APPEAL with the Clerk of Court and served a copy via electronic mail on the following:

Brett Payne
Great Hills Corp. Center
9020 N. Capital of Tex. Hwy.
Building I, Ste 170
Austin, Texas 78759
paynevfax@wbclawfirm.com
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Mark Kosanovich
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San Antonio, Texas 78283-1121
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Tel:210-408-6793
Fax:210-408-6797

FILED
May 15, 2023
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY: klw
DEPUTY

United States Court of Appeals for the Fifth Circuit

No. 22-50976

RAVINDRA SINGH, PH.D.,

Plaintiff—Appellant,

versus

WAL-MART STORES, INCORPORATED; WAL-MART STORES TEXAS, L.L.C.; ALAN MARTINDALE; EVA MARIE MOSELEY; CITY OF AUSTIN; OFFICER RICHARD W. MILLER, *Badge No. AP3538, in his individual and official capacities*; OFFICER JOHN DOE 1, *in his individual and official capacity*,

Defendants—Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:17-CV-1120 RP

CLERK'S OFFICE:

Under 5TH CIR. R. 42.3, the appeal is dismissed as of May 15, 2023, for want of prosecution. The appellant failed to timely file appellant's brief.

LYLE W. CAYCE
Clerk of the United States Court
of Appeals for the Fifth Circuit

By: _____
MELISSA B. COURSEAULT, *Deputy Clerk*

ENTERED AT THE DIRECTION OF THE COURT

A True Copy
Certified order issued May 15, 2023

Clerk, U.S. Court of Appeals, Fifth Circuit

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

May 15, 2023

Mr. Philip Devlin
Western District of Texas, Austin
United States District Court
501 W. 5th Street
Austin, TX 78701-0000

No. 22-50976 Singh v. Wal-Mart Stores
USDC No. 1:17-CV-1120

Dear Mr. Devlin,

Enclosed is a copy of the judgment issued as the mandate.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Melissa B. Courseault, Deputy Clerk
504-310-7701

cc w/encl:
Mr. Gregory Richardson Ave
Mr. Mark Kosanovich
Mr. Brett Hermes Payne
Mr. Ravindra Singh