IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

SAUNDRA M. FLOYD; CANDYSS C. WHITE; STEVEN R. FLOYD, JR.; CHYVANTE E. FLOYD; RACHEL ANN POWELL as Personal Representative of the Estate of LIEUTENANT STEVEN R. FLOYD, SR.; CORRECTIONAL OFFICER WINSLOW H. SMITH; CORRECTIONAL OFFICER JOSHUA WILKINSON; CORPORAL JUSTIN TUXWARD; CORPORAL MATTHEW MCCALL; and CORPORAL OWEN HAMMOND,	:	
Plaintiffs,	:	**C.A.No. 17-431-RGA**
v.	:	
JACK MARKELL, individually; RUTH ANN MINNER, individually; STANLEY W. TAYLOR, JR., individually; THE HONORABLE CARL C. DANBURG, individually; ROBERT COUPE, individually; ANN VISALLI, individually; BRIAN MAXWELL, individually; PERRY PHELPS, in his official capacity; MICHAEL S. JACKSON, in his official capacity; and DEPARTMENT OF CORRECTION, STATE OF DELAWARE,	:	
Defendants.	:	

PLAINTIFFS' CONSOLIDATED ANSWERING BRIEF IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

JACOBS & CRUMPLAR, P.A.
THOMAS C. CRUMPLAR, ESQ. (#942)
RAEANN C. WARNER, ESQ. (#4931)
750 Shipyard Drive
Wilmington, DE 19801
(302) 656-5445
Tom@JCDELaw.com
Raeann@JCDELaw.com

THE NEUBERGER FIRM, P.A.
STEPHEN J. NEUBERGER, ESQ. (#4440)
THOMAS S. NEUBERGER, ESQ. (#243)
17 Harlech Drive, P.O. Box 4481
Wilmington, Delaware 19807
(302) 655-0582
SJN@NeubergerLaw.com
TSN@NeubergerLaw.com

Dated: August 28, 2017

Attorneys for Plaintiffs

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages**

Constitutions, Statutes and Rules

Other Authorities

NATURE AND STAGE OF THE PROCEEDINGS

This is a civil rights action under 42 U.S.C. § 1983 brought by the Estate and survivors of a deceased Correctional Officer, and five fellow Correctional Officers, who were injured in the workplace by defendants' actions and policies which violated plaintiffs' substantive due process rights under the Fourteenth Amendment to the U.S. Constitution. This is plaintiffs' consolidated answering brief in opposition to defendants' motions to dismiss.

SUMMARY OF THE ARGUMENT

1. The defense motions are premature because the Court cannot conduct the required "exact analysis" of the "totality of facts" without discovery.

2. The standard of review does not impose a heightened pleading standard.

3. Defendants' actions shock the judicial conscience under the Fourteenth Amendment.

4. Defendants also violated the state created danger doctrine.

5. Defendants are liable for failure to train and for maintaining policies which caused plaintiffs' injuries.

6. Defendants had personal involvement in and caused the constitutional violations.

7. This action was timely filed within 3 months of claim accrual.

8. Sgt. Floyd's family has standing to pursue this § 1983 wrongful death action.

9. The political question doctrine does not apply.

10. Legislative immunity does not apply.

11. Qualified immunity does not apply.

12. Eleventh Amendment immunity does not apply.

STATEMENT OF FACTS

A. The Parties. On the morning of February 1, 2017, the late Sgt. Steven R. Floyd, Sr.,

and plaintiff Correctional Officers Winslow H. Smith, Joshua Wilkinson, Justin Tuxward, Matthew McCall and Owen Hammond all were members of the Correctional Officers Association of Delaware ("COAD") and working in Building C at the Delaware Correctional Center ("DCC"). (Compl., D.I. 1, ¶ 3-6, 16-20, 31-32, 202-203).

Plaintiff Rachel Ann Powell is the executrix of Sgt. Floyd's Estate and brings this §1983 survival action on behalf of the Estate for the injuries suffered by Sgt. Floyd prior to his death. Plaintiff Saundra M. Floyd is Sgt. Floyd's wife and plaintiffs Candyss C. White, Steven R. Floyd, Jr., and Chyvante E. Floyd are their children. As spouse and children, they bring this § 1983 wrongful death action. (¶ 3, 7-15).

Defendant Jack Markell was the Governor of Delaware from January 2009 until January 2017. His predecessor was defendant Ruth Ann Minner who served from January 2001 until January 2009. Both are sued in their individual capacities. (¶ 21-22).

Defendant Stanley W. Taylor was the Commissioner of the Delaware Department of Correction ("DOC") from 1995-2007. His successor was defendant Carl C. Danberg who served as Commissioner from 2007 until 2013 and, prior to that time, as Deputy Principal Assistant to Taylor. His successor was defendant Robert Coupe who served as Commissioner from 2013 until January 2017. All are sued in their individual capacities. (¶ 23-25).

Defendant Ann Visalli was the Director of the Delaware Office of Management and Budget ("OMB") from January 2009 until approximately April 2016. Her successor defendant Brian Maxwell was Director from April 2016 until January 2017 and, prior to that time served as her Deputy Director. Both are sued in their individual capacities. (¶26- 27).

B. The Union Contracts. Important to understanding this case are the collective bargaining agreements ("CBAs"), from 2002 to the present, entered into between the State of

Delaware and COAD. (¶ 31-32, 35-37, 42). The current CBA was signed by defendants DOC Commissioner Coupe and OMB Director Visalli (¶ 38; see D.I. 16 at A136-177), and therein the State "voluntarily and contractually bound itself to provide a safe, secure and healthy work environment for all correctional officers working in all DOC facilities." (¶ 35). By its plain terms, the CBA contractually obligates the State to:

- "provide *sufficient staffing* to ensure a *safe and secure work environment* appropriate for penal institutions at all work locations any time prisoners are supervised." (¶ 39).
- "provide a safe and healthy work environment for all employees." (¶ 40)
- provide training to all of its employees, to enable them to function safely and securely in the prisons. (¶ 41).

"All prior Union contracts ... contained similar provisions." (¶ 42). Review of the defense briefs reveals no challenge, whatsoever, to any of these undisputed facts. This failure is ultimately fatal to their motion to dismiss Counts I, II and III.

C. The Status Quo of the DOC Before Defendants. Prior to defendants, the DOC used to follow and abide by certain fundamental tenets or pillars of prison operation. DOC prisons were: highly secure; well staffed; had sufficient numbers of well trained and equipped correctional officers to allow them to safely and securely function; the safety of the officers was paramount; any temporary shortage of staff was compensated for and protected against by an increase in other non-staff dependent security measures; and inmates were closely supervised and had restricted movement. (¶ 48-57). Although prisons can be dangerous, they are considered to be "manageably dangerous." Issues may arise, but if the system functions properly, those issues are addressed and resolved. Small problems do not turn into large problems unless one of the essential pillars outlined above breaks down or is not functioning. Only then does a prison go from being a "manageably dangerous" place to being an "unmanageably dangerous" place. (¶

58-61). The defense does not challenge any of these key and undisputed facts and this failure is ultimately fatal to their motion to dismiss Count II.

D. The Minner Defendants Create a New Policy Which Breaks the System.

Beginning in 2001, defendants Minner, Taylor and Danberg (the "Minner defendants"), instituted a new policy of not filling vacant positions within DOC. (¶ 62-64, 68). This policy caused severe understaffing in essential security positions at the DCC, changed the status quo and turned it into an "unmanageably dangerous" place. (¶ 62-63, 65-66, 70).

1. Defendants Hide the Severe Problems That Result from the General Assembly. In order to hide the extent of the severe problem caused by their new policy from the General Assembly, defendant Minner ordered the removal of all vacant job positions in DOC. This was done to create the appearance that the DOC was only short a small number of officers, while in reality it was greatly and severely understaffed by an even larger number. (¶ 67, 69, 71-73). Defendants Taylor and Danberg implemented this order. (¶ 68).

2. Defendants Eliminate Weapon Searches and Cut Officer Training. The severe understaffing caused by this policy only worsened with time and caused numerous staffing, security and safety problems. (¶ 74-77, 81-88). To try and cope, these defendants adopted additional new policies which also compromised the security of the prisons. Examples include eliminating required searches of prisoners for contraband weapons and propping open secure doors with pieces of wood. (¶ 89-93). Defendants also eliminated essential officer training, which caused numerous specifically identified security breakdowns. (¶ 94-97).

E. The 2004 DOC Outside Expert Report Harshly Condemns Defendants. In the spring of 2004 a DOC security expert and consultant publicly released a report harshly criticizing the DOC and squarely placing responsibility upon the Minner defendants for numerous security

lapses and their lackadaisical approach to prison safety. The expert concluded that "somebody is going to be seriously injured or killed" unless things change. (¶ 98-100).[1]

F. The Media and Union Sound the Alarm. Throughout the spring and summer of 2004, there was widespread media attention to the many dire safety issues plaguing the DOC. (¶ 101-102). COAD also sounded the alarm and warned the Minner defendants that the severe levels of understaffing had reached "crisis proportions" and would "inevitably lead to murder, injury or even rape." (¶ 103-108).

1. Defendants Lie to the General Assembly. The Minner defendants had actual knowledge of all of these things but lied to the General Assembly and the public and assured them that the DOC prisons were safe and secure for all. (¶ 102-104, 109-111).

G. The July 2004 Horrific and Violent Incident at DCC. On July 12, 2004, as presciently and repeatedly warned by COAD, the outside DOC expert and others, the severe levels of understaffing, forced overtime and the lack of proper training caused a horrific and violent incident in the maximum security facility at DCC. (¶ 112-113).

The root cause of this incident was understaffing in the DCC which caused numerous security breakdowns that day, including: security doors being left open instead of being locked and secured; security doors being propped open with pieces of wood instead of being locked and secured; a single untrained correctional officer being required to monitor electronic displays for an entire section of the building, a job intended for three correctional officers, not one; insufficient numbers of "rovers" being assigned to the building; lack of searches for weapons and other contraband; and other breakdowns. (¶ 114-115).

H. The Damning and Highly Critical 2005 Executive Task Force Report. Defendant

[1] Defendants did not include this outside expert report in their selective appendix.

Minner then created an Executive Task Force headed by two distinguished Delaware jurists, Chancellor Brown and Judge Bifferato, to investigate the root causes of the problems at DCC and issue a report to allow those problems to be identified and fixed in order to prevent such an incident from ever happening again. (¶ 118-120). Following an exhaustive investigation, the Executive Task Force Report (¶ 121):

- found that "the battle was lost" leading up to the July 2004 incident because of severe staffing shortages and complacency.
- identified that the DOC's overtime expenditures jumped from $2 million in the recent past to $8 million in 2004.
- found that "excessive reliance upon overtime ... leads to numerous security breakdowns, as tired staff fall victim to complacency."
- urged that the DOC decrease reliance on overtime.
- found that the DOC policies and procedures, including standard operating procedures and post orders, are useless, and too outdated or too vague to be useful.
- found that the inmate at the center of the rape and attempted murder had managed to conceal an 8 inch shank, which had not been detected because shakedowns and searches were not being performed.
- identified that there was inadequate training and supervision, creating "great confusion" among the staff.

It also concluded (¶ 122):

- the DOC's policies of "freezing" or "forced overtime" for correctional officers present a "serious security risk" yet "[s]till the practice is routine." It creates a "dangerous environment" where "it is clear that tired, less alert personnel, manning a high security prison population during times of inmate movement, can be a recipe for disaster on any day." It urged that these problems must be eliminated.
- the severe levels of understaffing regularly put individual correctional officers into positions where they were being given duties it was impossible for them to perform alone.
- the training and policies of the DOC are abysmal. "In many cases, no uniform training/policy exists for specific critical functions." Such uniform training and policies are vital and must be corrected.

- "DCC also suffers from a negative culture" which raises the "larger question ... of leadership." It urged that the DCC "sorely need[s]" "[l]eadership that functions to create an environment that offers clear directions, limits lapses in judgment and develops a feeling of esprit de corps based on clarity of mission rather than anxiety."

Specific to DCC, defendants' own Executive Task Force concluded (¶ 123):

- correctional officers are "the first line of security" within DCC and that line has "become dangerously thin."

- "The State must reduce the excessive amount of overtime that is currently being drawn upon to compensate for the shortage of security personnel available to staff needed security positions throughout DOC, and particularly at DCC."

- as of December 2004, DCC operated at a vacancy rate of 24%, meaning that of the authorized strength, 24% of the positions are vacant.

- "at present hiring and retention is not keeping pace with departures" and "[m]ore correctional personnel are leaving DOC than are being hired and retained."

- due to the conditions at DCC, the attrition rate within correctional officer positions is twice as high at DCC as it is in the entirety of all DOC correctional officer positions as a whole, 21% in the DOC as a whole compared to 40% at DCC. This contributes to the severity of the security problems at DCC.

- "After having worked eight hours through the night it is not possible for a correctional officer to be as alert as he/she should be ... This is not a good thing for a prison."

I. Defendants Ignore the Report and Conditions Deteriorate. But rather than fix the problems caused by their policies, the Minner defendants ignored the conclusions of the report and conditions at DCC deteriorated even more. (¶ 124-128). For example, by November 2005:

- the DOC started every day approximately 400 officers down. (¶ 126).

- defendants repeatedly refused to fill vacant positions that had been fully funded by the Delaware General Assembly. (¶ 127).

- defendants refused to spend money already allocated by the General Assembly and returned millions of dollars in unspent funds to the state's General Fund. (¶ 128).

J. The Markell Defendants Make Things Even Worse. Throughout the Markell administration, defendants Markell, Danberg, Coupe, Visalli and Maxwell (the "Markell

defendants") made DOC prisons in general, and DCC in particular, "unmanageably dangerous," (¶ 129-130), and even worse.

1. The New Policy to Rely Even More on Overtime. Defendant Markell enacted a new policy to rely even more on overtime than had the Minner defendants. Defendants Danberg, Coupe, Visalli and Maxwell implemented and participated in implementing defendant Markell's policy. (¶ 134, 136). As a result, the severe understaffing problem increased and the overtime budget went from $13 million a year to $23 million a year. (¶ 131-133).

2. The Order to Ignore the 2005 Report & Deceive the General Assembly. Defendant Markell ordered that all the key findings of severe understaffing in the 2005 Executive Task Force Report were to be ignored in order to deceive the legislature and the public into thinking that conditions in the DOC prisons in general, and DCC in particular, were safe and secure for all involved. Defendants Danberg, Coupe, Visalli and Maxwell implemented and participated in implementing this order. (¶ 137-38, 135, 165-66). As a result (¶ 139-141):

- overtime hours worked in the DOC rose from 500,000 in 2009 to nearly 800,000 in 2015. That is the equivalent of needing an additional 470 employees.
- as of early 2017, almost 40% of the staffing at DCC was filled by overtime.

3. The Order That Positions at DCC Not Be Filled. The Markell defendants also formally enacted an official new policy of not filling vacant positions. As part of this policy, defendant Markell ordered that at least 90 vacant DOC positions must go unfilled at all times, most of which were at DCC. (¶ 154-56, 159). Defendant Markell specifically required that this order be obeyed, "even when critical staffing and safety requirements necessitated that these positions be filled" and when "doing so guaranteed that correctional officers staffing the prisons would be severely injured, or killed." (¶ 157-58).

Defendants Visalli and Maxwell worked to implement and participated in implementing

this policy. (¶ 160, 166). The President of COAD repeatedly met with defendants Visalli and Maxwell and warned them that this policy would result in the deaths of correctional officers. They responded and -

> repeatedly voiced an 'I don't care' attitude and said that they were willing to take these risks with the lives of correctional officers at DCC because the Markell defendants placed more importance on the short term public relations value of being able to say they saved money, than on saving the lives of correctional officers.

(¶ 161-62). Defendants Danberg and Coupe also implemented and participated in implementing Markell's orders. (¶ 163, 166). COAD again repeatedly brought to the Markell defendants' attention the key understaffing, overtime and other findings of the 2005 Executive Task Force Report and pleaded with them that they follow the urgent recommendations it contained, but these defendants refused and instead followed Markell's order that they ignore it. (¶ 164-65).

4. Commissioner Coupe's Admissions. Defendant Coupe has admitted that:

- working for an extended period of time without full staffing elevates security risks and decreases security. (¶ 142).
- there is an inverse correlation between staffing levels and risk in prisons. (¶ 143).
- the DOC operates at a substantial staff vacancy rate. (¶ 144).
- prison design, functioning equipment, and standard operating procedures are of limited help without a full complement of staff. (¶ 145).
- the DOC's maintenance of its prisons, including DCC, fails industry standards set by the U.S. Department of Justice's National Institute of Corrections. (¶ 146).
- thinly deployed staff cannot respond quickly to security incidents and timely response is often the difference between a minor incident turning into a major one. (¶ 147).

Consistent with defendant Coupe's admissions, numerous major violent incidents caused by lack of staff at DCC continued. (¶ 148-153).

K. Elimination of Vital Safety & Security Features Due to Understaffing.

1. Random Security Sweeps for Weapons. Because of the severe staff shortage

caused by the Markell defendants' policies, the necessary and vital practice of random searches for weapons and contraband at DCC was halted. The warden at DCC has repeatedly admitted that this was eliminated because of lack of staff. (¶ 167-69, 179).

2. Targeted Searches for Known Contraband Weapons. In late 2016 and early 2017, there were numerous reports up the chain of command from correctional officers and maintenance staff at DCC that fixtures and other pieces of equipment at DCC had been tampered with and numerous pieces of metal removed from them. Doing this is a well known means in prison to make contraband homemade knives, shivs and other dangerous weapons. However, because of the severe levels of understaffing, no searches or shakedowns were conducted to look for these contraband weapons which were known to exist. (¶ 170-72).

3. Identification of Inmate Security Threats. Because of the lack of staff, it also was no longer possible to identify inmates who posed security threats and move them to higher-security housing units. Instead, they were not identified and were left in lower security housing units at DCC. (¶ 173-74).

L. "Dangerous Building C." Because of defendants' policies the most dangerous place to work within DOC was at DCC. Beginning in 2016 and forward, the most dangerous place to work within DCC was Building C. It was called "dangerous Building C" among the staff and employees. It was widely discussed among the employees, staff and management at DCC that Building C was "unmanageably dangerous" and was a powder keg about to explode. It was widely discussed that it was not a matter of "if," but "when" the explosion would occur. Defendants were aware of all of this. (¶ 192-99).

1. Order to Release the Most Dangerous Violent Offenders Into Building C. In 2016, the Markell defendants also enacted a new policy and released approximately 100 of the

most dangerous violent offenders back into the general prison population at DCC, a majority of whom were placed in Building C, but due to the understaffing problems, they did not increase staffing or security measures. (¶ 177-79, 196).

2. Rise in Violent Incidents. As a direct result, in 2016 forward, there was a significant rise in major incidents of violence. These major incidents of violence continued, unabated, because there was not enough security staff to deal with, prevent and control them. There were numerous instances of "Code Threes," or major disturbances. (¶ 175-76, 180-82).

3. Inmate Dry Runs to Test Security Response. In late 2016 into early 2017, the prisoners in Building C at DCC conducted numerous dry runs in which they caused mass disturbances in order to gage and test the security response to their actions. This is a well known prisoner tactic to find weak points and vulnerabilities in the system. These also "are well known red flags occurring of looming problems known to correctional officers, as the essential pillars of a properly functioning prison system broke down." (¶ 180-82).

Numerous correctional officers on staff at DCC then filed reports about all of these red flag incidents, and requested: additional staffing to deal with them, security sweeps to detect contraband and weapons, that other security measures be taken, and that the most violent or dangerous ringleaders be separated and transferred to other buildings in order to nip the problem in the bud. However, due to severe lack of staff, no remedial action was taken. (¶ 183-84).

M. COAD Sounds the Alarm to Defendants. Sensing the imminent danger and grave threats to its members' lives, COAD sounded the alarm and told each Markell defendant directly that correctional officers would be killed sometime in early 2017 as a direct result of defendants' policies. Specifically, they were told that the situation "was critical," and "cannot continue." "Assaults are dramatically increasing. We have been virtually ignored for the past 8 years ...

Someone is bound to be seriously injured - or even worse" and that "sometime between January and July [of 2017], the wheels are going to come off." But the Markell defendants ignored these warnings and stood by their newly enacted policies and orders. (¶ 185-191).

N. The Predicted Uprising Occurs. As predicted, on the morning of February 1, 2017, the uprising occurred. (¶ 202-373). The Complaint specifically and factually details how the defendants' new policies and orders caused the uprising to occur (¶ 374-383, 403-426), and resulted in plaintiffs' injuries. (¶ 384-387).

ARGUMENT

I. THE DEFENSE MOTION IS PREMATURE BECAUSE THE COURT CANNOT CONDUCT THE REQUIRED "EXACT ANALYSIS" OF THE "TOTALITY OF FACTS" WITHOUT DISCOVERY.

A. Introduction. All three Counts of the Complaint arise out of the substantive due process protections of the Fourteenth Amendment (see D.I. 1 at pp. 48-50, 1-2), which exist to protect "the individual against arbitrary action of government." County of Sacramento v. Lewis, 523 U.S. 833, 845 (1998). As a result, "the threshold question is whether the behavior of the government officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." Id. at 847 n.8.

B. Substantive Due Process Requires an "Exact Analysis" of the "Totality of Facts." "The question of whether a given action shocks the conscience has an elusive quality to it." Kaucher v. County of Bucks, 455 F.3d 418, 426 (3d Cir. 2006); Estate of Smith v. Marasco, 430 F.3d 140, 153 (3d Cir. 2005). Substantive due process -

> formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case.

Lewis, 523 U.S. at 850. It "demands an exact analysis of circumstances." Id.; Schieber v. City

of Phila., 320 F.3d 409, 418 (3d Cir. 2003).

C. The Required "Exact Analysis" of the "Totality of Facts" is Not Possible Without Discovery. Simply put, this Court cannot appraise "the totality of facts" and conduct the "exact analysis of circumstances" required by both the Supreme Court and the Third Circuit based upon the limited factual record which plaintiffs' pre-lawsuit investigation was able to uncover. Instead, the required analysis can only be conducted after discovery. This appears to be the implicit and underlying reason why Judge Farnan denied a similar motion to dismiss filed in the earlier companion case by two of our same defendants and instead allowed discovery to proceed. See Arnold v. Minner, 2005 WL 1501514, *6 (D.Del. June 24, 2005) ("the Court concludes that Plaintiff should be given the opportunity to engage in discovery and obtain testimony and documents that may establish a violation"); id. ("a plaintiff cannot be expected to know what training was in place or how training procedures were adopted without the benefit of discovery"). Seventy allotted pages of defense briefing failed to make any mention of this key legal precedent.

D. The Defense Filings Also Concede Discovery is Necessary. The defense submitted a highly selective and incomplete 245 page factual appendix and a three page declaration (D.I. 16) and rely on numerous documents not in or attached to the Complaint. This is in effect an admission that the Court cannot appraise the "totality of facts" and conduct the "exact analysis of circumstances" required under the case law without the benefit of factual discovery.

Defendants also exclude certain key documents from their selectively limited appendix.

- Although it includes the current CBA with COAD referenced in the Complaint (covering the time frame of July 1, 2015 to present), it omits the similarly referenced and important numerous prior CBAs covering the rest of the time frame at issue, from 2000-2015.
- While it contains the 2005 Executive Task Force Report referenced in the Complaint, it glaring excludes the 2004 Outside Expert Report also referenced.

- It similarly ignores the 2007 State Auditor Report criticizing defendants' use of overtime in the DOC.

Notably, defendants also fails to mention at least two highly critical official government reports supportive of the factual allegations made in the Complaint which were issued post-filing:

- the May 2017 Report from State Auditor Thomas Wagner which suggests defendants' use of overtime in the DOC is illegal under state law; and
- the damning June 2017 Preliminary Report and Review of security issues at DCC by former U.S. Attorney Charles Oberly and Judge William Chapman, Jr.

Factually, the defense cannot have it both ways, selectively including or excluding factual documents as it wishes. Legally, both the U.S. Supreme Court and Third Circuit require a review which cannot be conducted in the absence of discovery.

II. STANDARD OF REVIEW.

A. The Plausibility Test. "The touchstone of the pleading standard is plausibility." Bistrian v. Levi, 696 F.3d 352, 365 (3d Cir. 2012). "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." Connelly v. Lane Constr. Corp., 809 F.3d 780, 786 (3d Cir. 2016).

1. Not a Heightened Pleading Standard. As the Third Circuit recently explained, "the plausibility standard does not impose a heightened pleading requirement, and that [Fed.R.Civ.P.] 8(a) continues to require only a 'showing' that the pleader is entitled to relief." Schuchardt v. President of the U.S., 839 F.3d 336, 347 (3d Cir. 2016).[2] It need not be "rich with detail." Fowler v. UPMC Shadyside, 578 F.3d 203, 211-12 (3d Cir. 2009). The "plausibility standard does not impose a probability requirement, [but] it does require a pleading to show more

[2] Accord Phillips v. County of Allegheny, 515 F.3d 224, 233 (3d Cir. 2008) (the Supreme Court in Twombly "emphasized throughout its opinion that it was neither demanding a heightened pleading standard of specifics nor imposing a probability requirements.").

than a sheer possibility that a defendant acted unlawfully." Connelly, 809 F.3d at 786 (internal punctuation and citations omitted). The complaint's "factual allegations must be enough to raise a right to relief above the speculative level." Great Western Mining & Mineral Co. v. Fox Rothschild LLP, 615 F.3d 159, 176 (3d Cir. 2010) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 522 (2007)). As the shortened version set forth in the Facts earlier, as well as review of the entire 52 page Complaint makes clear, plaintiffs far exceed this minimal pleading standard.

B. No Bare Bones Legal Conclusions Are Alleged. Rule 8 "does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Plaintiffs' remarkable 426 paragraph Complaint is replete with detailed factual allegations, and is not legally conclusory.

C. And Historical Facts Still Receive All The Traditional Inferences. "Even after Twombly and Iqbal, a complaint's allegations of historical fact continue to enjoy a highly favorable standard of review at the motion-to-dismiss stage of proceedings." Connelly, 809 F.3d at 790. The Court "must still ... assume all remaining factual allegations to be true, construe those truths in the light most favorable to the plaintiff, and then draw all reasonable inferences from them." Id. Thus, the facts summarized above - historically detailing who did what, when, where and why - cannot be ignored as the defense seeks, but instead as history must be taken in the light most favorable to plaintiffs, who also receive all the inferences from them.

1. Specific Types of Highly Plausible Historical Evidence.

a. Insider Accounts. The Third Circuit recently explained that the existence of a "detailed insider account," although not necessary for a complaint, "strongly supported the plausibility of "a plaintiff's allegations." Schuchardt, 839 F.3d at 348.

As set forth in the Facts above, the Complaint specifically discusses two such "detailed

insider accounts," the harshly critical 2004 Outside Expert Report from the DOC's own expert and the damning 2005 Executive Task Force Report from Chancellor Brown and Judge Bifferato. The existence of these reports, and their consistency with the allegations of the Complaint, strongly support the plausibility of plaintiffs' allegations against the Minner defendants. In the same way, but as to the Markell defendants, so does the post-Complaint June 2017 Preliminary Report and Review of security issues at the DCC by U.S. Attorney Oberly and Judge Chapman, as well as the May 2017 State Auditor Report from Auditor Wagner. All four of these official government reports are qualitatively similar to, yet a step above, the 'detailed insider accounts' the Third Circuit has found so convincing and supportive of plausibility.

b. Media Reports May Be Relied On. The Third Circuit recently held that the source of a plaintiff's factual allegations is improperly considered at the motion to dismiss stage, and encouraged plaintiffs to rely upon "media reports and other publicly-available information." Id. In the same way, the specific factual allegations in the Complaint which are taken from media reports in the *Wilmington News Journal*, *Delaware State News* and other local media sources speaking to the severe and longstanding problems caused by defendants' policies, defendants' knowledge of them and refusal to correct them, all are properly relied upon. Indeed, this is, again, why discovery is necessary. If this much detailed factual information exposing defendants' misconduct over the last 16 years can be found in public newspaper stories by intrepid reporters beating the bushes, it is reasonable to expect that even more similarly helpful factual information will be found with the aid of the discovery process.

D. The Court Cannot Assess Credibility or Weigh the Evidence. The Court "must ... refrain from engaging in any credibility determinations." U.S. ex rel. Customs Fraud Investigations, LLC. v. Victaulic Co., 839 F.3d 242, 256 (3d Cir. 2016). As the Supreme Court

explicitly held in Iqbal, factual allegations that are "unrealistic," "nonsensical," "chimerical," and even "extravagantly fanciful" must still be taken as true. Iqbal, 556 U.S. at 681; accord Connelly, 809 F.3d at 789; Great Western, 615 F.3d at 177. This is so "even if it strikes a savvy judge that actual proof of those facts is improbable and that a recovery is very remote and unlikely." Twombly, 550 U.S. at 556; see Great Western, 615 F.3d at 176 ("improbable"); Phillips, 515 F.3d at 231 (even if it is "unlikely that the plaintiff can prove those facts or will ultimately prevail"). Defendants clearly do not like the detailed factual allegations set forth in the Complaint, because of the terribly unflattering, yet truthful, light it paints them in. But because the allegations are factual in nature, they can not be ignored even if they were incorrectly characterized as "unrealistic," "nonsensical," "chimerical," or "extravagantly fanciful." Iqbal, 556 U.S. at 681. The Supreme Court has clearly spoken on this point. Any unflattering allegations will be proven at trial.

E. Pleading Standards Are Different From Evidence Standards. Courts also "cannot inject evidentiary issues into the plausibility determination." Schuchardt, 839 F.3d at 347. As the Third Circuit has explained in another post-Twombly substantive due process case, "[s]tandards of pleading are not the same as standards of proof." Phillips, 515 F.3d at 246.[3] As recently explained, "[i]t is worth reiterating that, at least for purposes of pleading sufficiency, a complaint need not establish a *prima facie* case in order to survive a motion to dismiss." Connelly, 809 F.3d at 788. A prima facie case "is an evidentiary standard, not a pleading requirement and hence is not a proper measure of whether a complaint fails to state a claim." Id. at 789 (internal punctuation and citations omitted) (citing Swierkiewicz v. Sorema, N.A., 534

[3] This has long been the law. See Weston v. Pa., 251 F.3d 420, 429 (3d Cir. 2001) ("[c]omplaints need not plead law or match facts to every element of a legal theory.").

U.S. 506, 510 (2002)). "Instead of requiring a *prima facie* case, the post-Twombly pleading standard simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary elements." Id. (internal punctuation omitted). Thus, assuming *arguendo* the defense claim that plaintiff has not, for example, adequately pled each of the four elements of a state created danger doctrine theory, such a claim is irrelevant since it is an evidentiary standard, not a pleading requirement.[4]

F. Cautionary Warnings. The Third Circuit has issued several cautionary warnings about the plausibility test which are *apropos* given the overreach of the defense briefing.

1. "Unduly Crabbed" Readings. First, it warned against taking an "unduly crabbed" reading of a complaint which "denies [plaintiff] the inferences to which her complaint is entitled." Phillips, 515 F.3d at 237. Try as they might, the defense motions cannot ignore the detailed factual allegations of their specifically identified wrongdoing, willful misconduct and purposeful ignorance in enacting new policies and procedures, and ignoring the warnings and other red flag consequences, which directly caused the injuries suffered by plaintiffs.

2. Abuse of the Process. Citing statistics, the Third Circuit also has counseled that the motion to dismiss process is being abused by defendants.

> One of the consequences of the Supreme Court's decisions in Twombly and Iqbal is a general increase in the number of motions to dismiss filed against plaintiffs. As a result, plaintiffs are now twice as likely to face a motion to dismiss. It is highly unlikely that in the years since Twombly was decided, plaintiffs' complaints are dramatically worse or less meritorious. Rather, defendants now have incentive "to challenge the sufficiency of the plaintiff's complaint more frequently." More frequent motions to dismiss are not necessarily more meritorious motions to dismiss.

Customs Fraud, 839 F.3d at 249-50 (internal footnotes omitted). The meritless defense briefing

---

[4] Of course, as discussed in Argument **IV** below, it is impossible to read the Complaint as not factually asserting each of the required elements.

is a case study in such abuse.

G. Liberal Construction and Substantial Justice. "Pleadings must be construed so as to do justice." Fed.R.Civ.P. 8(e). This has long been the law in our local federal courts,[5] continues to be the law today, post-Iqbal,[6] and is further reason to deny the defense motions.

H. The Complaint Must Be Viewed as a Whole, Not as Pieces in Isolation. Importantly, the "complaint should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible." Wilson v. Ark. Dept. of Human Serv., 850 F.3d 368, 371 (8th Cir. 2017). This is in accord with the Supreme Court's explanation in Twombly, that the plausibility analysis must look at the complaint "*in toto*." Twombly, 550 U.S. at 569 n.14. Numerous Circuits, including our own, have explained the same.[7] This is because "[a] play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a [legal] analysis must concentrate not only on individual incidents, but on the overall scenario." Andrews v. City of Phila., 895 F.2d 1469, 1484 (3d Cir. 1990);

---

[5] See Herman v. Mut. Life Ins. Co. of N.Y., 108 F.2d 678, 679 (3d Cir. 1939) (a complaint must be construed "as to do substantial justice"); Guilday v. Dep't of Justice, 451 F.Supp. 717, 722 (D.Del. 1978) ("A complaint is to be liberally construed in favor of the plaintiff.").

[6] See, e.g. Hall v. DIRECTV, LLC, 846 F.3d 757, 765 (4th Cir. 2017) ("a complaint is to be construed liberally so as to do substantial justice"); Bret Binder v. Weststar Mortg., Inc., 2016 WL 3762710, *3 (E.D.Pa. July 13, 2016) ("Under Rule 8, Fed.R.Civ.P., pleadings are to be liberally construed...."); Mangan v. Corp. Synergies Grp., Inc., 834 F.Supp.2d 199, 204 (D.N.J. 2011) ("liberally construed").

[7] See, e.g. Argueta v. U.S., 643 F.3d 60, 74 (3d Cir. 2011) (a court must look at "the complaint as a whole" in making the plausibility determination); Ocasio-Hernandez v. Fortuno-Burset, 640 F.3d 1, 14–15 (1st Cir. 2011) ("No single allegation need lead to the conclusion ... of some necessary element, provided that, in sum, the allegations of the complaint make the claim as a whole at least plausible.")(internal punctuation omitted); Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1253 n.11 (11th Cir. 2005) ("the placement of the paragraph in another count is unimportant.... We read the complaint as a whole.").

Moore v. City of Phila., 461 F.3d 331, 346 (3d Cir. 2006). Thus, defendants' repeated efforts to read each specific paragraph of the Complaint in isolation from the other preceding/succeeding 425 paragraphs is improper. Instead, the Complaint must be viewed as a whole.

I. Novel Theories of Law. Even if the legal theories were new or novel, "courts should be reluctant to grant a motion to dismiss when the claim in question asserts a novel legal theory of recovery." Buckhead Am. Corp. v. Reliance Capital Group, Inc., 178 B.R. 956, 961 (D.Del. 1994). Post-Twombly, our District has explained that "novel legal theories 'are best tested for legal sufficiency in light of actual, rather than alleged facts.'" Riddell v. Gordon, 2008 WL 4766952, at *3 (D.Del. Oct. 31, 2008).[8] This is further reason why discovery is necessary.

J. Documents Outside the Complaint. Defense efforts to improperly cherry pick and expand the factual record beyond the Complaint must be rejected. The defense appendix and affidavit should be stricken and their motions considered purely under Rule 12(b)(6). See In re Asbestos Products Liability Litig., 822 F.3d 125, 133 (3d Cir. 2016). If the Court disagrees, plaintiffs are contemporaneously filing an appropriate Rule 56(d) declaration.

K. Must Be Given Opportunity to Amend Before Dismissal. To the extent the Court ultimately disagrees with plaintiffs' position that the defense motion is completely without merit, plaintiffs invoke their right to amend the Complaint prior to dismissal.[9]

---

[8] See also Wright v. N.C., 787 F.3d 256, 263 (4th Cir. 2015); McGary v. City of Portland, 386 F.3d 1259, 1270 (9th Cir. 2004); Baker v. Cuomo, 58 F.3d 814, 818–19 (2d Cir. 1995); 5B C. Wright & A. Miller et al., *Fed. Practice & Procedure* § 1357 (3d ed.2015).

[9] See Estate of Lagano v. Bergen Cty. Prosecutor's Office, 769 F.3d 850, 861 (3d Cir. 2014) ("a district court considering a 12(b)(6) dismissal must permit a curative amendment unless such an amendment would be inequitable or futile.") (internal punctuation omitted); Phillips, 515 F.3d at 245 ("we have instructed that a district court must provide the plaintiff with this opportunity even if the plaintiff does not seek leave to amend."); id. (the "court must inform the plaintiff that he or she has leave to amend the complaint within a set period of time."); id. at 246 (not doing so is reversible error).

III. DEFENDANTS' ACTIONS SHOCK THE CONSCIENCE.

A. The Cases Ignored by the Defense. Preliminarily, the defense has flatly ignored District of Delaware as well as en banc Third Circuit precedent directly relevant, and fatal to, its motion. Yet omitting this key legal precedent does not make it go away.

1. District of Delaware. As noted above, in Arnold v. Minner, 2005 WL 1501514, *6 (D.Del. June 24, 2005), a case arising out of some of the exact same facts, involving two of the same defendants, and invoking two of the identical legal theories, Judge Farnan denied a similar motion to dismiss and instead held that discovery was necessary. No mention is made of this case or holding in the entire defense briefing.

2. Third Circuit. The Third Circuit, sitting en banc, has twice held that state actors can create conditions which cause third parties to deprive a plaintiff of their Fourteenth Amendment substantive due process rights. This series of binding, en banc, Third Circuit decisions undermines defense citation to and reliance on cases from foreign, non-binding Courts of Appeal less hospitable to upholding long established constitutional protections.

a. Creating Conditions That Allow Private Parties to Attack Plaintiffs. As the Third Circuit has long explained -

> we find no Supreme Court precedent that would limit the protected liberty interest in freedom from attack to those attacks inflicted by the state officials themselves. Certainly it would be absurd to argue that a state prisoner does not have a liberty interest that would be infringed were his or her state custodian deliberately to open the prison door knowing that a lynch mob converged outside. The state infringement would be as direct as if the prison guard had tied the rope around the prisoner's neck.

Davidson v. O'Lone, 752 F.2d 817, 822 (3d Cir. 1984) (en banc), aff'd sub nom. Davidson v. Cannon, 474 U.S. 344 (1986). Our sister district courts have held the same. See Roberts v. Langton, 1988 WL 134499, *1 (E.D.Pa. Dec. 9, 1988); Douglas v. Marino, 684 F.Supp. 395, 398 (D.N.J. 1988). No mention is made of this case or holding in the defense briefing. Thus, and

contrary to numerous defense claims, it has long been the law that substantive due process protections are not limited to attacks by state actors themselves but instead apply even when these same government officials create conditions which then allow others to deprive plaintiffs of their life or liberty. Davidson demolishes one cornerstone of the defense motions.

b. Putting Plaintiffs into a Position of Danger From Private Persons and Then Failing to Protect Them. Similarly, as the Third Circuit en banc also long has held -

> We do not want to pretend that the line between action and inaction, between inflicting and failing to prevent the infliction of harm, is clearer than it is. If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.

D.R. v. Middle Bucks Area Vocational Tech. Sch., 972 F.2d 1364, 1374 (3d Cir. 1992) (en banc). No mention is made of this case or holding either in the defense briefing. Thus, and again contrary to numerous defense claims, it has long been Third Circuit law that a government official who places a plaintiff in danger from third persons but then fails to protect that individual is as much liable as if he had attacked the plaintiff himself. This en banc decision similarly destroys the core of the defense motions.

B. Context is Key. Fourteenth Amendment substantive due process requires a "context-specific inquiry." Kaucher, 455 F.3d at 426.

1. An Exacting Review of Factual Circumstances is Required. As explained in Argument **I.B.** above, this Court must conduct an exacting analysis of the totality of the facts and circumstances.

2. What Shocks the Conscience Varies by Context. Also, as the Third Circuit en banc has recognized, the "exact degree of wrongfulness necessary to reach the conscience shocking level depends upon the circumstances of a particular case." Nicini v. Morra, 212 F.3d

798, 810 (3d Cir. 2000) (en banc) (internal punctuation omitted).

C. The Test Depends Upon Whether the State Actor Must Act Under Pressure.

There are "three tests" in the Third Circuit to identify "conscience-shocking behavior." Sanford v. Stiles, 456 F.3d 298, 310 n.15 (3d Cir. 2006) (per curiam).[10] But which test applies depends upon the amount of time a defendant has to think about their decision under challenge. "The level of culpability required to shock the conscience increases as the time state actors have to deliberate decreases." Id. at 309; accord Phillips, 515 F.3d at 240. Stated another way, "the level of culpability required to shock the conscience will depend upon the extent to which a state actor is required to act under pressure." Sanford, 456 F.3d at 301.

Although defendants concede, as they must, that the lowest and easiest to meet liability standard of "deliberate indifference" applies, requiring "conscious disregard of a substantial risk," (DOC OB at 12), brief review of all three standards is helpful to contextually understand the importance of this concession.

1. Split Second Decisions in Hyperpressurized Environments - Intent to Cause Harm. The first and most difficult test applies to split second decisions, made in a "hyperpressurized environment." Id. at 309. There, the state of mind necessary is that of "intent to cause harm." Id.; accord Phillips, 515 F.3d at 240. Consistent with the defense admission, this standard could not apply given that they had 8-16 years to make their decisions.

2. Hours or Minutes to Act but Still With Some Urgency - Conscious Disregard of a "Great Risk". The second and middle ground test "involv[es] something less urgent then a 'split-second' decision but more urgent than an 'unhurried judgment.' Generally

[10] In Sanford, the Third Circuit panel surveyed the history of its case law addressing the different culpability levels amounting to conscience shocking behavior and sought to "clarify" and reconcile its sometimes inconsistent prior decisions. Id. at 305.

this category will include situations in which the state actor is required to act 'in a matter of hours or minutes.'" Sanford, 456 F.3d at 310; accord Phillips, 515 F.3d at 237. Thus, "when a state actor is not confronted with a 'hyperpressurized environment' but nonetheless does not have the luxury of proceeding in a deliberate fashion, the relevant question is whether the officer consciously disregarded a great risk of harm." Sanford, 456 F.3d at 310. Thus, the state of mind necessary is 'conscious disregard of a great risk'. Consistent with the defense admission, this standard also does not apply given the 8-16 years they had to deliberate over fixing the problem. However, despite the defense concession, under the facts of our case plaintiffs satisfy even this heightened standard.

3. Defense Concession - Time to Deliberate and Unhurried Judgments - Deliberate Indifference and Conscious Disregard of a "Substantial Risk". As noted, defendants concede this is the standard by which to judge their actions. (DOC OB at 12). "[I]n cases where deliberation is possible and officials have the time to make 'unhurried judgments,' deliberate indifference is sufficient." Sanford, 456 F.3d at 309; accord Phillips, 515 F.3d at 240.[11] As the Third Circuit en banc has held, a government official who "had time to make unhurried judgments ... should be judged under the deliberate indifference standard." Nicini, 212 F.3d at 811.[12] "[A]s the very term 'deliberate indifference' implies, the standard is sensibly employed only when actual deliberation is practical," Lewis, 523 U.S. at 851; Nicini, 212 F.3d at 810, such

[11] As both the Supreme Court and Third Circuit have recognized, the "deliberation, as required to show deliberate indifference could take place very quickly" and is not to "be viewed in the 'narrow technical sense' often adopted by traditional homicide law." Sanford, 456 F.3d at 309 n.12; accord Lewis, 523 U.S. at 851 n.11(citing Caldwell v. State, 84 So. 272, 276 (Ala. 1919) for the proposition that deliberation does not require "ponder[ing]" but can occur "even if it be only for a moment or instant of time.")

[12] This is because it is a "luxury" to be able to make such unhurried judgments. Kaucher, 455 F.3d at 426; Lewis, 523 U.S. at 853.

as when a defendant has the luxury of 8-16 years to think about how to fix a problem of her or his own creation.

Lewis is the most recent U.S. Supreme Court decision on substantive due process. There, in the course of analyzing the applicable shocks the conscience liability standard to apply to a public official defendant in different situations, the Supreme Court explained that the deliberate indifference standard originated in the Eighth Amendment conditions of confinement context. It arose out of -

> the luxury enjoyed by prison officials of having time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pull of competing obligations. **When such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking**.

Lewis, 523 U.S. at 853 (double emphasis added); accord Schieber, 320 F.3d at 419; see Nicini, 212 F.3d at 810; Kaucher, 455 F.3d at 426 n.3. Extended opportunities to do better, teamed with protracted failure to even care - a truer, more apt description of defendants' actions in our present case could not be written. Such callous indifference is truly conscience shocking.

a. Deliberate Indifference Defined - "Conscious Disregard of a Substantial Risk". "We have defined deliberate indifference as requiring a 'conscious disregard of a substantial risk of serious harm.'" L.R. v. Sch. Dist. of Phila., 836 F.3d 235, 246 (3d Cir. 2016). This is the most recent reported definition in the Third Circuit, dating from 2016.

(1). Actual Knowledge Is Not Necessary if the Risk is "Obvious". "[A]ctual knowledge can be inferred if a risk is obvious." Kaucher, 455 F.3d at 427 n.5 (citing Hope v. Pelzer, 536 U.S. 730, 738 (2002) ("We may infer the existence of this subjective state of mind from the fact that the risk of harm is obvious.")).[13] Here, as detailed in

[13] See, e.g. L.R., 836 F.3d at 246 ("deliberate indifference might exist without actual knowledge of a risk of harm when the risk is so obvious that it should be known."). The

Argument **III.C.3.b.** below, defendants had actual knowledge of the substantial risk of serious harm, which was brought directly to their individual attentions in numerous ways.

(2). Gravity of the Risk. In considering whether behavior shocks the conscience, the Third Circuit has identified the "apparent gravity of the risk" to be a relevant factor. Sanford, 456 F.3d at 311. Here, as also detailed in Argument **III.C.3.b.** below, defendants (in both gubernatorial administrations) were repeatedly and specifically warned that the situation created by their policies:

- had reached "crisis proportions," (D.I. 1 ¶ 105, 107);
- would "inevitably leader to murder, injury or even rape," (id. ¶ 106);
- presents a "serious security risk" and is a "recipe for disaster," (id. ¶ 122);
- would result in someone being "seriously injured or killed," (id. ¶ 98);
- was placing "individual correctional officers into positions where they were being given duties it was impossible for them to perform alone," (id. ¶ 122);
- resulted in the "first line of security" within DCC (correctional officers) "becom[ing] dangerously thin," (id. ¶ 123);
- "was going to result in the death of correctional officers, specifically including those at DCC," (id. ¶ 161);
- "was critical" and that "sometime between January and July [of 2017], the wheels are going to come off," (id. ¶ 188); and
- "cannot continue." "[A]ssaults are dramatically increasing. We have been virtually ignored for the past 8 years ... Someone is bound to be seriously injured - or even worse." (Id. ¶ 190).

(3). Was the Risk Ignored? Another factor is whether that risk

---

Supreme Court has found "'obviousness' of a risk can be sufficient for liability." Sanford, 456 F.3d at 309 n.13 (citing Bd. of County Comm'rs v. Brown, 520 U.S. 397, 410-12 (1997) (obviousness sufficient in decision-to-hire case); City of Canton v. Harris, 489 U.S. 378, 390 (1989) (obviousness sufficient in failure-to-train cases)).

was "disregarded" or properly acted upon. Sanford, 456 F.3d at 311. This is one of the factors the Third Circuit analyzed and found important in its earlier correctional officer case where it found the facts did not add up to conscience shocking behavior. In Kaucher, the Court found there was "no evidence that at the time defendants made their decisions ... they were aware, or should have been aware, that their remedial and preventative measures were inadequate." 455 F.3d at 428.[14] Contrast that with our case where there is abundant evidence that defendants contemporaneously were aware of and disregarded the many problems and rather than rectify them instead made them worse. (See Facts at **E., F., H., J.3., K.2., L., L.3., M.**).

In Kaucher, the facility at issue was found to be "substantially in compliance with state standards ... giving defendants reason to believe the measures were adequate." 455 F.3d at 428. But in our present case, defendant Commissioner Coupe has admitted, in writing, that the DOC flunks nationwide corrections standards set by the U.S. Department of Justice. (D.I. 1 ¶ 146). Defendants also had the benefit of both the 2004 Outside Expert Report and 2005 Executive Task Force Report telling them that their policies were sinking the ship, all while COAD repeatedly sounded the alarm about the same. Relatedly, in Kaucher the Third Circuit noted the "defendants had in place policies and procedures to ensure sanitary conditions in the jail." 455 F.3d at 428. Contrast that with our present facts where defendants were on notice that their policies and procedures were inadequate. (See Facts at **E., F., H., I., J.2., J.3., L., L.3., M.**).

Thus it is clear that defendants ignored the known risks, refused to take any remedial steps and instead actively made matters worse.[15]

---

[14] Procedurally, Kaucher did not occur in the motion to dismiss context but instead at summary judgment following a complete factual record revealed during discovery.

[15] For the refusal of the Minner defendants (see, e.g. D.I. 1 ¶ 124, 104, 109-11, 116-17, 127-28). For the refusal of the Markell defendants (see, e.g. id. ¶ 137, 157-58, 162, 164-65, 184,

(4). Gross Negligence or Recklessness Are Sufficient. Although "[m]ere negligence is never sufficient for substantive due process liability," Nicini, 212 F.3d at 810, both the U.S. Supreme Court and Third Circuit have repeatedly held that gross negligence or recklessness are. See, e.g. Lewis, 523 U.S. at 849 (we have "expressly recognized" that some government actions "such as recklessness or gross negligence ... may be actionable under the Fourteenth Amendment."); Nicini, 212 F.3d at 810 ("conduct falling within a middle range of culpability - that is, involving more than negligence but less than intentional conduct - can be shocking in the constitutional sense."); Ye v. U.S., 484 F.3d 634, 638 n.2 (3d Cir. 2007) ("where a state actor has the time to act deliberately and is not under pressure to make split-second decisions, gross negligence may be sufficient."). Thus, if defendants were at least grossly negligent in creating the conditions which led to plaintiff's injuries, they are liable. As the factual recitation set forth above makes clear, defendants were above and beyond grossly negligent. Instead they were at a minimum reckless and a fair reading of the historical facts recounted in the Complaint shows actual intent at times. (See D.I. 1 ¶ 158, 161-62).

b. The Supreme Court's Recent Instructive Explanation of What is Sufficient to "Plausibly" Plead "Deliberate Indifference." The defense briefs also fail to mention that earlier this summer, the U.S. Supreme Court specifically addressed the factual allegations necessary to "plausibly" plead "deliberate indifference" and overcome a Rule 12(b)(6) motion to dismiss. In Ziglar v. Abbasi, - U.S.-, 137 S.Ct. 1843 (2017), the Court held a factual allegation that a defendant had knowledge of a condition by way of, *inter alia*, "staff complaints" and that he "ignored other direct evidence ... including logs and other official records," "plausibly show the [defendant's] deliberate indifference" under the standards of Iqbal

187, 189, 191, 142-47).

and Twombly. Id. at 1864 (internal punctuation omitted).

The parallels to our present case could not be more clear. The severe problems and emergency conditions at DCC caused by the newly enacted policies of the individual Minner defendants from 2001-2009 (Facts at **D.** and **I.** above), were specifically brought to their attention and knowledge by way of:

- the 2004 Outside Expert Report, (Facts at **E.**);
- the media writing newspaper stories about them, (Facts at **F.**);
- COAD bringing them directly to defendants' attention, (Facts at **F.**); and
- the damning 2005 Executive Task Force report commissioned by defendant Minner herself. (Facts at **H.**).

Yet despite actual knowledge, they refused to fix the problems. (See, e.g. D.I. 1 ¶ 124, 104, 109-11, 116-17, 127-28). Under Ziglar, this is above and beyond that which is necessary to "plausibly" plead "deliberate indifference" by the Minner defendants. Id.

In the same way, from 2009-2017, as the newly enacted policies of the individual Markell defendants spiraled the DCC even further out of control (Facts at **J.**, **K.** and **L.** above), these severe problems and emergency conditions were specifically brought to the their attention and knowledge by way of:

- COAD raising them in individual meetings with the individual defendants, including specifically how these policies would cause correctional officers to be killed, (Facts at **J.3.**);
- numerous reports up the chain of command about the problems and begging for help, (Facts at **K.2.**);
- the widespread discussion amongst both management and staff that Building C was a powder keg about to explode, which was brought directly to their attention, (Facts at **L.**);
- the filing of official reports by correctional officers begging for help, (Facts at **L.3.**); and

- as the ignored canary in the mine, COAD later again sounding the alarm directly to each of the individual Markell defendants and telling them specifically that correctional officers would be killed sometime in early 2017 as a direct result of defendants' policies. (Facts at **M.**).

Yet despite actual knowledge, they refused to fix the problems. (See, e.g. D.I. 1 ¶ 137, 157-58, 162, 164-65, 184, 187, 189, 191, 142-47). Again, under Ziglar, this is above and beyond that which is necessary to "plausibly" plead "deliberate indifference" by the Markell defendants. Id. Thus the factual plausibility of our case has been clearly established for all defendants.

As to all of the Minner and Markell defendants: they created the severe problems by way of their newly enacted policies; they worked to implement these same policies; they knew of the extreme problems their policies created by numerous means brought directly to their attention; and they consciously ignored and refused to fix them over an 8-16 year time frame.[16] This is what both the Supreme Court and Third Circuit meant in holding "[w]hen such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking." Lewis, 523 U.S. at 853; Schieber, 320 F.3d at 419.

As noted, this "truly shocking," id., behavior satisfies both the necessary liability standard of "conscious disregard of a substantial risk of serious harm," L.R., 836 F.3d at 246, which defendants admit applies (DOC OB at 12), as well as the higher standard requiring a "conscious disregard of a great risk of harm." Sanford, 456 F.3d at 310. But given the luxury of 8-16 years to think about and deliberate over these issues and in the light most favorable to the plaintiffs, there is no way to view these egregious facts other than far exceeding both gross negligence and recklessness leading to the conclusion that the individual defendants intended the final result,

[16] As the Third Circuit has explained in another § 1983 context, "it is logical to assume that continued official tolerance of repeated misconduct facilitates similar unlawful adventures in the future." Bielevicz v. Dubinon, 915 F.2d 845, 851 (3d Cir. 1990).

meeting the highest liability standard of "intent to cause harm." Id. at 301. Accordingly, plaintiffs have established that defendants' actions violate the Fourteenth Amendment.

D. The Union Contract and Legal Obligations it Imposes. While the extensive discussion above independently establishes that defendants' actions shock the conscience under the Third Circuit legal standard, our present case also contains an additional, cumulative factual and legal component not present in any of the substantive due process cases cited in the defense opening briefs. The blatant violation of the contractual duty to sufficiently staff the prison to maintain a safe and secure workplace, added to their prior history above, unquestionably shocks the judicial conscience even more. Yet despite being front and center in the Complaint (D.I. 1 ¶ 35-42), the CBA is substantively ignored by the defense.

1. The Core Defense Claim Fails. At its core, the defense claim can fairly be summed up as follows: 'because we have no legal obligation to provide a safe working environment to correctional officers, our failure to do so cannot shock the judicial conscience as is necessary for a Fourteenth Amendment substantive due process claim. At worst, our failure was to act honorably, ethically or morally as public servants, but that simply is not illegal.'

2. The State Contractually Bound Itself to Provide "Sufficient Staffing" for a "Safe and Secure Work Environment." The problem with the defense claim is that it ignores almost 50 years of State of Delaware case law to the contrary which specifically addresses how the terms and conditions voluntarily agreed to in CBAs impose binding legal obligations on state officials, such as defendants.[17] Defendants contractually agreed to:

- "provide *sufficient staffing* to ensure a *safe and secure work environment* appropriate for

[17] This is in addition to being contrary to controlling federal case law, holding that if defendants create the dangerous condition, they are liable for damages caused by it. (See, e.g. Argument **III.A.2.** above).

penal institutions at all work locations any time prisoners are supervised." (D.I. 1 ¶ 39).

- "provide a safe and healthy work environment for all employees." (Id. ¶ 40).
- provide training to all of its employees, to enable them to function safely and securely in the prisons. (Id. ¶ 41).

The current CBA was signed by defendants DOC Commissioner Coupe and OMB Director Visalli (id. ¶ 38), contains "mutually negotiated terms and conditions of employment" between "the State of Delaware" and COAD (D.I. 16 at A137) which cannot be "alter[ed], var[ied], waive[d] or modif[ied]" (id. at A176), and all prior union contracts contained similar provisions and were signed by their fellow cabinet official defendants. (See D.I. 1 ¶ 42).

3. Delaware Law Governing Union Contracts is Clear. In State v. Am. Fed'n of State, County & Mun. Employees, Local 1726, 298 A.2d 362, 367-68 (Del.Ch. 1972) ("Local 1726") and Del. State Troopers Lodge F.O.P. Lodge #6 v. State, 1984 WL 8217, *4-5 (Del.Ch. June 13, 1984) ("FOP Lodge 6"), the Delaware courts specifically addressed the significance of CBA provisions which executive branch agencies fail to fulfill.[18] The short holding is that -

> Local 1726 requires a State agency to do all those things contemplated and to perform all acts within its power that are 'necessary' to bring about the performance of its undertakings under a collective bargaining agreement with its employees.

FOP Lodge 6, 1984 WL 8217, *5.

a. Statutory Authority. The underlying statutory authority for collective bargaining for state employees, the Public Employment Relations Act, is presently found at 19 Del.C. Chapter 13. It explains that it is legislative policy "to promote harmonious and cooperative relationships between public employers and their employees and to protect the public" thereby. 19 Del.C. § 1301. This is accomplished by "[o]bligating public employers ... to

[18] These opinions also directly undermine the misleading, red herring defense claims to be entitled to legislative immunity despite being executive branch officials.

enter into collective bargaining" agreements. Id. at § 1301(2). A public employer is required to "negotiate in good faith with respect to terms and conditions of employment, and to execute a written contract incorporating any agreements reached." 19 Del.C. § 1302(e).

b. The CBA is Binding. The Delaware Chancery Court has explained that "[c]ollective bargaining agreements are not ordinary contracts. And this is especially true in the case of those entered into by public employees." Local 1726, 298 A.2d at 367 (internal citation omitted). The "legislature certainly could not have intended that agencies of the State should enter into these agreements and not be bound thereby." Id. at 367. The "statute commands that the public employer 'negotiate in good faith,' [19 Del.C. § 1302(e)], and a good faith negotiation implies that the employer will perform those acts within its power necessary to bring about performance of its undertakings." Id. at 368. Here, defendants signed a contract agreeing to provide sufficient staffing to allow for a safe, secure and healthy working environment but failed to live up to their agreement. Instead of doing everything in their power to comply, they actively worked to undermine the CBA and explicitly did the opposite.

c. The State "Signed Away Its Discretion." Delaware law is clear, when state agencies enter into a CBA and agree to its provisions, they cannot later claim managerial discretion as a defense to non-compliance. The Chancery Court has repeatedly held -

> I am aware that the decision not to include [the negotiated item] as a priority item was based upon an administrative judgment as to what items were required to be so included in order [to] meet the minimum needs of the Department, a decision based upon the exercise of discretion in 'trading off' potential priority items. But the Department signed away its discretion when it bound itself to this agreement. It is, therefore, bound to pursue every step within its power to see that the [negotiated item] is provided. The time for discretionary 'trade-offs' is before and during the bargaining, not after a solemn agreement has been made.

Local 1726, 298 A.2d at 368; FOP Lodge 6, 1984 WL 8217, *3 (emphasis added). Stated another way, "the Department may not hide behind a veil of administrative inaction drawn across the

terms of an otherwise properly negotiated agreement." Local 1726, 298 A.2d at 368; FOP Lodge 6, 1984 WL 8217, *3. Similarly, defendants herein cannot hide behind managerial discretion and a veil of competing obligations as a defense to failing to live up to the duly bargained for and agreed upon terms and conditions.

d. They Must Do 'All Acts Within Their Power'. The CBA requires those bound "to do all those things contemplated and to perform all acts within its power that are 'necessary' to bring about the performance of its undertakings." FOP Lodge 6, 1984 WL 8217, *5; see Local 1726, 298 A.2d at 368 (it "could and did bind the Department to do all of those things the agreement contemplated which were within the Department's legitimate powers."). But here, defendants actively worked to undermine and contradict the very provisions they accepted.

(1). If Monetary Expenditure Is Necessary. If a monetary expenditure is required under a CBA,[19] the Department must perform "a simple administrative act of including [the contractually negotiated provision] as a 'priority item' in its budget." Local 1726, 298 A.2d at 368. The "obligation imposed ... by the agreement is to attempt in good faith to seek funding from the General Assembly." FOP Lodge 6, 1984 WL 8217, *5. The department must ensure that its contractual obligation is included in the Governor's budget request to the General Assembly as a "priority item." Id. Here, defendants did not do so.

e. Who is Bound by the CBA. The Delaware courts have specifically addressed the issue of who is bound by a CBA and held as a matter of state contract law that the holding of Local 1726 "clearly applies" to the signatories to the contract and they may be sued

[19] Such as a promise of a specified raise. See FOP Lodge 6, 1984 WL 8217, *1-6 (addressing how an executive department complies with its good faith requirements when it includes a specified pay raise in its CBA).

for non-compliance. FOP Lodge 6, 1984 WL 8217, *4-5. The current CBA was signed by defendants Commissioner Coupe and Director Visalli, on behalf of their executive agencies, binding them and their successors, such as defendant Maxwell.[20]

Additionally, since the time of the Chancery Court decisions in Local 1726 and FOP Lodge 6, the Delaware Code was amended and even when not a signatory, the Governor is now legally required to take compensation provisions included in CBAs and formally "recommend" them to the General Assembly. 19 Del.C. § 1311A(c). This also was not done.

4. Why This Shocks the Conscience. This failure shocks the judicial conscience because defendants are violating at least 45 years of clear state law. They signed the contract, agreed to its terms and must do everything in their power to live up to it. But instead they actively worked to undermine the very provisions they legally obligated themselves to obey. If their best efforts required additional funding, they had to notify and take the issue to the General Assembly as a priority item in the Governor's proposed budget. If they did not need funding, they had to do everything in their power to comply.

a. The Five Cabinet Secretary Defendants. As signatories to the CBAs with COAD, DOC Commissioner defendants Taylor, Danberg and Coupe as well as OMB Director defendants Visalli and Maxwell each were legally obligated to do everything in their power to: ensure that there was "sufficient staffing to ensure a safe and secure work environment;" provide a "safe and healthy work environment" for the correctional officers; and

[20] Because no discovery has taken place, plaintiffs have not seen the prior union contracts and defendants omitted them from their selective appendix, but given the specific allegation that all prior CBAs between the DOC and the union (be it COAD or its predecessor) were similar (D.I. 1 ¶ 42), it is reasonable to expect that the other Commissioner defendants were signatories or were bound by their predecessors' signatures. If discovery reveals that prior OMB Directors also were signatories to those earlier CBAs, the Complaint will be amended to add them as defendants.

to provide training sufficient to allow them to function safely and securely. Instead, as set forth in the Facts above, these defendants did the opposite and actively undermined the "solemn agreement" they signed and were legally required to obey. Local 1726, 298 A.2d at 368.

b. The Governor Defendants. Although not signatories themselves, Governor defendants Markell and Minner's actions were even worse.[21] They authorized their hand picked cabinet secretary defendants to sign the CBAs and deceive COAD and all correctional officers, all while actively enacting new policies which directly contradicted their legal obligations under the CBA. They:

- failed to notify the General Assembly of the problems and instead actively deceived that legislative body and falsely assured it that conditions were safe, (see, e.g. D.I. 1 ¶ 109-111, 116);
- repeatedly refused to fill vacant positions that had been fully funded by the General Assembly, (id. ¶ 127); and
- refused to spend money already allocated to the DOC by the General Assembly and returned millions of dollars in unspent funds to the state's General Fund. (Id. ¶ 128).

Putting to the side the actual allocated funds they returned unspent and fully funded vacant positions they refused to fill, if the Governor defendants felt that more financial resources were necessary, they had to do the jobs they were elected to do, notify the General Assembly and request the funds. This is not rocket science. The most compelling evidence of defendants' conscious disregard and deliberate indifference is revealed by looking at what their successor did.

---

[21] Article III, § 1 of the Delaware Constitution vests the "supreme executive powers of the State" in the Governor. As the Supreme Court has explained in a directly analogous context, "the President cannot delegate ultimate responsibility or the active obligation to supervise that goes with it because Article II [of the U.S. Constitution] makes a single President responsible for the actions of the Executive Branch." Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 496-97 (2010) (internal punctuation omitted). In the same way that the "buck stops with the President," id. at 493, the buck stops with the Governors, who cannot "escape responsibility for [their] choices by pretending that they are not [their] own." Id. at 497.

The speed with which the newly elected and current Governor of Delaware and his new appointees at DOC and OMB worked in conjunction with COAD, notified the General Assembly and immediately acted to address and fix the problems is compelling evidence of what defendants should have done and the ease by which it could have been done. Indeed, Governor Carney did more in five short months to fix the DOC than defendants did in 16 long years.[22] In the words of the U.S. Supreme Court, "when such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking." Lewis, 523 U.S. at 853. There can be no doubt that defendants' actions shock the judicial conscience. At a bare minimum, the Complaint plausibly suggests so and so satisfies the 12(b)(6) standard of review.

IV. DEFENDANTS VIOLATED THE STATE CREATED DANGER DOCTRINE.

A. Independent Legal Theories. Plaintiffs note that the stand-alone Fourteenth Amendment substantive due process 'shocks the conscience' liability theory exists independently from the 'state created danger doctrine' theory. In other words, defendants can be held liable under a shocks the conscience theory (Count I) even in the absence of the "affirmative act" required under state created danger theory (Count II). The Third Circuit recognized this in Kaucher, 455 F.3d at 425-35, a case brought by a correctional officer challenging unsafe working conditions in the prison where he worked. There the Court analyzed these two liability theories independently: initially, 'shocks the conscience' as a stand-alone liability theory, see id. at 425-31 (exhaustively analyzing whether the "shocks the conscience" test has been satisfied); then followed by a separate and distinct analysis of 'state created danger.' See id. at 431-35 (proceeding to analyze and reject the same claim under the state created danger theory,

[22] See, e.g. http://news.delaware.gov/2017/06/20/48390/ (visited on July 25, 2017); and http://www.delawareonline.com/story/news/local/2017/06/20/agreement-raise-starting-pay-state-doc-correctional-officers/412282001/ (visited on July 25, 2017).

explaining "[n]or have the Kauchers alleged a valid claim under the state created danger doctrine"). Finally, also in Kaucher, contrary to defense claims, the Third Circuit did not categorically exclude correctional officer plaintiffs from substantive due process protections. Instead, the Court applied both traditional tests but found, factually, the claims in that case simply did not meet those tests.[23] Indeed, this is consistent with Judge Farnan's holding in the companion case where the Court held that plaintiff was entitled to discovery on this theory in the DOC employment context. Arnold v. Minner, 2005 WL 1501514, *6.

B. The Four Part Test. The "state-created danger doctrine has become a staple of our constitutional law," Bennett v. Phila., 499 F.3d 281, 287 (3d Cir. 2007), and is "widely recognized." Sanford, 456 F.3d at 304. It has four elements:

(1) the harm ultimately caused was foreseeable and fairly direct;

(2) a state actor acted with a degree of culpability that shocks the conscience;

(3) a relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts, or a member of a discrete class of persons subjected to the potential harm brought about by the state's actions, as opposed to a member of the public in general; and

(4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.

L.R., 836 F.3d at 242. L.R. is the most recent Third Circuit reported decision on this theory.

1. The Harm Caused Was Foreseeable and Fairly Direct. The "plaintiff must only allege an awareness on the part of the state actors that rises to the level of actual knowledge

[23] See also Eddy v. V.I. Water and Power Auth., 256 F.3d 204, 212-13 (3d Cir. 2001) (holding that the viability of a stand-alone 'shocks the conscience' liability theory in the employment context, even apart from the separate state created danger theory, has been clearly established in the Third Circuit since 1994, even when the facts in a particular case cited did not meet the standard).

or an awareness of risk that is sufficiently concrete to put the actors on notice of the harm." Id. at 245 (emphasis in original). As already exhaustively explained, defendants were aware of the specific risks and harm (see Argument **III.C.3.a.(2).** above) which were brought to their attention by numerous means, ranging from direct in person meetings to official government reports. (See Argument **III.C.3.b.** above). Thus defendants were aware of the risks and the harm caused was both direct and foreseeable.

a. Ordinary Common Sense and Experience. The use of "ordinary common sense and experience" are sufficient to make a risk foreseeable. Id. Since the harm caused by defendants' policies was repeatedly warned of, both by inside and outside official government reports, COAD, the media and others, it was not only clearly foreseeable, it was explicitly foreseen and actually predicted.

b. Basic Safety Requirements. The Third Circuit has recognized that the establishment of "basic safety requirements" regarding a danger is evidence of foreseeability of that danger. Henry v. City of Erie, 728 F.3d 275, 283 (3d Cir. 2013). Here, the requirement under the CBA that there be "sufficient staffing" to allow for a safe, secure and healthy work environment "any time prisoners are supervised" (Facts at **B.**) is fairly viewed as such a basic safety requirement. Indeed, the very reason such a provision was negotiated by COAD, and agreed to by defendants, was in recognition of the fact that prisoners cannot be safely supervised with insufficient numbers of staff.

2. Defendants Acted with a Degree of Culpability That Shocks the Conscience.[24] As established in Argument **III** above, defendants acted with a degree of

[24] In older cases, this element was sometimes phrased as requiring that the state actor "acted in willful disregard for the safety of the plaintiff." Estate of Smith, 430 F.3d at 153; accord Kneipp v. Tedder, 95 F.3d 1199, 1209 (3d Cir. 1996). However, this was clarified and

culpability that shocks the judicial conscience, satisfying this second element.

3. Plaintiffs Were Foreseeable Victims of Defendants' Acts. "The relationship that must be established between the state and the plaintiff can be 'merely' that the plaintiff was a foreseeable victim, individually or as a member of a distinct class." Phillips, 515 F.3d at 242. "Such a relationship may exist where the plaintiff was a member of a discrete class of persons subjected to the potential harm brought about by the state's actions." Id. There is "no principled distinction between a discrete plaintiff and a discrete class of plaintiffs. The ultimate test is one of foreseeability." Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 914 (3d Cir. 1997).

Here, plaintiffs were not 'random individuals' who happened upon these dangers. Cf. Phillips, 515 F.3d at 239 (a "distinction exists between harm that occurs to an identifiable or discrete individual under the circumstances and harm that occurs to a 'random' individual with no connection to the harm-causing party."). Instead, plaintiffs were correctional officers and members of COAD, working at DCC, a prison operated by defendants. Numerous CBAs contained contractual obligations requiring sufficient staffing to allow plaintiffs and the rest of the correctional officers to work safely and securely at DCC and other prisons. Defendants' failure to live up to their contractual obligations would place, and did place, plaintiffs in grave danger. So clearly as members of the class of correctional officers at DCC, plaintiffs were foreseeable victims of defendants' actions and satisfy this third element. The defense argument to the contrary is specious.

4. An Affirmative Act That Created, Increased or Made Plaintiffs More Vulnerable to a Danger.

---

changed in light of the subsequent U.S. Supreme Court decision in Lewis. See Sanford, 456 F.3d at 304 (noting the same).

a. How to Define an "Affirmative Act"? Defendants can be liable if they "create plaintiffs' peril, increase their risks of harm, or act to render them more vulnerable to" a danger. D.R., 972 F.2d at 1374. "Liability ... is predicated upon the states' affirmative acts which work to plaintiffs' detriment in terms of exposure to danger." Id. In situations where the plaintiff's injuries are inflicted by a third party, the Third Circuit has explained that the affirmative act requirement looks to whether the state actor:

- "exercised his or her authority to create a foreseeably dangerous situation." Kaucher, 455 F.3d at 432.
- "used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur." Bright v. Westmoreland County, 443 F.3d 276, 283 (3d Cir. 2006); or
- "creat[ed] or exacerbat[ed] the danger posed by" the third parties. D.R., 972 F.2d at 1376.

b. A Difficult Line to Draw. In its most recent decision on the issue, our Circuit acknowledged the "inherent difficulty in drawing a line between an affirmative act and a failure to act. Often times there is no clear line to draw; virtually any action may be characterized as a failure to take some alternative action." L.R., 836 F.3d at 242. This is consistent with what the Third Circuit en banc has long declared -

> We do not want to pretend that the line between action and inaction, between inflicting and failing to prevent the infliction of harm, is clearer than it is. If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.

D.R., 972 F.2d at 1374.

c. The Helpful Framework - Departure from the Status Quo. In its most recent decision, the Third Circuit created a helpful framework to aid the trial courts in addressing this distinction. In L.R. v. Sch. Dist. of Phila., the Court instructed that:

> Rather than approach this inquiry as a choice between an act and an omission, we find it useful to first [1] evaluate the setting or the 'status quo' of the environment before the alleged act or omission occurred, and then [2] to ask whether the state actor's exercise of authority resulted in a departure from that status quo.

L.R., 836 F.3d at 243 (enumeration added). "[D]eparture from th[e] status quo" is key. Id.

In L.R., the Court looked at "a typical kindergarten classroom," finding that it is "closely supervised," "freedom of movement is restricted," it is unlikely that students "wander unattended" and that the teacher "acts as the gatekeeper." Id. This was then viewed as the status quo, a "safe" environment absent some departure from that status quo. Id.

(1). The Status Quo at DCC. As set forth in the Facts above, the factual status quo at DCC was specifically pled at length in the Complaint (see Facts at **C.**), none of which was challenged by defendants in their motions (nor could they under the factual standard of review). Before defendants arrived and enacted their polices which ultimately destroyed the DOC, the DCC and other prisons all followed and abided by certain fundamental tenets or pillars of prison operations. They were: highly secure; well staffed; had sufficient numbers of well trained and equipped correctional officers to allow them to safely and securely function; the safety of the officers was paramount; any temporary shortage of staff was compensated for and protected against by an increase in other non-staff dependent security measures; and inmates were closely supervised and had restricted movement. (D.I. 1 ¶ 48-57). This was the status quo.

Although DCC could be dangerous, it was considered to be "manageably dangerous." Issues may arise, but if the system functions properly, those issues are addressed and resolved. Small problems do not turn into large problems unless one of the above fundamental tenets or pillars breaks down or is not functioning. Only then does a prison go from being a "manageably dangerous" place to being an "unmanageably dangerous" place. (Id. ¶ 58-61). Again, the

defense did not challenge any of these key facts and they are uncontested.

(a). The Legal Obligations Imposed by the Union Contract Also Are Evidence of the Same. In addition to the specific factual allegations in the Complaint discussed above, the next best evidence of the status quo specific to working conditions has already been discussed at length and is similarly factually unchallenged by the defense - the CBA. (See Facts at **B.** above). The union contract with COAD, where the working conditions at DCC were specifically agreed to by defendants' signatures on the dotted line, or approval of the signing by their handpicked executive cabinet secretary subordinates, legally obligated them to provide:

- "*sufficient staffing* to ensure a *safe and secure work environment* appropriate for penal institutions at all work locations any time prisoners are supervised." (D.I. 1 ¶ 39).
- "a safe and healthy work environment for all employees." (Id. ¶ 40).
- training to all of its employees, to enable them to function safely and securely in the prisons. (Id. ¶ 41).

Sufficient staffing to ensure a safe, secure and healthy working environment and training sufficient to allow the same, this was the unchallenged status quo.

(2). Defendants' Actions Caused a Departure from the Status Quo. As set forth in the Facts above, defendants enacted various new policies which caused departures from the uncontested prior status quo.

(a). The Minner Defendants. The new policies enacted by and other actions taken by the Minner defendants are found in the Facts above. (See Facts at **D., D.1., D.2., F.1., I.**). These include:

- enacting a new policy of not filling vacant positions, (D.I. 1 ¶ 62-64, 68);
- ordering the removal of all vacant job positions in the DOC, (id. ¶ 67, 69, 71-73);

- eliminating searches for weapons and contraband and adopting basic security policies which defied ordinary common sense, (id. ¶ 89-93);
- eliminating officer training, (id. ¶ 94-97);
- lying to the General Assembly about the many dire safety issues at DCC, (id. ¶ 102-104, 111);
- refusing to fill vacant positions that had already been fully funded by the General Assembly, (id. ¶ 127); and
- refusing to spend money already allocated by the General Assembly and instead returning millions of dollars in unspent funds to the state's General Fund. (Id. ¶ 128).[25]

Each of these actions, viewed both individually and *in toto*, caused a departure from the status quo of sufficient staffing to ensure a safe, secure and healthy working environment and caused the DCC to go from a "manageably dangerous" status quo to "unmanageably dangerous" crisis conditions. (D.I. 1 ¶ 61-63). As explained in the Facts, the Complaint specifically and factually details how these policies, *inter alia*, created a "dangerous environment" (Facts at **H.**), caused understaffing and other problems to reach "crisis proportions" which would "inevitably lead to murder, injury or even rape" (Facts at **F.**), and in the words of the DOC's own Outside Security Expert, "somebody is going to be seriously injured or killed." (Facts at **E.**).

(b). The Markell Defendants. The new policies enacted by, prior policies expanded upon and other actions taken by the Markell defendants are found in the Facts above. (See Facts at **J., J.1., J.2., J.3., K., L.1., M.**). These include:

- enacting a new policy of doubling down and relying even more heavily on overtime than had the Minner defendants, (D.I. 1 ¶ 134, 136, 131-33);

[25] These latter two also are prime examples of the abdication of essential job functions which the Third Circuit has found to qualify as an affirmative misuse of state authority. See L.R., 836 F.3d at 244 (after surveying the case law, recognizing that when "the particular responsibilities that were relinquished ... [a]re an integral part of the state actor's job function ... [s]uch actions are an affirmative misuse of state authority.").

- ordering that the key findings of severe understaffing in the 2005 Executive Task Force Report were to be ignored in order to deceive the General Assembly into believing that the conditions at DCC and the DOC in general were safe and secure, (id. ¶ 137-38, 135, 165-66);

- enacting a formal new policy of not filling existing vacant positions, including a specific order that at least 90 vacant DOC positions must go unfilled at all times, most of which were at DCC, (id. ¶ 154-66); and

- enacting a new policy of releasing approximately 100 of the most dangerous violent offenders back into the general prison population at DCC, most of whom were placed in Building C. (Id. ¶ 177-79, 196).

Each of these actions, viewed both individually and *in toto*, caused a departure from the status quo of sufficient staffing to ensure a safe, secure and healthy working environment and caused the DCC to go from a "manageably dangerous" status quo to "unmanageably dangerous" crisis conditions. (D.I. 1 ¶ 129-130, 61). As explained in the Facts, the Complaint specifically and factually details how these policies, *inter alia*, were "going to result in the death of correctional officers, specifically including those at DCC" (Facts at **J.3.**), created a situation that was "critical" and "cannot continue" because "sometime between January and July [of 2017] the wheels are going to come off" and "[s]omeone is bound to be seriously injured - or even worse." (Facts at **M.**).

(3). Discussion. By taking these actions, defendants rendered plaintiffs more vulnerable to and increased the risk of harm they faced as correctional officers at DCC. D.R. 972 F.2d at 1374. Creation of these policies, later expansion of others as well as the giving of these many orders "exacerbat[ed] the danger posed" by prisoners at DCC, id. at 1376, and in doing so "create[d] a foreseeably dangerous situation," Kaucher, 455 F.3d at 432, by "creat[ing] an opportunity that otherwise would not have existed for the third party's crime to occur." Bright, 443 F.3d at 283.

Defendants' actions changed the status quo of "sufficient staffing to ensure a safe and secure work environment" (see Arguments **IV.B.4.c.(1).** and **IV.B.4.c.(1).(a).** above) by cutting correctional officer staffing to critical levels and proceeding to take additional actions and enact further policies which made the crisis worse over the next 16 years. As defendant Coupe succinctly admitted:

- "working for an extended period of time without full staffing elevates security risks and decreases security." (D.I. 1 ¶ 142).
- "there is an inverse correlation between staffing levels and risk in prison." (Id. ¶ 143).[26]

This is one of the very reasons why COAD negotiated the specific terms of the CBA at issue (Facts at **B.** above), because having sufficient staffing to ensure a safe and secure working environment minimizes risk. Or to use the factual terms from the Complaint, allows for a "manageably dangerous" environment - an environment where the risks are manageable because of the sufficient levels of staff. Yet defendants' actions, policies and orders flipped this, drastically reducing staffing to crisis levels, thus inversely elevating security risk, creating an "unmanageably dangerous" environment. Thus, plaintiffs have proven numerous affirmative actions under the case law, establishing the fourth and final element of the state created danger doctrine.[27] At a bare minimum, the Complaint plausibly suggests so and so satisfies the 12(b)(6) standard of review.

V. DEFENDANTS ARE LIABLE FOR FAILURE TO TRAIN AND FOR MAINTENANCE OF POLICIES, PRACTICES AND CUSTOMS WHICH

---

[26] The Complaint discusses this factual correlation elsewhere as well. (Id. ¶ 81-82 - "Security and understaffing go hand in hand ... [t]he more understaffed a facility is, the higher the risk of harm to the correctional officers....").

[27] Of course, as explained in Argument **II.E.** above, the law is clear that evidentiary standards are not pleading standards and so plaintiffs need not even plead the elements of this legal theory to survive a 12(b)(6) motion.

CAUSED THE VIOLATION OF PLAINTIFFS' RIGHTS TO SUBSTANTIVE DUE PROCESS.

A. The Union Contracts Required Necessary Safety and Security Training. The CBAs have long legally obligated defendants "to provide training to all of its employees, to enable them to function safely and securely in the prisons." (D.I. 1 ¶ 41-42). Prior to defendants' tenures, correctional officers received this vital training. (Id. ¶ 52)

B. But Defendants' Policies Eliminated This Vital Training. The Complaint explains that defendants "eliminated necessary training of correctional officers" which was vital to safety and security as required by the CBA, and thus caused "numerous" specifically identified "high profile major security breakdowns" (id. ¶ 94-97), including the June 2004 rape (id. ¶ 112, 115), as well as the February 2017 uprising. (Id. ¶ 192, 424; see ¶ 131-137).

C. The 2005 Executive Task Force Report Conclusions. Sadly, this Report:

- found there was "inadequate training and supervision" which caused "great confusion" at DCC, (id. ¶ 121);
- criticized "training and policies," finding them to be "abysmal," (id. ¶ 122);
- noted that "[i]n many cases, no uniform training/policy exists for specific critical functions," (id. ¶ 122); and
- found that "the DOC policies and procedures, including standard operating procedures and post orders, are useless, and too outdated or too vague to be useful." (Id. ¶ 121).

Defendants had actual knowledge of and ignored all of this. (Id. ¶ 404, 124, 102).

D. The June 2017 Oberly Report Again Details Continued Training Failures. Not necessary, but consistent with and issued after the filing of the Complaint, and completely omitted from the selective defense appendix, is the June 2017 Oberly Report[28] commissioned by

[28] See news.delaware.gov/files/2017/06/Independent-Review-Initial-Report-June-2-2017.pdf (visited on August 4, 2017).

the current Governor into the causes of the February 2017 uprising. As to training, it concludes:

- "the current training curriculum is inadequate for the challenging conditions of the" DCC. (Oberly at 28).

- "The continued use of outdated training creates an organization that is out of touch, one dimensional, and unable to cope with current correctional thinking and practices that often drive policies and court orders impacting corrections across the country." (Id.).

- "The continued use of outdated training exposes the Delaware DOC to operational risks, safety and security issues, low morale and litigation. The Delaware DOC should address training deficiencies to identify and implement best practices, mitigate risk, improve safety and security, increase professionalism, improve operations, and reduce exposure to adverse litigation at the department and facility levels." (Id. at 25).

It also specifically details many of the severe training and procedural failures still plaguing the DCC.[29] These many findings and conclusions of training and procedural deficiencies from the Oberly Report are consistent with the allegations set forth in the Complaint.

E. Discussion. The defense briefing does not challenge the viability of the legal theory against these defendants due to their supervisory responsibilities over these areas as previously recognized by Judge Farnan in the companion case, see Arnold v. Minner, supra., but instead appears to contend that the facts simply do not add up to a violation. However, as review of the above factual recitation makes clear, that contention is incorrect. This determination of factual viability and merit is supported by the findings and conclusions of both the 2005 Executive Task

[29] Among other things, it: (1) notes "the lack of regular training and the quality of training provided" to correctional officers, (id. at 10); (2) recommends that "[a]ll staff, not just specialized units, should receive regular and quality training, skills practice, and testing," (id. at 11); (3) finds recent "procedural modifications" made to institute certain policies "may have impacted the safety and security of the institution, putting staff ... at risk," (id. 19); (4) notes some supervisors "have not received appropriate supervisory training," (id. at 21); (5) observes reports that "training at [DCC] is limited and 'horrible,'" (id. at 25); (6) finds insufficient staffing levels [ ] limit training opportunities and the ability of personnel to participate in training because of the demands of maintaining basic facility operations," (id. at 25); (7) makes numerous specific training recommendations, (id. 28-29); and (8) finds "policies and procedures are not updated and are not followed" because of systemic communication breakdowns. (Id. 30).

Force Report and the 2017 Oberly Report. As noted in Argument **II.C.1.a.** above, both are "detailed insider account[s]," which "strongly support the plausibility of" plaintiffs' allegations. Schuchardt, 839 F.3d at 348. Thus, and consistent with Judge Farnan's earlier ruling in the companion case denying a similar defense motion to dismiss the same legal theory, this Court should deny the defense motion to dismiss Count III and allow discovery to begin because "a plaintiff cannot be expected to know what training was in place or how training procedures were adopted without the benefit of discovery." Arnold v. Minner, 2005 WL 1501514, *6. At a bare minimum, the Complaint plausibly suggests defendants' culpability for failure to train and for maintaining deficient polices and procedures and so satisfies the 12(b)(6) standard of review.

VI. DEFENDANTS CAUSED THE CONSTITUTIONAL VIOLATIONS.

A. A Person is Responsible for the Natural Consequences of Their Actions. The defense claims of insufficient involvement in the constitutional violations (see, e.g. DOC OB at 21) lack merit. Briefly, § 1983 is to "be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." Monroe v. Pape, 365 U.S. 167, 187 (1961).[30] Proximate cause is established if a constitutional violation "was made reasonably probable by permitted continuation of the custom" at issue. Watson v. Abington Tp., 478 F.3d 144, 156 (3d Cir. 2007).[31] The Third Circuit has explained that when a defendant "was on notice

[30] Thus there can be more than one proximate cause of an injury, see e.g. In re Frescati Shipping Co., Ltd., 718 F.3d 184, 212 (3d Cir. 2013); Duphily v. Del. Elec. Co-op., Inc., 662 A.2d 821, 829 (Del.1995), and questions of proximate, intervening and superceding cause are for the jury. See, e.g. Rivas v. City of Passaic, 365 F.3d 181, 193 (3d Cir. 2004); Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830, 840–41 (1996); Duphily, 662 A.2d at 830.

[31] The First, Fourth, Fifth, Seventh, Eighth, Ninth and Tenth Circuits all hold a defendant liable under § 1983 for "setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury." See, e.g. Martinez v. Carson, 697 F.3d 1252, 1255 (10th Cir. 2012); Lacey v. Maricopa Cty., 693 F.3d 896, 915 (9th Cir. 2012); Hughes v. Stottlemyre, 454 F.3d 791, 798 (8th Cir. 2006); Morris v.

that its procedures were constitutionally deficient," due both to prior incidents and a "custom of laxity," yet still "fail[s] to act" or take remedial measures, proximate cause exists. Bielevicz, 915 F.2d at 851 (citing Colburn v. Upper Darby Tp., 838 F.2d 663, 672 (3d Cir. 1988)). As explained at length both above and below, defendants were on notice by numerous means and methods, yet consciously refused to act or take remedial measures.

B. The Law of Personal Involvement. "A defendant in a civil rights action must have personal involvement in the alleged wrongs." Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988). Personal involvement can be shown in numerous ways, including:

- "through allegations of *personal direction* or of *actual knowledge and acquiescence*." Id. at 1207 (emphasis added).
- "if he or she *participated in violating* the plaintiff's rights, *directed others to violate* them, or, *as the person in charge, had knowledge of and acquiesced in his subordinates' violations*." A.M. ex rel. J.M.K. v. Luzerne Cty. Juvenile Det. Ctr., 372 F.3d 572, 586 (3d Cir. 2004) (emphasis added).
- "if he or she *implements a policy or practice* that creates an unreasonable risk of a constitutional violation on the part of the subordinate and the supervisor's *failure to change the policy or employ corrective practices* is a cause of this unconstitutional conduct." Argueta, 643 F.3d at 72 (emphasis added).
- by showing a defendant "*tolerated past or ongoing misbehavior*." Id. (emphasis added).

C. Defendants Were Personally Involved. The Complaint details defendants' personal involvement in the Fourteenth Amendment violations at the center of this case. Although already addressed above (see Argument **IV.B.4.c.(2).**), plaintiffs again note the following:

1. Defendant Markell. As Governor "vested with the supreme Executive powers

---

Dearborne, 181 F.3d 657, 672 (5th Cir. 1999); Sales v. Grant, 158 F.3d 768, 776 (4th Cir. 1998); Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 561 (1st Cir. 1989); Conner v. Reinhard, 847 F.2d 384, 397 (7th Cir. 1988). Although not necessary under our egregious facts, our Circuit has not yet had the opportunity to adopt this standard. See Burnsworth v. PC Lab., 364 Fed.Appx. 772, 775 (3d Cir. 2010).

of the State and the duty to faithfully execute all its laws," (D.I. 1 ¶ 21), defendant Markell:

- "enacted" a new policy to "rely upon even more overtime" than had his predecessor defendant Minner, "rather than to fill the critical shortfall of officers." (Id. ¶ 134, 133, 139-141).

- repeatedly "ordered that all the key findings of severe understaffing in the 2005 Executive Task Force Report were to be ignored to deceive the public and the legislature into thinking that the conditions in the DOC prisons in general, and DCC in particular, were safe and secure for all involved." (Id. ¶ 137, 165).

- "enacted an official new policy of not filling vacant DOC positions," including a specific order "that at least 90 vacant DOC positions must go unfilled at all times," most of which were at DCC. (Id. ¶ 154-156).

- "ordered that his vacant positions policy must be obeyed, even when critical staffing and safety requirements necessitated that these positions be filled ... even when doing so guaranteed that correctional officers ... would be severely injured, or killed." (Id. ¶ 157-59).

- in 2016, "enacted a new policy and released approximately 100 of the most dangerous violent offenders back into the general prison population at DCC, a majority of whom were placed in Building C," but due to the understaffing problems created by his other policies set forth above, did not increase security staffing or any other security measures to compensate. (Id. ¶ 177-84). Defendant Markell had actual knowledge of the security crisis this policy created due to being personally warned by COAD and also by internal reports up the chain of command which were relayed to him, but refused to take remedial action as required by the CBA with COAD. (Id. ¶ 183-91, 200-01).

- because of his orders and policies, numerous essential security features were eliminated, including, among other things, both random and targeted security sweeps for known and unknown weapons and contraband. (Id. ¶167-176).

2. Defendant Minner. As predecessor to defendant Markell, and with identical "supreme Executive powers" and duties, (id. ¶ 22, 21), defendant Minner:

- "made a policy decision not to fill vacant correctional officer positions within the DOC." (Id. ¶ 64).

- "in an effort to hide the extent of the severe understaffing in DOC facilities," she "ordered the removal of any vacant job positions at DOC" in order "to distort the actual numbers so they did not appear as bad for legislative consumption." (Id. ¶ 67, 72).

- "enacted policies ... which compromised the security of ... DCC," including, among other things, elimination of searches for weapons and elimination of various types of

"necessary training." (Id. ¶ 89-90, 93-95, 97).

- ignored "internal reports," numerous warnings from COAD and widespread media coverage of the security crisis at DCC and instead "repeatedly reassured the public and the legislature that the conditions ... were safe and secure for all involved." (Id. ¶ 101-11).

- affirmatively lied to the public and the legislature and "denied that the severe levels of dangerous understaffing had played any role" in the July 2004 security breakdown at DCC. (Id. ¶ 116-117).

- ignored the findings of her own 2005 Executive Task Force Report. (Id. ¶ 124).

- "refused to fill vacant positions that had been fully funded by the Delaware General Assembly" and instead "returned millions of dollars in unspent funds to the State's General Fund each year." (Id. ¶ 127-28).

3. Defendant Taylor. As DOC Commissioner under Governor Minner with responsibility for all DOC operations and for "implementing the orders and policies of the Governor," (id. ¶ 23), defendant Taylor:

- "made a policy decision not to fill vacant correctional officer positions." (Id. ¶ 64).

- "implement[ed] Minner's order" to remove "vacant job positions at DOC" in order to "hide the extent of the understaffing" so the "actual numbers ... did not appear as bad for public and legislative consumption." (Id. ¶ 67-68, 72).

- "enacted policies ... which compromised the security of ... DCC," including, among other things, elimination of searches for weapons and elimination of various types of "necessary training." (Id. ¶ 89-90, 93-95, 97).

- ignored "internal reports," numerous warnings from COAD and widespread media coverage of the security crisis at DCC and instead deceptively and "repeatedly reassured the public and the legislature that the conditions ... were safe and secure for all involved." (Id. ¶ 101-111).

- affirmatively lied to the public and the legislature and "denied that the severe levels of dangerous understaffing had played any role" in the July 2004 security breakdown at DCC. (Id. ¶ 116).

- ignored the findings of the 2005 Executive Task Force Report. (Id. ¶ 124).

- "refused to fill vacant positions that had been fully funded by the Delaware General Assembly" and instead "returned millions of dollars in unspent funds to the State's

General Fund each year." (Id. ¶ 127-28).

4. Defendant Danberg. First as Deputy Commissioner serving under defendant Taylor and then as DOC Commissioner starting under Governor Minner and continuing under Governor Markell with responsibility for all DOC operations and for "implementing the orders and policies of the Governor," (id. ¶ 24, 23), defendant Danberg:

- "made a policy decision not to fill vacant correctional officer positions." (Id. ¶ 64).
- "implement[ed] Minner's order" to remove "vacant job positions at DOC" in order to "hide the extent of the understaffing" so the "actual numbers ... did not appear as bad for public and legislative consumption." (Id. ¶ 67-68, 72).
- "enacted policies ... which compromised the security of ... DCC," including, among other things, elimination of searches for weapons and elimination of various types of "necessary training." (Id. ¶ 89-90, 93-95, 97).
- ignored "internal reports," numerous warnings from COAD and widespread media coverage of the security crisis at DCC and instead deceptively and "repeatedly reassured the public and the legislature that the conditions ... were safe and secure for all involved." (Id. ¶ 101-111).
- affirmatively lied to the public and the legislature and "denied that the severe levels of dangerous understaffing had played any role" in the July 2004 security breakdown at DCC. (Id. ¶ 116).
- ignored the findings of the 2005 Executive Task Force Report. (Id. ¶ 124).
- "refused to fill vacant positions that had been fully funded by the Delaware General Assembly" and instead "returned millions of dollars in unspent funds to the State's General Fund each year." (Id. ¶ 127-28).
- "implemented" defendant Markell's new policy to "rely upon even more overtime rather than to fill the critical shortfall of officers." (Id. ¶ 136, 134, 133, 139-141).
- "implemented" defendant Markell's several orders "that all the key findings of severe understaffing in the 2005 Executive Task Force Report were to be ignored to deceive the public and the legislature into thinking that the conditions in the DOC prisons in general, and DCC in particular, were safe and secure for all involved." (Id. ¶ 138, 166, 137, 165).
- "implemented" defendant Markell's "official new policy of not filling vacant DOC positions," including his specific order "that at least 90 vacant DOC positions must go unfilled at all times," most of which were at DCC. (Id. ¶ 163, 154-156).

- "implemented" defendant Markell's order "that his vacant positions policy must be obeyed, even when critical staffing and safety requirements necessitated that these positions be filled ... even when doing so guaranteed that correctional officers ... would be severely injured, or killed." (Id. ¶ 163, 157-59).

- because of his implementation of defendant Markell's orders and policies, numerous essential security features were eliminated, including, among other things, both random and targeted security sweeps for known and unknown weapons and contraband. (Id. ¶ 167-176).

5. Defendant Coupe. As DOC Commissioner under Governor Markell with responsibility for all DOC operations and for "implementing the orders and policies of the Governor," (id. ¶ 25, 23), defendant Coupe:

- "implemented" defendant Markell's new policy to "rely upon even more overtime rather than to fill the critical shortfall of officers." (Id. ¶ 136, 134, 133, 139-141).

- "implemented" defendant Markell's several orders "that all the key findings of severe understaffing in the 2005 Executive Task Force Report were to be ignored to deceive the public and the legislature into thinking that the conditions in the DOC prisons in general, and DCC in particular, were safe and secure for all involved." (Id. ¶ 138, 166, 137, 165).

- "implemented" defendant Markell's "official new policy of not filling vacant DOC positions," including his specific order "that at least 90 vacant DOC positions must go unfilled at all times," most of which were at DCC. (Id. ¶ 163, 154-156).

- "implemented" defendant Markell's order "that his vacant positions policy must be obeyed, even when critical staffing and safety requirements necessitated that these positions be filled ... even when doing so guaranteed that correctional officers ... would be severely injured, or killed." (Id. ¶ 163, 157-59).

- in 2016, he helped "enact[ ] a new policy and released approximately 100 of the most dangerous violent offenders back into the general prison population at DCC, a majority of whom were placed in Building C," but due to the understaffing problems created by defendant Markell's other policies, did not increase security staffing or any other security measures to compensate. (Id. ¶ 177-84). Defendant Coupe had actual knowledge of the security crisis this policy created due to being personally warned by COAD and also by internal reports up the chain of command to him by the Warden and Deputy Warden at DCC, but refused to take remedial action as required by the CBA with COAD, which he had signed. (Id. ¶ 183-91, 38, 200-01).

- because of his implementation of defendant Markell's orders and policies, numerous essential security features were eliminated, including, among other things, both random

and targeted security sweeps for known and unknown weapons and contraband. (Id. ¶ 167-176).

6. Defendant Visalli. As OMB Director under Governor Markell with responsibility "for preparing and implementing the Governor's policy agenda and orders" and other duties assigned by the Governor (id. ¶ 26), defendant Visalli:

- "implemented" defendant Markell's new policy to "rely upon even more overtime rather than to fill the critical shortfall of officers." (Id. ¶ 136, 134, 133, 139-141).
- "implemented" defendant Markell's several orders "that all the key findings of severe understaffing in the 2005 Executive Task Force Report were to be ignored to deceive the public and the legislature into thinking that the conditions in the DOC prisons in general, and DCC in particular, were safe and secure for all involved." (Id. ¶ 138, 166, 137, 165).
- "implemented" defendant Markell's "official new policy of not filling vacant DOC positions," including his specific order "that at least 90 vacant DOC positions must go unfilled at all times," most of which were at DCC. (Id. ¶ 160, 154-156).
- "implemented" defendant Markell's order "that his vacant positions policy must be obeyed, even when critical staffing and safety requirements necessitated that these positions be filled ... even when doing so guaranteed that correctional officers ... would be severely injured, or killed." (Id. ¶ 160-62, 157-59).
- in 2016, she helped "enact[ ] a new policy and released approximately 100 of the most dangerous violent offenders back into the general prison population at DCC, a majority of whom were placed in Building C," but due to the understaffing problems created by defendant Markell's other policies, did not increase security staffing or any other security measures to compensate. (Id. ¶ 177-84). Defendant Visalli had actual knowledge of the security crisis this policy created due to being personally warned by COAD and also by internal reports up the chain of command, but refused to take remedial action as required by the CBA with COAD, which she signed. (Id. ¶ 183-91, 38, 201).
- because of her implementation of defendant Markell's orders and policies, numerous essential security features were eliminated, including, among other things, both random and targeted security sweeps for known weapons and contraband. (Id. ¶ 167-176).

7. Defendant Maxwell. First as Deputy Director under defendant Visalli and then as OMB Director under Governor Markell with responsibility "for preparing and implementing the Governor's policy agenda and orders" and other duties assigned by the Governor (id. ¶ 26), defendant Maxwell:

- "implemented" defendant Markell's new policy to "rely upon even more overtime rather than to fill the critical shortfall of officers." (Id. ¶ 136, 134, 133, 139-141).

- "implemented" defendant Markell's several orders "that all the key findings of severe understaffing in the 2005 Executive Task Force Report were to be ignored to deceive the public and the legislature into thinking that the conditions in the DOC prisons in general, and DCC in particular, were safe and secure for all involved." (Id. ¶ 138, 166, 137, 165).

- "implemented" defendant Markell's "official new policy of not filling vacant DOC positions," including his specific order "that at least 90 vacant DOC positions must go unfilled at all times," most of which were at DCC. (Id. ¶ 160, 154-156).

- "implemented" defendant Markell's order "that his vacant positions policy must be obeyed, even when critical staffing and safety requirements necessitated that these positions be filled ... even when doing so guaranteed that correctional officers ... would be severely injured, or killed." (Id. ¶ 160-62, 157-59).

- In 2016, he helped "enact[ ] a new policy and released approximately 100 of the most dangerous violent offenders back into the general prison population at DCC, a majority of whom were placed in Building C," but due to the understaffing problems created by defendant Markell's other policies, did not increase security staffing or any other security measures to compensate. (Id. ¶ 177-84). Defendant Maxwell had actual knowledge of the security crisis this policy created due to being personally warned by COAD and also by internal reports up the chain of command, but refused to take remedial action as required by the CBA with COAD, by which he was bound. (Id. ¶ 183-91, 38, 201).

- because of his implementation of defendant Markell's orders and policies, numerous essential security features were eliminated, including, among other things, both random and targeted security sweeps for known weapons and contraband. (Id. ¶ 167-176).

D. Conclusion. As detailed above, defendants each had abundant personal involvement in causing the substantive due process violations set forth in Arguments **III-V**. These well pleaded factual allegations demonstrate that defendants created policies, gave orders, implemented and participated in implementing these policies and orders and also failed to change or correct them when their destructive effects became known, all of which, both individually and *in toto*, are more than sufficient to establish personal involvement under the case law, as well as proximate cause. (See Facts at **N.** above). At a bare minimum, the Complaint plausibly suggests so and satisfies the 12(b)(6) standard of review.

VII. THIS ACTION IS TIMELY.

The defense claim that this action is untimely (see, e.g. DOC OB at 22), is incorrect. The statute of limitations for a § 1983 claim in Delaware is two years. See Wallace v. Kato, 549 U.S. 384, 387 (2007); Shockley v. Minner, 726 F.Supp.2d 368, 374-75 (D.Del. 2010); 10 Del.C. § 8119. "It is axiomatic that the statute of limitations begins to run when the plaintiff's cause of action accrues." Shockley, 726 F.Supp.2d at 375. "The date of accrual of a § 1983 claim is a matter of federal law." Estate of Lagano, 769 F.3d at 860. "Accrual is the occurrence of damages caused by a wrongful act - when a plaintiff has a complete and present cause of action, that is, when the plaintiff can file suit and obtain relief." Id. (internal punctuation omitted). As the Supreme Court has explained, the "cause of action accrues, and the statute of limitations commences to run, when the wrongful act or omission results in damages." Wallace, 549 U.S. at 391.[32]

Plaintiffs did not suffer injuries or damages as a result of defendants' wrongdoing until February 1-2, 2017 (see D.I. 1 ¶ 202-373, 384-387), when the statute of limitations began to run. This action was filed on April 18, 2017, less than three months later. This lawsuit is timely.

VIII. SGT. FLOYD'S WIFE AND CHILDREN HAVE STANDING TO PURSUE THIS § 1983 WRONGFUL DEATH ACTION.

A. Introduction. Plaintiffs Saundra Floyd, Candyss C. White, Steven R. Floyd, Jr., and Chyvante E. Floyd have filed a § 1983 wrongful death action as the surviving spouse and children of Sgt. Floyd. (D.I. 1 ¶ 14, 3, 7-13). Defendants challenge their standing to do so (DOC

[32] See Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1386 (3d Cir. 1994) ("A claim accrues in a federal cause of action as soon as a potential claimant either is aware, or should be aware, of the existence of and source of an injury."); Johnson v. Cullen, 925 F.Supp. 244, 248 (D.Del. 1996) ("A section 1983 claim accrues when a plaintiff knows or has reason to know of the injury that forms that basis of his or her cause of action.")

OB at 25-26; Gov. OB at 39-40),[33] betraying a fundamental misunderstanding of how § 1983 claims function under decades of Supreme Court and District of Delaware precedent.

B. The Law. "Rights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect." Carey v. Piphus, 435 U.S. 247, 254 (1978). Section 1983 "creates a species of tort liability in favor of persons who are deprived of rights, privileges, or immunities secured to them by the Constitution." Memphis Comm. Sch. Dist. v. Stachura, 477 U.S. 299, 305-06 (1986) (internal punctuation omitted). "[W]hen § 1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts." Id. at 306.

Briefly, as Judge Farnan has explained in another § 1983 correctional officer death case, because the text of § 1983 provides no guidance on evaluation of damages, under 42 U.S.C. § 1988(a) we look to the law of the forum state and, in death cases, apply the state's wrongful death and survival statutes. Balas v. Taylor, 567 F.Supp.2d 654, 661 (D.Del. 2008).[34] Stated another way, "a section 1983 [death] claim [ ] incorporates Delaware tort law principles, including those encompassed in a wrongful death action." Balas, 567 F.Supp.2d at 662.

So, looking to Delaware, a wrongful death "action may be maintained against a person whose wrongful act causes the death of another." 10 Del.C. § 3722(a). The purpose of the statute "is to permit the recovery of damages ... by persons injured as the result of the death of another

---

[33] Defendants appear to concede that Sgt. Floyd's estate is a proper plaintiff for the § 1983 survival action portion of this case. (See DOC OB at 26).

[34] In Judge Roth's words, "[w]hen the act which caused a death is itself charged as a 'constitutional tort' under section 1983, applicable survival and wrongful death statutes under state law will be applied," consistent with the purposes of § 1983. Sterner v. Wesley Coll., Inc., 747 F.Supp. 263, 273 (D.Del. 1990).

person." Id. at § 3725. The statute specifically identifies the spouse and children of the deceased as proper injured parties with standing to file a wrongful death action. Id. at § 3724(a).[35] So the defense is incorrect that only Sgt. Floyd's estate has a claim arising out of his death. As the Delaware Supreme Court has explained, a "Delaware wrongful death claim has always been a separate and different right of action than that held by the deceased." Deuley v. Dyncorp Int'l, Inc., 8 A.3d 1156, 1165 (Del. 2010) (internal punctuation omitted). "In Delaware, a wrongful death action is maintained for the benefit of the loved ones of the decedent and not for the benefit of the estate." Parlin v. Dyncorp Int'l, Inc., 2009 WL 3636756, *6 (Del.Super. Sept. 30, 2009). This is because Delaware law "recognizes that when a person dies as the result of another's wrongful conduct, there is injury not only to the deceased but also to immediate family members." Spencer v. Goodill, 2009 WL 3823217, *7 (Del.Super. Nov. 13, 2009).

Accordingly, as both Judge Farnan and Judge Roth have recognized, the Floyd family are proper plaintiffs to assert § 1983 claims arising out of the death of their beloved husband and father because § 1988(a) looks to and adopts underlying Delaware wrongful death principles consistent with the fundamental tort purpose of § 1983 to compensate for and deter others from violating cherished constitutional rights.[36] Thus they have a more than sufficient "personal stake" in the litigation because the Delaware wrongful death statute has created a "concrete and particularized" "legally protected interest," and they have suffered "actual" injury because of defendants' violation of Sgt. Floyd's constitutional rights which caused his death, which can be

---

[35] See Luff v. Hawkins, 551 A.2d 437, 438 (Del.Super. 1988) ("Only a party entitled to sue under the [Wrongful Death] Act may bring an action for wrongful death."); Lisowski v. Bayhealth Med. Ctr., Inc., 142 A.3d 518, 522 (Del.Super. 2016) (holding that a spouse may pursue a wrongful death claim).

[36] See, e.g. Stachura, 477 U.S. at 309 ("[s]ection 1983 presupposes that damages that compensate for actual harm suffice to deter constitutional violations.")

redressed[37] by a "favorable decision." Neuberger v. Gordon, 567 F.Supp.2d 622, 629 (D.Del. 2008) (the elements of constitutional standing).

IX. THE POLITICAL QUESTION DOCTRINE DOES NOT APPLY.

Putting to the side the mischaracterization of plaintiffs' legal claim, the defense attempt to invoke the political question doctrine fails (DOC OB at 23), because the doctrine applies only when the U.S. Constitution dictates that resolution of the question is in the hands of a co-equal branch of the federal government; it does not similarly defer to state government. A question "is properly deemed political when its resolution is committed by the Constitution to a branch of the Federal Government other than this Court." Elrod v. Burns, 427 U.S. 347, 351 (1976).[38] As the Supreme Court has repeatedly held, "it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the states, which gives rise to the 'political question.'" Baker v. Carr, 369 U.S. 186, 210 (1962); Elrod, 427 U.S. at 351. It "has no applicability to the federal judiciary's relationship to the States." Elrod, 427 U.S. at 352.[39]

---

[37] See 10 Del.C. § 3724(d) (listing the areas of damages recoverable to grieving spouses and children in wrongful death actions).

[38] See Japan Whaling Ass'n v. Am. Cetacean Soc., 478 U.S. 221, 230 (1986) ("The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch."); Texas Ass'n of Concerned Taxpayers, Inc. v. U.S., 772 F.2d 163, 165 (5th Cir. 1985)("A question is properly deemed political when resolution is committed by the Constitution to a branch of the federal government other than the judiciary"); Blount v. Mandel, 400 F.Supp. 1190, 1195 (D.Md. 1975) ("the 'political question' derives not from the fact that a state action gave rise to the controversy, but from the presentation of the controversy, whatever its origin, to the wrong branch of the Federal Government.").

[39] See Saldano v. O'Connell, 322 F.3d 365, 370 (5th Cir. 2003) ("The parameters of the political question doctrine generally extend to cover the federal judiciary's relationship to the *federal* government and not the federal judiciary's relationship to the States."); Gordon v. Gulf

At its core, this case presents the simple question of whether actions taken by state actors violate the Constitution. Resolution of such a question is well within the purview of this Court.[40]

X. LEGISLATIVE IMMUNITY DOES NOT APPLY.

A. Introduction. Defendants[41] cite the established body of law that under certain circumstances, state level executive branch officials may sometimes be entitled to legislative immunity. See Bogan v. Scott-Harris, 523 U.S. 44 (1998); Baraka v. McGreevey, 481 F.3d 187 (3d Cir. 2007). Yet this defense, like so many above, is doomed by: (1) the actual facts as pled; and (2) the consequences of the union contracts with COAD.

B. The Complaint Only Challenges Security Policies Within the Executive Branch. The Complaint just challenges numerous security policies enacted by two governors within their spheres of law enforcement responsibilities in the executive branch. (See, e.g. D.I. 1 ¶ 64 - Minner defendants' policy of not filling vacant positions; ¶ 154 - Markell defendants' policy of not filling vacant positions). Indeed the theme of the Complaint is that defendants affirmatively

---

Coast Rod, Reel and Gun Club, 153 F.3d 190, 194 (5th Cir. 1998) ("the potential for a clash between a federal court and other branches of the *federal* government is fundamental to the existence of a political question ; a simple conflict between a federal court and state agencies does not implicate the doctrine."); Baker, 369 U.S. at 218 ("the nonjusticiability of such claims has nothing to do with their touching upon matters of state governmental organization.").

[40] See, e.g. Baker, 369 U.S. at 229 ("When challenges to state action respecting matters of the administration of the affairs of the State and the officers through whom they are conducted have rested on claims of constitutional deprivation which are amenable to judicial correction, this Court has acted upon its view of the merits of the claim.") (internal punctuation and footnote omitted); Larsen v. Senate of the Commonwealth of Pa., 152 F.3d 240, 246 (3d Cir. 1998) (Fourteenth Amendment due process challenges to state action "are firmly within the domain of the federal judiciary and [ ] are the subject of judicially developed legal principles that guide our decisions.").

[41] Despite formerly being elected to the highest level of the executive branch as Governors, defendants call themselves legislative defendants. (Compare Del.Const. Art. III (Executive) with Del.Const. Art. II (Legislature)).

lied to and sought to "deceive ... the legislature" (id. ¶ 137, see also ¶ 72, 111), not that they worked in concert with the General Assembly to enact legislation desired by both branches. Cf. Baraka, 481 F.3d 187. It also charges that defendants "repeatedly refused to fill vacant positions that had been fully funded by the Delaware General Assembly" and instead "returned millions of dollars in unspent funds to the State's General Fund each year." (Id. ¶ 127-28). The defense characterization of plaintiffs' claims as challenging the enactment of legislation is a red herring. (Gov. OB at 31).

1. Provision of Security is Executive. The Delaware Supreme Court has specifically held that the provision of security is an "inherently executive" function, not a legislative one and that any attempt by the legislature to assume such a function violates the separation of powers doctrine. Opinion of the Justices, 380 A.2d 109, 113 (Del. 1977) (citing Del.Const., Art. III, § 1); id. at 116 ("inherently executive in nature").

2. Law Enforcement is Executive. In the same way, the Department of Correction is a branch of law enforcement which is executive in nature. See, e.g. Morrison v. Olson, 487 U.S. 654, 691 (1988) ("[t]here is no real dispute that ... law enforcement functions [ ] typically have been undertaken by officials within the Executive Branch.").

C. The Union Contract Removed Defendants' Discretion. Additionally, as already explained in Argument **III.D.** above, by signing the CBA with COAD, defendants voluntarily and contractually bound themselves to provide a safe and secure working environment at DCC and "signed away [their] discretion" to do otherwise. Local 1726, 298 A.2d at 368; FOP Lodge 6, 1984 WL 8217, *3. That lack of discretion also is fatal to the defense attempt to hide behind legislative immunity.

Citing longstanding Supreme Court and other state law precedent, the Supreme Court in

Bogan explained that legislative immunity does not attach when the state actors "lacked discretion." Bogan, 523 U.S. at 51. The Court explained that a court order mandating that an official take a certain action creates a "ministerial duty," depriving that official of legislative immunity because, legally, they lacked discretion to do otherwise. Id.

> The rule is well settled, that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such an act, he may be compelled to respond in damages to the extent of the injury arising from his conduct.

Id. at 51-52 (quoting Amy v. Supervisors, 78 U.S. 136, 138 (1870)).

The legally binding contractual requirements of the CBAs in our present case are functionally equivalent to the binding court order cited in Bogan. Both limit defendants' discretion and accordingly deprive them of legislative immunity.

Indeed, the Third Circuit also has recognized that a state government can contractually bind itself and limit its discretion as a result. See Baraka, 481 F.3d at 207. This recognition and deference to the requirements of state contract law is the reason defendants cannot escape the legally binding effects of the CBAs in surrendering their discretion in whether or not to safely and securely maintain DCC. For the sake of completeness plaintiffs note that this lack of discretion appears to best logically and properly fit, and disqualify defendants from legislative immunity, under the procedural prong of the Third Circuit's two part substantive/procedural inquiry. See Baraka, 481 F.3d at 198-99. Rather than repeat the extensive discussion of Delaware CBA law and its impact on defendants' legal duties and responsibilities set forth in Argument **III.D.** above, plaintiffs incorporate it by reference here.

XI. DEFENDANTS DO NOT RECEIVE QUALIFIED IMMUNITY.

A. It Does Not Apply to Non-Discretionary Decisions. As the Supreme Court reaffirmed earlier this summer, "[g]overnment officials are entitled to qualified immunity with

respect to 'discretionary functions' performed in their official capacities." Ziglar, 137 S.Ct. at 1866 (citing Anderson v. Creighton, 483 U.S. 635, 638 (1987)). This foundational requirement and condition precedent was established in the Supreme Court's earliest qualified immunity decisions. See, e.g. Harlow v. Fitzgerald, 457 U.S. 800, 816 (1982) (qualified "[i]mmunity generally is available only to officials performing discretionary functions.").

As explained above, the Chancery Court has repeatedly held that by agreeing to the terms of the CBA, defendants -

> signed away [their] discretion when [they] bound [themselves] to this agreement ... The time for discretionary "trade-offs" is before and during the bargaining, not after a solemn agreement has been made.

Local 1726, 298 A.2d at 368; FOP Lodge 6, 1984 WL 8217, *3. As a matter of state contract law, defendants surrendered their discretion to do anything other than abide by their contractual obligations under the CBA. In doing so, they disqualified themselves from qualified immunity. Ziglar, 137 S.Ct. at 1866; Harlow, 457 U.S. at 816.[42]

B. The Basics. Despite its inapplicability, out of an abundance of caution, plaintiffs will analyze the question of qualified immunity. Qualified immunity is a two part test, requiring: (1) violation of a constitutional right; and (2) that the right be clearly established. Estate of Lagano, 769 F.3d at 858.

C. Defendants Violated the Constitution. Three constitutional violations of Fourteenth Amendment substantive due process protections have been independently established. (See Arguments **III-V** above).

D. Contract Law is Clearly Established. The state contract law predicate to many of

---

[42] See Doe v. Fed. Democratic Republic of Eth., 189 F.Supp.3d 6, 26 (D.D.C. 2016), aff'd, 851 F.3d 7 (D.C. Cir. 2017) ("[a] government official has no discretion to violate the binding laws, regulations, or policies that define the extent of his official powers.").

the issues in this case has long been clearly established.

1. 1765 - Parties are Bound by Their Contracts. The law of contracts and their binding obligations has been clearly established since before the founding of the country. For example, Sir William Blackstone's *Commentaries on the Laws of England*, published in 1765, speaks in detail of the rights and obligations flowing from binding one's self to a contract. See 2 W. Blackstone, *Commentaries* *442-470.

Delaware law is clear that parties are bound by the contracts they sign.[43] This is true even if a party later regrets the terms and thinks they made a bad deal.[44] It also is true if they did not read the contract. In such a case, it is -

> his own fault. It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written. But such is not the law. A contractor must stand by the words of his contract; and, if he will not read what he signs, he alone is responsible for his omission.

---

[43] See, e.g. NAF Holdings, LLC v. Li & Fung (Trading) Ltd., 118 A.3d 175, 180–81 (Del. 2015) (it "is a fundamental principle of contract law that the parties to a contract are bound by its terms, and have a corresponding right to enforce them."); Official Comm. of Unsec. Motors Liquid. Co. v. JPMorgan Chase Bank, N.A., 103 A.3d 1010, 1015 (Del. 2014) ("[a]s a matter of ordinary course, parties who sign contracts and other binding documents, or authorize someone else to execute those documents on their behalf, are bound by the obligations that those documents contain."); W. Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC, 2007 WL 3317551, *11 (Del.Ch. Nov. 2, 2007) ("Contract liability is strict liability. It is an accepted maxim that *pacta sunt servanda*, contracts are to be kept.").

[44] See, e.g. Nemec v. Shrader, 991 A.2d 1120, 1126 (Del. 2010) ("Parties have a right to enter into good and bad contracts, the law enforces both."); id. (a court will "not rewrite the contract to appease a party who later wishes to rewrite a contract he now believes to have been a bad deal."); Jeffries v. Econ. Life Ins. Co., 89 U.S. 47, 53–54 (1874) (the "right ... to make an unwise bargain is as complete as that to make a wise bargain. The right to make contracts carries with it the right to determine what is prudent and wise, what is unwise and imprudent, and upon that point the judgment of the individual is subject to that of no other tribunal."); Tolliver v. Christiana Sch. Dist., 564 F.Supp.2d 312, 316 (D.Del. 2008) (under Delaware law, a "contract is to be kept ... even if circumstances have made the contract more burdensome or less desirable than anticipated.").

Pellaton v. Bank of N.Y., 592 A.2d 473, 477 (Del. 1991); Upton v. Tribilcock, 91 U.S. 45, 50 (1875). The law here has been clearly established for centuries.

2. 1972 - State Officials are Bound by CBAs. Without repeating the extensive recitation of Delaware law set forth in Argument **III.D.** above, plaintiffs briefly note that since the Chancery Court's 1972 decision in Local 1726, supra, and the earlier statutory enactment of the Public Employee Relations Act giving public employees the right to organize and collectively bargain with the state, Delaware law has been clearly established that executive branch officials and state agencies are bound by the terms agreed to in CBAs.

3. The Purpose of the Qualified Immunity. Qualified immunity protects public officials and ultimately turns on the "objective legal reasonableness" of their actions. Ziglar, 137 S.Ct. at 1866; see Harlow, 457 U.S. at 819 (the "test ... focuses on the objective legal reasonableness of an official's acts."). This "objective reasonableness ... [i]s measured by reference to clearly established law." Harlow, 457 U.S. at 818; see id. ("insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."). "If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." Id. at 818–19.[45] Simply stated, no reasonably competent public official can claim it was objectively reasonable to ignore the long existing, mutually bargained for contractual obligations of a CBA, all the more so when Delaware contract law on the matter has been clear for decades. Thus defendants' actions are objectively unreasonable and they are not immune.

[45] See Shockley, 726 F.Supp.2d at 380 ("the purpose of qualified immunity is to protect public officials from liability in situations involving extraordinary circumstances and where they neither knew nor objectively should have known the appropriate legal standard.") (internal punctuation omitted) (quoting Andrews, 895 F.2d at 1480) (citing Harlow, 457 U.S. at 819).

E. The Federal Substantive Due Process Theories Also Are Clearly Established.

1. 2005 - The Earlier D.Del. Correctional Officer Companion Case. Despite being completely ignored by the defense, on June 24, 2005, this Court recognized and held that executive branch officials in the State of Delaware, specifically including defendant Governor Minner and defendant DOC Commissioner Taylor, would be held responsible for violating Fourteenth Amendment substantive due process protections in creating unsafe working conditions for state correctional employees, specifically at the very DCC facility in our present case. Thus, for all actions taken after that date by defendants Minner and Taylor, and their successors and related defendants, (see Facts at **I.** forward), this Court's Minner decision clearly establishes substantive due process liability under Counts II-III. 2005 WL 1501514, *1-6.

2. 2006 - The Earlier Third Circuit Correctional Officer Case. As already noted in Argument **IV.A.** above, and discussed throughout Arguments **III** and **IV**, on August 2, 2006, the Third Circuit issued its correctional officer decision in Kaucher, confirming the key holding of this Court's Minner decision, and recognizing, in our Circuit, that state actors will be held accountable for unsafe working conditions in correctional facilities when their actions 'shock the conscience.' Thus, for all actions taken after that date by defendants (see Facts at **I.** forward), the Third Circuit's Kaucher decision clearly establishes substantive due process liability under Counts I-II. Kaucher, 455 F.3d at 425-35.

3. 1994 - Other Longstanding Third Circuit Precedent. As the Third Circuit held in 2014 in Estate of Lagano, 769 F.3d at 859, "[i]t has been clearly established in this Circuit for nearly two decades that a state-created danger violates due process." This places the clearly established date in approximately 1994, well before the underlying facts in our present Complaint. In Estate of Lagano, our Circuit warned against "unduly narrow construction of the

right at issue." Id. Second, even if the holdings of Minner and Kaucher did not exist, it continued "[t]hat we have not applied the ... theory in the [specific] context ... is not dispositive on the qualified immunity defense." Id.

> [A]lthough earlier cases involving fundamentally similar facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding.

Id. (quoting Hope, 536 U.S. at 741).[46] The Third Circuit explained it was error for a district court to require an identical set of facts in preexisting precedent before denying qualified immunity. Estate of Lagano, 769 F.3d at 859. Thus, even in the absence of both our District's Minner and our Circuit's Kaucher decisions, both for correctional officers, the law can still be clearly established that appropriate conscience shocking behavior violates substantive due process. The Court continued and explained that -

> The focus of the qualified immunity inquiry is on the allegations made by the [plaintiffs]. Specifically, the question is whether the facts averred by the [plaintiff] fall within the elements of the state-created danger theory, and whether it would clear to a reasonable officer that

his actions violated it. Id. (internal punctuation omitted); accord L.R., 836 F.3d at 248. Here, for the reasons set forth in Arguments **III-V** above, it is clear that plaintiffs' factual allegations fall well within the confines of preexisting substantive due process law.

4. 2006 - "Unreasonable Dangers" in the Workplace. In 2006, our Circuit recognized that a state actor who compels an employee to confront "unreasonable dangers" in the workplace can shock the judicial conscience. Kaucher, 455 F.3d at 430-31 (citing, *inter alia*,

---

[46] In Hope, the Supreme Court held that "officials can still be on notice that their conduct violates established law even in novel factual circumstances." 536 U.S. at 741. The Court unanimously agreed on this point. Id. at 753-54 (Thomas, J. dissenting with whom Rehnquist, C.J. and Scalia, J. join) (agreeing that "officials can still be put on notice that their conduct violates established law even in novel factual circumstances"). This continues to be the law today. See, e.g. Schneyder v. Smith, 653 F.3d 313, 329-30 (3d Cir. 2011).

Eddy, 256 F.3d 204 (3d Cir. 2001)). As explained at length above (see, e.g. Argument **IV.B.4.c.(3).**), by changing the status quo and failing to abide by the requirements of the CBAs with COAD, defendants exponentially increased the risk of danger to correctional officers at DCC. It was changed from being "manageably dangerous" to being "unmanageably" so. In 2006, the Third Circuit recognized this as illegal under federal substantive due process law. Id.

5. 1994 - the Conclusive Justice Alito Decision. If any doubt remains, it is allayed by the Third Circuit's 2001 Eddy decision cited in Kaucher. There, now Justice Alito specifically addressed the precise question of qualified immunity applying the stand-alone shocks the conscience liability theory in the employment context and specifically held that the viability of such a legal theory in this specific context has been clearly established since 1994, in light of the Third Circuit's en banc decision in Fagan v. City of Vineland, 22 F.3d 1296 (3d Cir. 1994) (en banc). Eddy, 256 F.3d at 212-13. Thus, the law in this regard has been clearly established since 1994 and all defense efforts to hide behind qualified immunity must be rejected.

XII. ELEVENTH AMENDMENT IMMUNITY DOES NOT APPLY.

The Complaint clearly states that both the official capacity defendants and DOC are sued solely for injunctive relief and attorneys' fees and costs, and not for monetary damages or back pay. (D.I. 1 ¶ 28-30). Our District has recognized this as proper under the Eleventh Amendment.[47]

Finally, letters of apology have been vital to resolution of numerous local federal cases,[48]

---

[47] See Shotzberger v. State of Del., Dept. of Corr., 2004 WL 758354, *4 (D.Del. Jan. 30, 2004); Justice v. Danberg, 571 F.Supp.2d 602, 612-13 (D.Del. 2008); Balas, 567 F.Supp.2d at 666.

[48] See, e.g. Neuberger v. Gordon, C.A.No. 05–916–TNO (D.Del.); In re: Catholic Diocese of Wilmington, Case No. 09-13560-CSS (Bankr.D.Del.) (approximately 150 cases).

and courts have recognized their viability as part of a carefully crafted equitable remedy for civil rights violations when other remedies are insufficient.[49] Resolution of this issue should be deferred until the facts of the full damages picture develops to ensure the "make-whole" remedy requirements of § 1983, Squires v. Bonser, 54 F.3d 168, 172 (3d Cir. 1995), can be fulfilled.

CONCLUSION

The Fourteenth Amendment standard of review requires an 'exact analysis' of the 'totality of facts.' Ours is a substantive due process play containing many scenes and acts, but one which cannot be properly understood unless viewed as part of the larger scenario of the overall story. This is a story about public officials whose actions and policies over 16 long years destroyed the DCC. For the last 13 of those years, they ignored repeated warnings of where their new policies would lead and instead doubled down and plowed ahead. Thus this story is a tragedy, because the end was avoidable. When such extended opportunities to do better are teamed with protracted failure even to care, such indifference is truly shocking.

Respectfully Submitted,

THE NEUBERGER FIRM, P.A.

/s/ Stephen J. Neuberger
STEPHEN J. NEUBERGER, ESQ. (#4440)
THOMAS S. NEUBERGER, ESQ. (#243)
17 Harlech Drive, P.O. Box 4481
Wilmington, DE 19807
(302) 655-0582
SJN@NeubergerLaw.com
TSN@NeubergerLaw.com

[49] See, e.g. Villescas v. Abraham, 285 F.Supp.2d 1248, 1256 (D.Colo. 2003); Gray v. Nash Finch Co., 701 F.Supp. 704, 708 (N.D.Iowa 1988); Wells v. Lobb & Co., Inc., 1999 WL 1268331, *5 (D.Colo. Dec. 1, 1999); see Desjardins v. Van Buren Cmty. Hosp., 969 F.2d 1280, 1282 (1st Cir. 1992) (holding it was not plain error to order an apology).

THOMAS C. CRUMPLAR, ESQ. (#942)
RAEANN C. WARNER, ESQ. (#4931)
JACOBS & CRUMPLAR, P.A.
750 Shipyard Drive
Wilmington, DE 19801
(302) 656-5445
Tom@JCDELaw.com
Raeann@JCDELaw.com

Dated: August 28, 2017

Attorneys for Plaintiffs