UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL DWAYNE THOMAS

Plaintiff,

v

UNIVERSITY OF MICHIGAN, LYNN NODER-LOVE, DET. RYAN CAVANAUGH, DEPUTY SCOTT HEDDLE, DEPUTY WILLIAM COGGINS, and UNIVERSITY OF MICHIGAN HEALTH SYSTEM,

Defendants.

Case No. 2:13-cv-12772

Honorable Bernard A. Friedman

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DEFENDANTS THE REGENTS OF THE UNIVERSITY OF MICHIGAN AND DETECTIVE RYAN CAVANAUGH'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

Defendants the Regents of the University of Michigan and Detective Ryan Cavanaugh, by their undersigned counsel, allege the following in support of their motion to dismiss Plaintiff's First Amended Complaint:

1. On June 28, 2013, Plaintiff filed his First Amended Complaint in this action asserting seven counts against the Regents and Detective Cavanaugh. These counts consist of three federal civil rights claims under 42 U.S.C. § 1983 and four tort claims under state law.

2. All of the causes of action arise out of Plaintiff's allegation that, on June 27, 2011, Detective Cavanaugh arrested him without probable cause for the assault and robbery of a cafeteria worker in the kitchen of the University of Michigan hospital.

3. Plaintiff has failed to plead any of his claims under the standard required by *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Moreover, the Regents and Detective Cavanaugh are immune from the claims that Plaintiff has asserted against them.

For all these reasons and those stated in the attached brief, Defendants the Regents of the University of Michigan and Detective Ryan Cavanaugh respectfully request that this Court grant this motion, dismiss with prejudice all of the claims pled against them, and order any other relief deemed fair and equitable.

Respectfully submitted,

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Dated: August 19, 2013

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MICHAEL DWAYNE THOMAS

Plaintiff,

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UNIVERSITY OF MICHIGAN, LYNN NODER-LOVE, DET. RYAN CAVANAUGH, DEPUTY SCOTT HEDDLE, DEPUTY WILLIAM COGGINS, and UNIVERSITY OF MICHIGAN HEALTH SYSTEM,

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BRIEF IN SUPPORT OF DEFENDANTS THE REGENTS OF THE UNIVERSITY OF MICHIGAN AND DETECTIVE RYAN CAVANAUGH'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

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STATEMENT OF ISSUES PRESENTED

1. Should Plaintiff's First Amended Complaint against the Regents of the University of Michigan and Detective Ryan Cavanagh be dismissed for failure to state a claim where Plaintiff's claims against Detective Cavanaugh are implausible on their face, and Plaintiff's claims against the Regents contain legal conclusions devoid of any factual support?

Defendants answer: "Yes."

Plaintiff answers: "No."

2. Are the Regents of the University of Michigan and Detective Ryan Cavanagh immune from all of Plaintiff's claims where Plaintiff seeks only an official capacity damage award against them under 42 U.S.C. § 1983, and Plaintiff's state tort claims improperly derive from Defendants' exercise of a governmental function?

Defendants answer: "Yes."

Plaintiff answers: "No."

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Issue Number 1:

Ashcroft v. Iqbal, 556 U.S. 662 (2009)

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Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989)

Moore v. City of Harriman, 272 F.3d 769 (6th Cir. 2001)

MCL 691.1407

INTRODUCTION

This is a federal civil rights case. Plaintiff seeks to recover money damages against the Regents of the University of Michigan[1] and University Detective Ryan Cavanaugh based upon his alleged arrest without probable cause on June 27, 2011. Plaintiff does not deny that the crime for which he was arrested – assault and attempted robbery of a cafeteria worker in the kitchen of the University of Michigan hospital – in fact took place. Nor does he dispute that there was surveillance footage showing the suspect leaving the scene. Plaintiff's complaint of false arrest is based on the allegation that Detective Cavanaugh, the lead investigating officer, supposedly "knew" that Plaintiff "was not the individual [depicted] in the surveillance footage." First Amended Complaint ("Compl.") at ¶ 13. Specifically, even though three separate witnesses identified Plaintiff from the surveillance video as the individual fleeing the scene, Plaintiff contends that his arrest was improper because his "booking photo" did not match the person shown in the surveillance footage, demonstrating that he was not the individual who

[1] Plaintiff incorrectly names the University of Michigan and the University of Michigan Health System as defendants in the First Amended Complaint. Neither of these is an independent legal entity subject to suit. The Regents, who are the governing body of the University of Michigan and its various departments and divisions, are the proper defendants. *See* MICH. CONST. ART. VIII, § 5 (establishing the Regents of the University of Michigan as "a body corporate . . . [vested with] general supervision of its institution"); MCL 390.4 (granting the Regents the right "of suing and being sued"). Plaintiff has so acknowledged by agreeing to substitute the Regents as a defendant in this case.

committed the crime.

Defendants have moved to dismiss Plaintiff's case for two reasons: he has failed to properly plead his case and, in any event, these defendants are immune from this suit. Plaintiff has failed to plead his case in accordance with the standard required by *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). His factual allegation that Detective Cavanaugh lacked probable cause because of the booking photo is not plausible on its face because the booking photo was taken as part of the booking process *after* Plaintiff was taken into custody as required by Michigan law. As such, the booking photo could not possibly have been a part of the probable cause analysis that triggered that arrest. Nor is there any plausibility to Plaintiff's claim that Detective Cavanaugh violated his rights by failing to disclose the booking photo to the state court judge who subsequently authorized a warrant after Plaintiff was taken into custody. Such disclosure was unnecessary because, far from undermining the finding of probable cause, a comparison of the booking photo to the surveillance footage only supported Detective Cavanaugh's reasonable suspicion that Plaintiff was responsible for the crime.

The additional allegations Plaintiff makes against the Regents fare no better. In an attempt to impose liability at the institutional level, the Complaint strings together a series of conclusory allegations that the Regents acted with deliberate indifference by failing to train, supervise, and discipline its officers. Notably,

however, the complaint alleges no facts to support these formulaic recitals and therefore lacks the specificity required to plead a viable claim.

But even if Plaintiff had pled the complaint in accordance with the standard required by the United States Supreme Court, this case must still be dismissed because the Regents, an official state entity, and Detective Cavanaugh, who is sued only in his official capacity, are immune from the causes of action that have been pled. Plaintiff has asserted two types of claims in this case: civil rights claims under 42 U.S.C. § 1983 and tort claims under state law. Yet states and state officials, sued in their official capacity, cannot be sued for money damages under § 1983. Official capacity suits are permitted for injunctive relief only, a remedy which plaintiff does not seek.

In addition, the Michigan Governmental Tort Liability Act ("GTLA") protects states and state officials sued in their official capacity from tort liability if engaged in the exercise of a governmental function. All of Plaintiff's claims are undeniably predicated upon exercise of the state police power. Therefore, Plaintiff has failed to state a claim upon which relief may be granted, and his claims against the Regents and Detective Cavanaugh must be dismissed in their entirety.

STATEMENT OF FACTS

Plaintiff filed this action on June 24, 2013 seeking damages in connection with his arrest on June 27, 2011 for the assault and robbery of a cafeteria worker at

the University of Michigan hospital. On June 26, 2013, he filed a First Amended Complaint asserting seven causes of action against six defendants. Four of the defendants are individuals: (1) Detective Ryan Cavanaugh of the University of Michigan Department of Public Safety, who was the lead investigating officer for the incident; (2) Deputies Scott Heddle and William Coggins of the Washtenaw County Sheriff's Office, who physically arrested Plaintiff at Detective Cavanaugh's request; and (3) Lynn Noder-Love, the District Manager for Aramark, the outside company that runs the hospital cafeteria, who identified Plaintiff as the individual fleeing the scene of the crime. Plaintiff also named two institutional defendants, the University of Michigan and the University of Michigan Health System, but has agreed to substitute the Regents as the proper party in interest.

The First Amended Complaint sets forth seven counts for relief. Four are state tort claims asserted only against the individual defendants. Specifically, Plaintiff has filed claims for gross negligence (Count I); intentional infliction of emotional distress (Count II); false arrest and imprisonment (Count IV); and malicious prosecution (Count VII). Plaintiff names Detective Cavanaugh as a defendant in each of these four state tort claims. The Complaint's remaining three counts assert deprivation of constitutional rights under 42 U.S.C. § 1983. The first of these counts is made against all defendants (Count III); the second against only

individual defendants (Count V); and the last only against the Regents (Count VI).

Although the First Amended Complaint is frequently difficult to parse,[2] each of its four state tort claims appears to be predicated upon Plaintiff's arrest on June 27, 2011 for the assault and robbery of a cafeteria worker in the University of Michigan hospital. Compl. at ¶ 12(a)&(f). Plaintiff's core contention is that there was no probable cause for that arrest. Specifically, he alleges that Detective Cavanaugh "knew that plaintiff was not the individual" who committed the offense when he was taken into custody because surveillance footage captured by the hospital of the perpetrator fleeing the scene did not match Plaintiff's "booking photo."[3] *Id*. at ¶ 13. Plaintiff also faults Detective Cavanaugh for failing to inform state District Court Judge Julie Creal about the existence of the booking photo when she authorized a warrant for Plaintiff on June 29, 2011, two days after he was arrested. *See id*. at ¶ 14. Plaintiff alleges that had Judge Creal been afforded the opportunity to compare the surveillance video to that photo, she would not have authorized the warrant and would have ordered his release. *See id.* at ¶ 15.

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[2] In many places, the Complaint reads as if it were cobbled together from other false arrest cases. It contains allegations that contradict or repeat each other, seem out of place, or simply make no sense. In paragraph 20, for example, Plaintiff alleges: "That without the misrepresented states and Defendant's failure to had provided the Court with two photos, there was no probable cause to obtain a warrant for Plaintiff arrest and detention."

[3] A copy of screen shots from the surveillance video of the perpetrator leaving the scene is attached as Exhibit A to this brief. A copy of Plaintiff's booking photos is attached as Exhibit B.

This same factual predicate underlies all three of Plaintiff's § 1983 claims. Plaintiff alleges that the individual defendants violated his right to be free from unreasonable seizure and deprivation of liberty without due process by participating in an arrest without probable cause. *See* Compl. at ¶¶ 44, 55. As for the Regents, Plaintiff claims that they were "deliberately indifferent to, and permitted and tolerated a pattern and practice of violation of constitutional rights" by "systematically failing to properly train, evaluate, supervise, investigate, review and/or discipline police officers under their supervision." *Id*. at ¶¶ 28, 60. Plaintiff makes no factual allegations whatsoever as to how the Regents' oversight was either deficient or reoccurring. He simply repeats the same broad conclusion in slightly different terms throughout the First Amended Complaint, alleging that the Regents "fail[ed] to enforce their own rules and regulations," "allowed, acquiesced in and/or encouraged [their] police officer to unconstitutionally search and seize citizens," and "deliberately encourage[ed] an atmosphere of lawlessness." *Id*. at ¶¶ 28, 61, 64.

STANDARD OF REVIEW

A Rule 12(b)(6) motion tests whether a legally sufficient claim has been pleaded in a complaint, and provides for dismissal when a plaintiff fails 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, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). A claim is facially plausible when a plaintiff pleads factual content that permits a court to reasonably infer that the defendant is liable for the alleged misconduct. *Id.* (citing *Twombly*, 550 U.S. at 556). When assessing whether a plaintiff has set forth a "plausible" claim, the district court must accept all of the complaint's factual allegations as true. *See Ziegler v. IBP Hog Mkt., Inc.*, 249 F.3d 509, 512 (6th Cir. 2001). "Mere conclusions," however, "are not entitled to the assumption of truth. While legal conclusions can provide the complaint's framework, they must be supported by factual allegations." *Iqbal*, 556 U.S. at 664. A plaintiff must provide "more than labels and conclusions," or "a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 556. Therefore, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

In ruling on a motion to dismiss, the Court may consider both the allegations in the complaint as well as documents that are referenced in the complaint or that are central to Plaintiff's claims. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *see also Greenberg v. Life Ins. Co. of Virginia*, 177 F.3d 507, 514 (6th Cir. 1999) (holding that documents referred to the complaint, attached to a motion to dismiss, and central to the claim are deemed to form a part

of the pleadings). In this case, such documents include the surveillance footage and booking photo that stand at the core of Plaintiff's case.

ARGUMENT

A. All of Plaintiff's Claims Fail Under *Iqbal*'s Pleading Requirements.

Each of the claims Plaintiff asserts must be dismissed in its entirety because Plaintiff has failed to meet his pleading burden under *Iqbal*. Plaintiff's claims against Defendant Cavanaugh are not facially plausible because the "booking photo" that supposedly demonstrates the illegality of his arrest was not taken until after he was in custody, and thus it could not possibly have contributed to the decision to arrest him. Moreover, a comparison of the booking photo to the surveillance video of the perpetrator fleeing the scene of the crime only confirms the existence of probable cause for Plaintiff's arrest. The claims against the Regents fail under *Iqbal* because those claims contain mere legal conclusions devoid of any factual support.

1. *The Claims Against Detective Cavanaugh Are Not Plausible on Their Face Because the Booking Photo Could Not Possibly Have Undermined the Probable Cause Analysis.*

In order to state a claim for relief in federal court, a plaintiff may not simply make allegations that conform to the elements of a cognizable cause of action. The allegations must also be plausible on their face. As the Sixth Circuit has recognized: "Plausibility is a context-specific inquiry, and the allegations in the

complaint must permit the court to infer more than the mere possibility of misconduct, namely, that the pleader has show[n] entitlement to relief. *Center for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 369 (6th Cir. 2011). Plaintiff has failed to meet that burden with respect to the claims against Detective Cavanaugh.

All of Plaintiff's claims against Detective Cavanaugh are predicated upon the allegation that Detective Cavanaugh arrested Plaintiff knowing that he did not have probable cause to do so. *See* Compl. at ¶¶ 33, 36, 44, 49, 57, 62, 71. According to Plaintiff, the reason Detective Cavanaugh allegedly "knew" he lacked probable cause is that Plaintiff's "booking photo" did not match the surveillance footage of the perpetrator fleeing the scene of the crime. *Id*. at ¶ 13. By definition, however, a "booking photo" is produced when a criminal defendant is booked *i.e.* when he is arrested and taken into custody. Since "booking" necessarily occurs *after* the initial decision to arrest is made, the "booking photo" could not have existed at the time of Plaintiff's arrest. It would not have been part of Detective Cavanaugh's probable cause analysis, much less a basis to claim that Detective Cavanaugh knew the arrest to be improper.

Plaintiff also asserts that Detective Cavanaugh violated his rights by failing to disclose the booking photo to the state District Court Judge who authorized the warrant for his arrest two days after he was taken into custody. *See* Compl. at ¶¶

14-15. It is well established, however, that in order for such an omission to be actionable, it must have "created a falsehood" that was "material" to the finding of probable cause. *Sykes v. Anderson*, 625 F.3d 294, 305 (6th Cir. 2010); *accord Davis v. Collins*, 2013 WL 2940845, at *3 (E.D. Mich. June 14, 2013) (dismissing false arrest claim where plaintiff failed to allege that the police made false statements relevant to the issuance of the warrant). As this Court is well aware, probable cause "does not depend on whether the suspect actually committed a crime." *Michigan v. DeFillippo*, 443, U.S. 31, 36 (1979). Similarly, it "does not require evidence that is completely convincing or even evidence that would be admissible at trial." *Everson v. Leis*, 556 F.3d 484, 498 (6th Cir. 2009). Rather, the Sixth Circuit has described the probable cause threshold as a "low" bar that simply asks whether there is an "objectively reasonable basis" for believing that the suspect in question committed the crime. *Cheolas v. City of Harper Woods*, 467 Fed. Appx. 374, 378, 380 (6th Cir. 2012).

Detective Cavanaugh's failure to disclose Plaintiff's booking photo was not a material omission that could possibly have undermined the probable cause finding here. In fact, a comparison of the booking photo to the surveillance video of the perpetrator fleeing the hospital only underscores the identification evidence that Detective Cavanaugh had gathered from the witnesses at the scene – namely,

that Plaintiff was the individual who committed the crime.[4] *Compare* Exhibit A *with* Exhibit B. Accordingly, as a matter of law, there is no basis upon which to conclude that Detective Cavanaugh created a falsehood undermining the probable cause analysis by failing to show the booking photo to the judge who issued the arrest warrant. Plaintiff's claims simply are not plausible under *Iqbal*.

2. *Plaintiff's Claims Against the Regents Are Conclusory and Lack the Specific Factual Allegations Required to Sustain Them*.

Plaintiff's allegations against the Regents also suffer from insurmountable pleading deficiencies. The sole basis on which Plaintiff claims that the Regents are liable under § 1983 is that they were "deliberately indifferent to, and permitted and tolerated a pattern and practice of violation of constitutional rights" by "systematically failing to properly train, evaluate, supervise, investigate, review and/or discipline police officers under their supervision." Compl. at ¶¶ 28, 60. Plaintiff pleads no specific facts, however, to support these generalized and conclusory allegations. This is fatal to his claim because, in order to sustain a § 1983 claim on a failure to train or supervise theory, a plaintiff must plead and

[4] The police report for the incident reveals that three witnesses identified Plaintiff as the perpetrator based on the surveillance footage. Defendant Noder-Love told authorities that she was positive that it was Plaintiff. Philemon Padonou, who chased the subject as he fled the scene, indicated that he thought the individual depicted in the surveillance footage was Plaintiff. Neil Galbraith, the victim of the attack, indicated that the surveillance footage looked like Plaintiff, but the he could not tell for sure.

prove "prior instances of unconstitutional conduct" demonstrating that the governmental entity "ignored a history of abuse and was clearly on notice that the training in this particular area was deficient and likely to cause injury." *Plinton v. County of Summit*, 540 F.3d 459, 464 (6th Cir. 2008).

Plaintiff pleads no such details here. Instead, he offers only formulaic and threadbare conclusions about "deliberate indifference" that appear to be borrowed from other civil rights complaints. *See, e.g.*, Compl. at ¶¶ 28, 60, 61, 64. Critically absent from those generic allegations is any factual link to the specific constitutional violation supposedly perpetrated by Detective Cavanaugh or the Regents' oversight of him. This Court has not hesitated to dismiss similar § 1983 claims where the plaintiff fails to plead his case with adequate specificity. *See Powell v. Paris*, 2013 WL 3944439, at *11 (E.D. Mich. July 31, 2013) (invoking *Iqbal* to dismiss § 1983 claim on failure to train and supervise theory because the complaint "lacked allegations" regarding the training employed by the governmental entity to handle recurring situations, as well as its purported indifference to prior violations). The result in this case should be no different.

B. Both the Regents and Detective Cavanaugh Are Immune from the Claims Plaintiff Asserts.

In addition to the pleading deficiencies surrounding Plaintiff's First Amended Complaint, all of the claims must also be dismissed for the separate and distinct reason that both the Regents and Detective Cavanaugh are immune from

suit. The Regents are an official state entity, and Detective Cavanaugh is sued in his official capacity. The law is crystal clear that § 1983 does not permit such official capacity suits for damages, yet a money judgment is all that Plaintiff seeks. In addition, under the GTLA, states and state officials sued in their official capacity are immune from tort liability if engaged in the exercise of a governmental function. Because Plaintiff's allegations arise out of Defendants' use of the state police power, this Court must dismiss all of Plaintiff's claims.

1. *Section 1983 Does Not Permit Official Capacity Suits for Damages*.

Section 1983 is a civil rights statute that provides a private means of redress for violations of the U.S. Constitution. It provides, in relevant part, that "[e]very person who, under color of any statute . . . of any state . . . subjects or causes to be subjected, any citizen of the United States . . . 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." 42 U.S.C. § 1983.

It is well settled that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). A state, by definition, is plainly not a person, and "[a] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office." *Id*. Put another way, it is "no different from a suit against the State itself." *Id*. For this reason, the Sixth Circuit

has repeatedly recognized that states and state officials acting in their official capacity may "not be held liable for money damages" under § 1983.[5] *Moore v. City of Harriman*, 272 F.3d 769, 771 (6th Cir. 2001).

Plaintiff only seeks money damages in this lawsuit. Indeed the prayer for relief for each and every claim pled in the First Amended Complaint is exactly the same: Plaintiff "seek[s] judgment against Defendants, in whatever amount in excess of Seventy-Five Thousand ($75,000.00) Dollars, to which Plaintiff [is] entitled which [is] reasonable, fair and just, plus costs, interest and attorney fees, together with exemplary and/or punitive damages." Compl. at pp. 6, 7, 8, 9, 10, 12, 13.

The only remaining issue, therefore, is whether this is an official capacity lawsuit. It is well established that the Regents are an "arm of the state" and, as such, constitute an official state entity immune from a claim for money damages under § 1983. *Dillon-Barber v. Regents of University of Michigan*, 51 Fed. Appx. 946, 952 n.6 (6th Cir. 2002); *accord Western Michigan Univ. Bd. of Control v. State*, 455 Mich. 531, 537, 540-41 (1997) (discussing statutory basis underlying treatment of public universities as state entities).

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[5] This bar does not extend to official capacity suits against state officials for injunctive relief. *See Will*, 491 U.S. at 71 n.10. In that circumstance, the official "would be a person under § 1983 because official-capacity actions for prospective relief are not treated as actions against the State." *Hamilton's Bogarts, Inc. v. Michigan*, 501 F.3d 644, 654 (6th Cir. 2007).

The First Amended Complaint does not specifically allege whether Detective Cavanaugh is being sued in his official or individual capacity. Plaintiff has failed to make that important distinction, even though the Sixth Circuit "requires that plaintiffs seeking damages under § 1983 set forth clearly in their pleading that they are suing the state defendants in their individual capacity for damages, not simply in their capacity as state officials." *Wells v. Brown*, 891 F.2d 591, 592 (6th Cir. 1989). In such circumstances, the Sixth Circuit employs a "course of proceedings" test to determine whether the plaintiff is reasonably seeking to hold a defendant individually liable. *Moore*, 272 F.3d at 771. This test looks to the allegations in the complaint and examines the manner in which a plaintiff describes the defendant and his conduct. The Court considers factors such as whether the plaintiff refers to the defendant as an individual or by his official title, whether the defendant is alleged to have acted outside the scope of his employment, and whether the defendant is alleged to have acted on behalf of himself or for his employer. *See id*. at 772-73.

Here, the "course of proceedings" demonstrates that Detective Cavanaugh is named in his official capacity only. Plaintiff identifies Detective Cavanaugh in the case caption and refers to him throughout the Complaint by his official title: Detective Cavanaugh. Moreover, Plaintiff alleges that "at all times" relevant to the allegations in the case, Detective Cavanaugh was "acting in his capacity as police

officer for the University of Michigan," that he was "performing his duties as a police officer," and that he was "acting within the scope of [his] employment" and under "color of [his] authority." Compl. at ¶¶ 6, 45, 49. Nowhere in the First Amended Complaint does Plaintiff allege that Detective Cavanaugh took any action outside the boundaries of his responsibilities as a law enforcement official or to advance his own personal interests. Accordingly, Plaintiff has named Detective Cavanaugh in his official capacity only. Both Detective Cavanaugh and the Regents are immune from suit under § 1983.

2. *Defendants Are Immune from State Law Tort Claims Under Michigan's Governmental Tort Liability Act*.

The remaining claims in the First Amended Complaint purportedly arise under state tort law. However, under the GTLA, "a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). The Act defines "governmental function" as "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law," and it expressly includes "an activity performed on public or private property by a sworn law enforcement officer within the scope of the law enforcement officer's authority, as directed or assigned by his or her public employer for the purpose of public safety." MCL 691.1401(b). The Michigan Supreme Court has held that because "governmental immunity is a characteristic of government," plaintiffs

must explicitly "plead [their] case in avoidance of immunity." *Mack v. City of Detroit*, 467 Mich. 186, 197-98 (2002).

Far from pleading in avoidance of immunity, the allegations in the First Amended Complaint fall directly within the scope of the GTLA. The actions giving rise to the Regents' and Detective Cavanaugh's purported liability all arise from the fact of Plaintiff's arrest, an event which undeniably constitutes a core law enforcement function arising out of the state police power. There is no question that the Regents are a "governmental agency" for purposes of triggering the statutory immunity. Indeed the GTLA expressly defines the term to include "a public university." MCL 691.1401(g). And because Detective Cavanaugh is being sued in his official capacity, he falls within the scope of that protection as well.[6] *See Alkire v. Irving*, 330 F.3d 802, 810 (6th Cir. 2003) (holding that "individuals sued in their official capacities stand in the shoes of the entity they represent"). Accordingly, the Regents and Detective Cavanaugh are immune from the state law tort claims pled by Plaintiff.

[6] By comparison, under the GTLA governmental officials sued in their individual capacity are entitled to qualified immunity which, depending upon the type of claim asserted, requires analysis of factors such as whether the individual was grossly negligent and whether he/she was acting in good faith. *See* MCL 691.1407(2)&(3).

CONCLUSION

For the reasons stated above, Defendants respectfully request that each of the claims pled against them in this matter be dismissed with prejudice in their entirety.

Respectfully submitted,

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Dated: August 19, 2013

CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2013, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to all counsel of record.

Respectfully submitted,

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