IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DONALD D. PARKELL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 17-157 (LPS)
	)	
DAVID PIERCE, *et al*.,	)	
	)	
Defendants.	)	

DEFENDANTS DAVID PIERCE, PHILLIP PARKER, DANA METZGER, PERRY PHELPS, JACK MARKELL, AND ROBERT COUPE'S REPLY BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

Joseph C. Handlon (#3952)
Adria B. Martinelli (#4056)
Deputy Attorneys General
Carvel State Office Building
820 N. French Street, 6th Floor
Wilmington, DE 19801
(302) 577-8400

Attorneys for Defendants

Dated: February 27, 2018

TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES AND OTHER AUTHORITIES

INTRODUCTION

The TAC[1] is rife with claims and allegations, but none of them is attributed directly to state officials named as defendants. Plaintiff acknowledges in his Answering Brief that he cannot know with certainty "which Defendant gave which order" without discovery.[2] However, Rule 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions."[3]

Unlike most plaintiffs defending Rule 12(b)(6) motions, Plaintiff had a voluminous "public record" from which to develop his allegations, including two investigatory reports issued following an independent and extensive investigation into the cause of the riot and inmate treatment. Yet that voluminous record fails to support a claim that any of the Defendants *ordered* constitutional violations.

Even if one assumes *arguendo* that inmates were mistreated during the riot or the months following it, this does not mean anyone—much less Defendants—*ordered* it. This incredible leap of logic makes crystal clear what was apparent from the TAC: Plaintiff has sued Defendants because of their positions, based on a *respondeat superior* theory of liability that has been roundly rejected by every court deciding the issue. The Court should dismiss these claims and the TAC.

[1] Capitalized terms herein shall have the meanings given to those terms in Defendants' Opening Brief (D.I. 43, cited herein as "OB"). "AB" citations refer to Plaintiff's Answering Brief (D.I. 45).
[2] AB at 14.
[3] *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009).

ARGUMENT

I. PLAINTIFF FAILS TO ALLEGE PLAUSIBLE FACTS TO STATE A § 1983 VIOLATION.

The Answering Brief improperly relies, heavily, not on allegations from the TAC, but rather on documents that have been improperly submitted with the Answering Brief.[4] Compounding this problem, the brief contains a number of inaccuracies and mischaracterizations of the TAC and the included documents. The inaccuracies and the reliance on documents outside of the pleadings only serve to highlight the TAC's factual deficiencies.

The first mischaracterization concerns what Plaintiff claims about ignored warnings preceding the riot. Plaintiff states that Lt. Floyd requested that certain inmates be removed from Building C and that his request was ignored by his supervisors.[5] Not only has Plaintiff failed to allege this fact in the TAC, nothing he cites in the report shows that Lt. Floyd made his request to a Defendant and that a Defendant ignored the request. Like most of Plaintiff's many criticisms of DOC in the Answering Brief (and the TAC), this claim is (1) not connected to any Defendant, nor (2) is it connected to any alleged injury to Plaintiff. For purposes of the present motion, this and other allegations relating to opportunities to avert the riot (by either heeding warnings, staffing the prison more fully, providing more programming, or improving prison conditions generally to

[4] Defendants oppose the Court's consideration of documents outside of the pleadings. The exception to the rule that documents outside of the pleadings may not be considered on a motion to dismiss generally pertains to documents that are "'*integral to or explicitly relied* upon in the complaint . . . . '" *See Schmidt v. Skolas*, 770 F.3d 241, 249 (3d Cir. 2014) (emphasis in original). Plaintiff had the reports and other documents at his disposal and cited to those documents in the TAC. Finally, the documents (with the possible exception of the CLASI Order) are not "public records" that can be judicially noticed in response to Defendants' motion. *See Schmidt*, 770 F.3d at 249-50 (rejecting review of SEC filings and press releases, noting the documents were not "records of a government agency.").

[5] AB at 3, 6. Plaintiff fails to provide a pinpoint site in the 158-page Final Report to support his assertion.

incentivize good behavior) are not what allegedly caused Plaintiff's injuries. The alleged retaliation by corrections officers during and after the rescue effort caused injuries to other inmates, who are not party to this lawsuit.

The Final Report also provides additional context to the claim, asserted in the Answering Brief, regarding the situation in Building C. The report provides that "based on an email written by the warden, it appears that some JTVCC administrators believed that the inmates' disciplinary records did not support their transfer to [SHU]" and that "[b]ecause there were no other housing units on the JTVCC compound that could house 'medium high' security level inmates, supervisors believed that the SHU was the only place these inmates could be moved." A218. JTVCC administrators' inaction, based on their perception of their authority from the Warden, is a much different thing than a claim that the Warden sent an email denying the request for a move of dangerous inmates, as implied by Plaintiff.

The Answering Brief states that there is evidence that Defendants "intentionally created the unreasonably dangerous situation in Building C to undermine the [CLASI Order]."[6] This "evidence" (not alleged in the TAC) is based upon an "impression" the Independent Review Team apparently gleaned from an email sent by Defendant Pierce that is only partially reproduced in the Final Report. *See* AB at 18 (referring to A226 at n. 78).[7] Plaintiff elsewhere qualifies this theory, however, when he states: "To the extent that Defendants' actions and inactions were in violation

[6] AB at 3.

[7] The entire email is attached hereto as Exhibit A. The TAC says little about the CLASI settlement. First, the TAC questions "[w]hether Pierce transferred certain inmates to C-Building and then assigned only three officers to manage 126 inmates in order to undermine the CLASI settlement, hoping for an incident[?]" TAC ¶ 118(l). Then, in Count IV, it states in conclusory terms that Pierce, Phelps and Coupe subjected inmates to cruel and unusual punishments in failing to address security issues they perceived would arise upon initiation of the agreement. These are not plausibly pled facts. Moreover, at best they allege speculative causes of the riot, not constitutional injuries following the riot.

of or designed to undermine the CLASI Order . . . ." AB at 13. Plaintiff cannot unleash the full probing of civil discovery by posing hypotheticals and citing the impressions of third parties reported in extrinsic documents.[8]

The primary defect in the TAC and Plaintiff's theory of liability is the absence of a plausible factual allegation that particular named Defendants actually ordered constitutional violations or other mistreatment. As set forth in the Opening Brief, the TAC should be dismissed for lack of personal involvement and for failure to state a plausibly pled policy or practices claim.[9] The Answering Brief highlights the TAC's deficiencies by stating, for example, that "[f]ollowing orders from Pierce, Parker, and Phelps, *other* inmate hostages (i.e. not Plaintiff) were restrained and beaten by the rescue team . . . ."[10] (Emphasis added). The Answering Brief cites ¶ 55-56 of the TAC, which states that these events occurred, but fails to reference any allegation against a named Defendant.

Similarly, the Answering Brief cites a letter sent by the ACLU to Judges Ridgely and Chapman, in which the ACLU summarizes inmate letters grieving many issues, but that do not allege that mistreatment was the result of Defendants' orders. Finally, the Answering Brief cites paragraph 80 of the TAC, which, in derogation of *Iqbal*, states a conclusory allegation that "[u]pon information and belief, the [rescuers] were given orders by Pierce, Phelps, and Parker to abuse inmates after they were restrained." Plaintiff compounds the problem with this conclusory

[8] That the claim is baseless is demonstrated no better than by Plaintiff's failure to cite one provision of the CLASI Order he claims was responsible for the February 2017 uprising. Moreover, it is not plausible that the Defendants would purposefully put lives at risk to get out of an agreement they had just reached, particularly where both the Order and the Court's rules contain mechanisms to obtain modifications of the Order. *See* A186; Fed. R. Civ. P. 60.
[9] *See* OB at 9-17.
[10] AB at 4-5.

speculation by including John Doe Defendants in the next sentence.[11] Later in the brief, Plaintiff admits that he actually does not know if any named Defendant gave such an order.[12] This assumes that a Defendant, or any DOC official, actually ordered constitutional violations. While it is conceivable that first responders *may have* acted aggressively during the unimaginably tense situation they undoubtedly faced in their efforts to secure Building C and rescue the hostages, this does not mean that any official *ordered* the abuse of inmates. The Court must employ its experience and common sense, as Plaintiff urges, when considering whether this inference is a reasonable one.[13]

Another unsupported assertion in the Answering Brief is the claim on page 8 that "Plaintiff was physically injured protecting Ms. May. . . ." Plaintiff cites nothing for this factual assertion and indeed, this claim is contradicted by the TAC, which alleges that that Sgt. Bane directed officers not to harm Plaintiff, Carello and Downing,[14] and public statements made on Parkell's

[11] Paragraph 78 of the TAC also makes conclusory allegations of reprisals against these defendants. The citation to the ACLU letter and the Final Report, Appendix E, is not helpful, as the authors expressly stated that they were reproducing the complaints for the purpose of giving the inmates "voice." *See* A297. There were no findings of abuse or mistreatment, especially abuse or mistreatment at the hands of Defendants.

[12] *See* AB 14 ("Without discovery, except as reflected in the public record, Plaintiff cannot know with certainty which Defendant gave which order.").

[13] AB at 13-14.

[14] Because of this allegation Plaintiff lacks standing to assert most, if not all, of the claims he asserts on behalf of other inmates. He certainly is not the proper party to represent a class of inmates alleging to have been abused during the rescue effort. In order to depart from the general rule that litigation is conducted on behalf of the individual harmed parties only (justifying a class action under Rule 23), "a class representative must be part of the class and possess the same interest *and suffer the same injury* as the class members." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (emphasis added; internal quotations omitted); *see also General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 156-60 (1982) (discussing the importance of the class representative suffering same injury as class). Plaintiff expressly alleges he was *not* harmed. TAC ¶ 54. Plaintiff therefore lacks standing to advance this claim (as well as many others where he does not allege harm to himself), let alone litigate it on behalf of other inmates.

behalf.[15] TAC ¶ 54. Plaintiff has not alleged that he was physically harmed in any way during the hostage crisis or in the rescue effort.

Plaintiff is entitled to reasonable inferences from a complaint, not speculative ones. *See Watson v. Dep't of Serv. for Children, Youths and Their Families Delaware*, 932 F. Supp.2d 615, 620 (D. Del. 2013) (in order to survive a motion to dismiss, the plaintiff must allege facts that raise a right to relief above the speculative level; the court is not required to accept bald assertions and unsupported and unwarranted inferences). The Court should reject the many inaccuracies and other speculation strewn throughout the Answering Brief. The adequacy of allegations as to the named Defendants must be based upon what Plaintiff has alleged in the TAC and nothing else.

The TAC's failure to allege plausible facts against the named Defendants necessitates dismissal under Rule 12(b)(6). However, the failure in this regard is also an indication that this action—in substance—is a lawsuit against the Delaware Department of Correction. Plaintiff makes this clear, stating "The State had the obligation to protect. . . It had the obligation to ensure. . . but has tragically failed to do so. The Plaintiff in this case and the class he represents[16] are victims of the *State's* abject failure. . ."[17] and the State's Agreement with COAD "obligated the State to ensure a safe and secure work environment for correction officers, and the CLASI

---

[15] *See*, *e.g.*, http://www.wdel.com/news/inmate-s-lawsuit-seeks-to-move-forward-to-learn-who/article_86da9bca-10ed-11e8-973f-0b300afd84d3.html (last visited 2/19/18) ("[Plaintiff's counsel] said his client was not among those who were brutally beaten after the overthrow.").

[16] Here and elsewhere, Plaintiff asserts arguments on behalf of all inmates as if this Court has already certified the class, which is not the case. Thus, Parkell is the only plaintiff presently in the case and he must have standing to assert each of the claims set forth in the TAC. Plaintiff's assertion that he is referred to as "Plaintiff" "for simplicity sake," (AB at n. 1) is wrong; he is referred to as Plaintiff because he is the only one.

[17] AB at 2.

Order."[18] These admissions raise Eleventh Amendment concerns in addition to highlighting a failure to state claims against Defendants.

II. GOVERNOR MARKELL IS IMMUNE.

Plaintiff acknowledges that legislative immunity extends to the executive branch under certain circumstances but asserts the TAC's factual allegations extricates former Governor Markell from its protections. Plaintiff states that the COAD agreement "obligated the State to ensure a safe and secure work environment. . ."[19] Plaintiff's statement sounds like an argument that the State can be held strictly liable for any injury that occurs in prison. In addition to raising Eleventh Amendment issues, the COAD agreement does not subject former governors (or the other Defendants) to strict liability; it certainly does not address legislative immunity.[20]

Second, Plaintiff attempts to morph his repeated allegations in the TAC that Markell continued policies of former administrations regarding funding and staffing into something not protected by legislative immunity, citing only *Opinion of the Justices*, 380 A.2d 109 (Del. 1977). That decision dealt with whether a transfer of executive functions to an administrative agency of the General Assembly violated the doctrine of separation of powers; it did not address legislative immunity for executive officers in a § 1983 action. It is not on point, and the cases cited by Defendants establish that staffing, as well as funding decisions, are inherently legislative and fully protected.[21] Likewise, any orders that open positions remain vacant is integral to budgetary

---

[18] AB at 12.
[19] *Id.*
[20] Plaintiff in passing also asserts that the CLASI Order affects Markell's absolute immunity. Plaintiff does not explain how this is so. Either way, there are no factual allegations against Markell with respect to the CLASI settlement, including the claim about placing inmates in disciplinary housing without a mental health evaluation. *See* AB at 13.
[21] *See* AB at 19-20; *see also Lewis v. New Mexico Dep't of Health*, 275 F.Supp.2d 1319, 1327-28 (D. N.M. 2003) ("Funding for any state program is a budgetary and policy decision for the state to make.").

issues.[22] Plaintiff fails to rebut Defendants' claim that Markell is absolutely immune.[23] Even if Markell is not absolutely immune, the doctrine of qualified immunity requires his dismissal. Plaintiff has not cited any precedent supporting a clearly established right restricting a head of state from making staffing decisions for budgetary reasons. Established law protects such decisions.

Assuming *arguendo* that allegations regarding inadequate staffing and overtime are relevant to the cause of the riot, such allegations are not pertinent to many, if not all, of Plaintiff's claims. Unlike in *Floyd v. Markell, et al.*, C.A. No. 17-431 RGA., in which the plaintiffs there alleged direct, and serious, injury from the rioting inmates, Plaintiff makes claims about unconstitutional retaliation by rescuers and correction staff following the riot. Allegations of inadequate staffing (ordering 90 vacancies remain vacant) are not relevant in a causational sense,[24] particularly in the context of qualified immunity. Qualified, if not absolute, immunity bars all claims based on budget and staffing.

III. PLAINTIFF FAILS TO ALLEGE PERSONAL INVOLVEMENT OR STATE A POLICY/PRACTICE CLAIM NECESSARY TO OVERCOME QUALIFIED IMMUNITY.

Defendants thoroughly addressed the lack of factual allegations of the personal involvement of the named Defendants above and in their Opening Brief. In responding to this argument, Plaintiff relies almost entirely upon *Connelly v. Lane Constr. Corp.*, 809 F.3d 780, 786 (3d Cir. 2016), a decision vacating the dismissal of an employee's claims against her employer

[22] *See also Youngblood v. DeWeese*, 352 F.3d 836, 841-42 (3d Cir. 2003) (holding that allocation of office-staffing appropriations is within the ambit of legislative immunity).
[23] *See Baraka v. McGreevey*, 481 F.3d 187, 199 (3d Cir. 2007) (noting that the elimination of positions constitute legislative acts); *see also Bagley v. Blagojevich*, 646 F.3d 378, 393 (7th Cir. 2011) (elimination of management positions in department of correction was legislative and protected by absolute immunity).
[24] Of course Governor Markell's term ended prior to Lt. Floyd's January 15, 2017 warning.

under Title VII. *Connelly* did not address *Iqbal* and the pleading standard against high-ranking state and correctional officials under § 1983, nor did it address the test for supervisory liability under *Sample v. Diecks*, 885 F.2d 1099 (3d Cir. 1989).[25] Rather, *Connelly* addressed whether factual allegations against an *employer* (an entity) sufficed under the *McDonnell-Douglas* test, where the plaintiff alleged numerous facts supporting her claim, including extensive allegations that her supervisor made advances that human resources ignored. *Connelly* does not assist Plaintiff.

Plaintiff's argument that Defendants (collectively) failed to pay officers, failed to train and monitor correctional officers, permitted and encouraged abuse, failed to ensure a safe Building C (AB at 14-15) are conclusory allegations unsupported by facts. Further, Plaintiff's argument is one that the Supreme Court specifically rejected nearly thirty years ago. The Court in *City of Canton, Ohio v. Harris*, set a high standard for claims of failure to train and supervise, noting that claims of failure to train and supervise, like Plaintiff's,

> could be made about almost any encounter resulting in injury, yet not condemn the adequacy of the program to enable officers to respond properly to the usual and recurring situations with which they must deal. And plainly, adequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the city liable.

489 U.S. 378, 391 (1989). The alleged deficiency in training or supervision must be "closely related" to the ultimate injury. *Id.* Plaintiff fails to plead any facts meeting this high standard.[26]

Plaintiff repeatedly makes allegations against "Defendants" generally or against two or three without specifically identifying who did what. This is improper in a § 1983 action. *Atuahene*

---

[25] *See also Barkes v. First Corr. Med., Inc.*, 766 F.3d 307, 316 (3d Cir. 2014), *rev'd on other grounds*, 135 S.Ct. 2042 (2015).

[26] Plaintiff states, for instance, the Court can "reasonably infer that Parker and Metzger were responsible for the retaliatory actions complained of from at least February 21, 2017 to present." (AB at 15). That is not a reasonable inference, nor is it one permitted at the pleading stage under *Iqbal* and its progeny. It is precisely allegations such as these that qualified immunity abhors.

v. City of Hartford, 10 F. App'x 33, 34 (2d Cir. 2001) ("By lumping all the defendants together in each claim and providing no factual basis to distinguish their conduct, [plaintiff's] complaint failed to satisfy [the] minimum standard [of fair notice]."); *Boone v. Salameh*, 2012 WL 1435555, at *4 (W.D. Pa. Mar. 28, 2012) (dismissing a party's generalized allegations against all defendants as insufficient, because the plaintiff "fail[ed] to specify how and when *each individual Defendant* violated his constitutional rights") (emphasis added).

Finally, Plaintiff has failed to state a claim that overcomes qualified immunity. Instead, Plaintiff's Answering Brief makes repeated claims of broad imperatives without focusing on actual conduct (because he has alleged none) of the Defendants.[27] They are immune.

CONCLUSION

The TAC must be dismissed for the reasons set forth above and in Defendants' Opening Brief in Support of their Motion to Dismiss.

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

/s/ Joseph C. Handlon
Joseph C. Handlon (#3952)
Adria B. Martinelli (#4056)
Deputy Attorneys General
Carvel State Office Building
820 N. French Street, 6th Floor
Wilmington, DE 19801
(302) 577-8400

Attorneys for Defendants

Dated: February 27, 2018

[27] *See* AB at 20 (noting the prohibition against cruel and unusual punishment). Not focusing on *conduct* of the Defendants, Plaintiff also makes statements about how Defendants could not know inmates rights were clearly established. That is simply not the inquiry on qualified immunity; the inquiry is the specific conduct of the Defendants. *Taylor v. Barkes*, 135 S.Ct. 2042 (2015); OB at 17-20.