DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

RONNIE GARCIA, **Plaintiff,** **v.** **CRUZAN VIRIL, LTD., BEAM SUNTORY, INC., AYANDA DANIELS, CRUZAN RUM DISTILLERY, UNITED INDUSTRIAL WORKERS OF THE SEAFARERS INTERNATIONAL UNION, AFL-CIO, EUGENE IRISH,** **Defendants.**	**1:23-cv-00007-WAL-EAH**

TO: Ronnie Garcia, *Pro Se*
Micol L. Morgan, Esq.
John J. Merchant, Esq.

REPORT & RECOMMENDATION

THIS MATTER comes before the Court on an Order by the District Judge referring the Motion to Dismiss Plaintiff's Complaint, Dkt. No. 18, and Motion to Dismiss Plaintiff's Amended Complaint, Dkt. No. 41, filed by Defendants Cruzan Viril Ltd. d/b/a Cruzan Rum, Beam Suntory, and Ayanda Daniels (the "Cruzan Defendants"), to the undersigned for a Report & Recommendation. Dkt. No. 49. Subsequently, the Cruzan Defendants withdrew their first Motion to Dismiss, Dkt. No. 43, which the Court accepted, terminating Dkt. No. 18. *See* Dkt. No. 54. For the reasons stated below, the Court recommends that the District Judge grant the Cruzan Defendants' Motion to Dismiss Plaintiff's Amended Complaint, Dkt. No. 41, dismiss the Amended Complaint without prejudice, and permit Garcia an opportunity to file a Second Amended Complaint to address the deficiencies in his Amended Complaint discussed herein.

BACKGROUND

On February 13, 2023, pro se Plaintiff Ronnie Garcia, a former employee at the Cruzan Rum Distillery on St. Croix, filed a complaint against Cruzan Viril Ltd., Cruzan Viril Ltd. d/b/a Cruzan Rum Distillery, Beam Suntory, Inc., and Ayanda Daniels, Human Resources Manager. Dkt. No. 1. On the Court's employment discrimination complaint form, Garcia checked boxes indicating he was bringing claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12112-12117, as well as "state law" claims under the Virgin Islands Wrongful Discharge Act ("WDA"), 24 V.I.C. § 76, and the Virgin Islands Civil Rights Act ("VICRA"). *Id.* at 3. He asserted the discriminatory conduct involved: termination of employment, failure to accommodate his disability, unequal terms and conditions of employment, retaliation, and "other" which he did not specify. *Id.* at 4. The alleged discriminatory acts occurred on April 21, 2021 and were based on race and disability/perceived disability. *Id*. Garcia indicated that he filed a charge with the Equal Employment Opportunity Commission ("EEOC") in September 2021, and that it issued a Notice of Right to Sue Letter (although he did not fill in the date when he received the letter). *Id*. at 5.

Garcia attached two typewritten addenda to his complaint (a "Statement of Claim" and "Relief"), totaling seven pages, that expounded on his claims. Dkt. Nos. 1-1, 1-2. In the Statement of Claim addendum, he referred to incidents in 2019 and 2020, culminating with his termination from the Cruzan Rum Distillery on St. Croix in May 2021. Dkt. No. 1-1. Garcia alleged that in June 2019, after working a twelve-hour shift and clocking out, his supervisor told him to throw away a huge garbage bin but did not ask anyone to help him. *Id.* at 5. Garcia already had back pain from lifting 1200 pounds of hydrated lime by himself. Because his supervisor neglected his health and safety concerns and singled him

out to work after he clocked out, he made a formal complaint to human resources. *Id*. In November 2019, the person assigned to train him brought his dog to work, and the dog attacked him, which he viewed as harassment. *Id*. at 4.

He also alleged that, in May 2020, he had a meeting to address heavy lifting of 1200 pounds, lack of personal protective equipment, and other unsafe practices he experienced. *Id*. at 5. He was retaliated against, discriminated, harassed and bullied after this meeting. In June 2020, the plant director suspended him and sent him home more than half-way through his shift because he saw a fellow Operator conversing with Garcia. *Id*. On July 26, 2020, Garcia was suspended because he complained about unsafe work conditions. *Id.* at 3.

On August 20, 2020, a disciplinary meeting took place; the Union President, Eugene Irish, was supposed to represent him at the meeting with Louis Houle, the General Manager, and Ayanda Daniels, the Human Resources Director. *Id.* at 1. One of the issues discussed was Garcia being written up because he did not have safety shoes. Irish told Garcia he would not represent him if Garcia did not agree with him, and said Garcia was responsible for buying two pair of steel-toed boots. *Id*. Garcia disagreed, citing an OSHA regulation that required all PPE (personal protective equipment), with few exceptions, to be provided by the employer. He had ordered a pair of safety shoes in 2020 (to be reimbursed by the company) and reminded his supervisor, the safety director, and plant manager that he was waiting for his order. After four months, he received the boots but "they" had ordered the wrong size, so he did not receive the boots until six months after "he" ordered them. *Id.* His employer, through his supervisor and management, disciplined and suspended him on August 20th because he complained about unsafe working conditions and in retaliation for filing a charge against the employer with the

Occupational Safety & Health Administration ("OSHA") and the National Labor Relations Board ("NLRB"). *Id.* at 3.

On September 9, 2020, Garcia experienced dizziness, chest pains, and light-headedness, and almost fell, after his supervisor insisted that he wear a mask in the extremely hot sun on a very humid day. *Id*. The supervisor ignored his concerns, "retaliated from past complaints," and called the plant director; both of them demanded he leave immediately. Garcia was unable to return to work until he produced a doctor's note, which he did. *Id.* He made a formal complaint to Human Resources. *Id.* On September 11, 2020, he was suspended for reporting his concerns about wearing the mask on a humid and very hot day. *Id*. at 4.

On December 10, 2020, Garcia had a conversation with his supervisor about his symptoms; his supervisor responded, "It sounds like you can't do your job and [I] will have to do what [I] have to do." Garcia never told him he could not do his job. The supervisor said his symptoms were not valid until he brought a doctor's note. *Id*. A week later, Garcia met with his supervisor, the human resources director, and his shop steward about a back injury he received that caused severe pain in several areas of his back and neck. *Id*. at 3. The supervisor threatened to call the police on him because he let the supervisor know he felt harassed and that his health concerns were not respected. Both the supervisor and human resources director infringed on his rights to express his health and safety concerns through intimidation, harassment, and retaliating against him. *Id*.

Garcia received a termination letter on May 3, 2021. *Id.* at 2. On May 12th, he called Irish, the Union President, saying he "really wanted to address the matter" and get his job back. *Id*. Garcia asked how he could move forward with the investigation process. Irish told Garcia to send him an email concerning his experience. Garcia stated that he paid his union dues and Irish was not behaving like Garcia was paying for a service to be

represented fairly. *Id.* On May 24th, Garcia had another conversation with Irish who told him that, after talking to workers on Garcia's shift, and reading Garcia's email, he found no grounds for filing a grievance on Garcia's behalf. *Id*. Irish infringed Garcia's rights. *Id.* Garcia asserted he was fired because the fuel gas system shut down on his shift, even though he got the unit back up and running in 40 minutes. *Id.* He was discriminated against and terminated in an unjust manner and has not heard much from Irish given the situations that led to his termination. *Id*. at 5.

In the "Relief" addendum, Garcia alleged that he was in constant pain from his back injuries and has faced extreme financial difficulty since being terminated. Dkt. No. 1-2 at 1. He sought: (1) compensation for his spinal injuries that occurred while he was working at Cruzan Rum; (2) compensation of $8,000,000 to cover his yearly salary for every year past retirement, including food, light, water, medical and mortgage; (3) compensation of $2,000,000 for mental and emotional damage affecting his health and causing pain and suffering; (4) compensation of $10,000,000 for medical and dental care, MRI, chiropractic treatment and future medical treatment, totaling $20,000,000. *Id*. at 2.

On March 2, 2023, the Court granted Garcia's motion to proceed in forma pauperis, and issued an initial screening Report and Recommendation pursuant to 28 U.S.C. § 1915(e)(2), in which it recommended that some claims be dismissed and other claims be allowed to proceed.[1] Dkt. No. 11. Almost two weeks later, Garcia filed an "Amended Complaint" in which he used the first two pages of the Court's employment complaint form to add United Industrial Workers of the Seafarers International Union, AFL-CIO, and Eugene Irish, as additional Defendants (the "Union Defendants") but did not attach the remaining pages from the original Complaint or his addenda. Dkt. No. 13.

[1] This R&R is still pending. The Cruzan Defendants filed Objections. Dkt. No. 20. It is recommended that that R&R be vacated and the objections be denied as moot.

The Cruzan Defendants filed a motion to dismiss (against the original complaint) after Garcia filed his Amended Complaint, Dkt. Nos. 18, 19, which has been withdrawn, Dkt. No. 43. In October 2023, the Union Defendants filed an Answer to the Amended Complaint. Dkt. No. 33. The Court issued summonses for the Amended Complaint, Dkt. Nos. 26-31; Garcia filed returns of the summonses in November 2023, Dkt. Nos. 34-40.

The Cruzan Defendants filed the instant motion to dismiss for failure to state a claim, directed at the Amended Complaint, in November 2023. Dkt. Nos. 41, 42. In their Memorandum, they first note that Defendant Cruzan Rum Distillery "does not appear on the Lt. Governor of the Virgin Islands Corporations & Trademarks website as an entity duly authorized to conduct business in the United States Virgin Islands or as a trade name. Upon information and belief, Cruzan Rum Distillery is not a legal entity with the capacity to sue or be sued." Dkt. No. 42 at 1 n.1. The Cruzan Defendants add that, although the Amended Complaint did not set forth any allegations, in an abundance of caution and insofar as the original Complaint was incorporated by reference into the Amended Complaint, they refiled their motion to dismiss against the Amended Complaint. *Id*. at 2.

They argue that all of Garcia's claims must be dismissed for failure to state a claim under Fed. R. Civ. P. 12(b)(6). In particular, the Title VII and ADA claims must be dismissed on timeliness grounds, because Garcia filed his Complaint in federal court more than 90 days after he received his right-to-sue letter from the EEOC. They attached Garcia's Charge of Discrimination to the EEOC,[2] dated August 13, 2021, Dkt. No. 42-1 at 2-8, and the EEOC's Dismissal and Notice of Rights (the right-to-sue) letter dated October 18, 2021, Dkt. No 42-2 at 2-4, to the motion to dismiss. The Cruzan Defendants contend

[2] In the Charge, Garcia named Cruzan Rum Distillery, Ayanda Daniels, United Industrial Workers, and Eugene Irish for discriminating against him on the basis of national origin, retaliation, and "safety complains [sic] leading to discrimination." Dkt. No. 42-1 at 2.

that while case law provides that, in considering a Rule 12(b)(6) motion, a court may consider only the complaint, "exhibits attached to the Complaint, matters of public record, as well as undisputedly authentic documents if the complainant's claims are based on those documents," Dkt. No. 42 at 3 n.5 (quoting *O'Reilly Plumbing & Construction, Inc. v. Lionsgate Disaster Relief, LLC*, 2022 U.S. Dist. LEXIS 175986, at *9-10 (D.V.I. Sept. 28, 2022)), district courts have held that "an EEOC charge of discrimination and the related documents (e.g., a Determination or Notice of Right to Sue) are public records which may thus be considered without converting the motion to dismiss into a motion for summary judgment." *Id*. quoting, *Elchik v. Akustica Inc*., 2013 U.S. Dist. LEXIS 53376, at *14 (W.D. Pa. Mar. 6, 2013). Not only did Garcia refer to the Charge in the Complaint, Dkt. No. 1 at 5, but it is a public record. Similarly, Garcia referred to receiving the Notice of the Right to Sue letter, Dkt. No. 1 at 5, and it is considered a public record. Dkt. No. 42 at 3 n.6. Thus, both documents are appropriately before the Court on the motion to dismiss.

Garcia filed his Complaint in federal court on February 13, 2023, 483 days after the EEOC issued the Right to Sue letter. As a result, because he filed his Complaint more than 90 days after its receipt, his Title VII and ADA claims were time-barred. *Id*. at 3-4, 6-7 (citing cases). Moreover, because Garcia failed to assert race and disability-based claims of discrimination and retaliation in the Charge, the claims asserted in his Complaint based on race or alleged disability must be dismissed for failure to exhaust his administrative remedies because an ensuing lawsuit is limited to the claims within the scope of the Charge to the EEOC and Garcia failed to allege these bases for discrimination in the Charge. *Id*. at 7-8. Garcia also did not name Beam in the Charge and therefore did not exhaust his administrative remedies as to that Defendant that are prerequisites to judicial review, requiring dismissal of the Title VII and ADA claims against it. *Id*. at 7-8.

Garcia's WDA must also be dismissed as preempted by Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, because the propriety of the termination decision arises solely out of the Collective Bargaining Agreement ("CBA"). *Id.* at 4, 8. Given that Garcia claimed that the Union failed him, he should have filed a "hybrid" claim within the applicable statute of limitations. When a territorial claim is substantially dependent on the terms of a CBA, the claim should be dismissed as preempted or treated as a § 301 claim. *Id.* at 9. They add that Garcia failed to exhaust the CBA's grievance and arbitration process to resolve his dispute concerning his termination, which is fatal to his claim. *Id.* at 9-10 (citing cases).

The Cruzan Defendants attached a copy of the CBA to their motion, Dkt. No. 42-3, which they contend the Court could consider because, although Garcia did not quote the CBA in the Complaint, he repeatedly referred to his Union membership, his right to fair representation by the Union regarding Cruzan's disciplinary and termination decisions, and grievance procedures which were dictated by the CBA. *Id*. at 8 (citing Dkt. No. 1-1 at 2-4). Because disposition of the wrongful discharge claim raised questions related to the interpretation of the CBA that should have been raised through the Union, the CBA was appropriately before the Court for consideration on the motion. *Id*. at 4 n.7. If, however, Garcia's references were insufficient to warrant consideration of the CBA in ruling on the motion to dismiss, the Cruzan Defendants ask the Court to take judicial notice of the CBA because it was not subject to reasonable dispute and could be "accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *Id*. at 4. n.8.

The Cruzan Defendants further contend that the WDA, 24 V.I.C. § 76(a), provides that, "[u]nless modified by union contract," an employer may dismiss any employee for nine enumerated reasons. *Id.* at 10-11. But here, Garcia's employment relationship was modified by the CBA, and an employer could prevail on a WDA claim if it could prove that

a CBA modified grounds for discharge under the WDA. *Id.* at 11. Article VII (Discipline and Discharge) of the CBA modified the grounds under which Garcia could be terminated, and thus he had no viable WDA claim. *Id.* at 11-12.

The Cruzan Defendants conclude that Garcia failed to state a cognizable claim of race or disability discrimination, or retaliation, under the VICRA. *Id*. at 5, 12-13. They cite the March 2023 R&R, Dkt. No. 11, in which the Court, when assessing his Title VII claims, observed that Garcia had not mentioned race in his Complaint nor had he alleged retaliation based on race. *Id.* at 12. In a similar vein, Garcia's claims for race and disability discrimination under the VICRA should be dismissed for failure to state a claim. *Id.* Because Garcia did not specify which provisions of VICRA supported his claim, the Cruzan Defendants did not have proper notice of the facts underlying Garcia's claim for relief to prepare their defense. *Id*. at 12-13. Neither did Garcia provide enough facts to properly apprise them of a disability discrimination claim, which would start with clarifying his disability and any associated alleged adverse employment action. He claimed to have experienced dizziness associated with wearing a facemask in the hot sun, and his disability claim is presumably premised on being required to leave for the day and to return with a doctor's note. But a physician ensuring he could perform his job was not an adverse employment action. *Id*. at 13. In a footnote, the Cruzan Defendants submit that if the Court denies the motion to dismiss the VICRA claim, they move for a more definite statement pursuant to Rule 12(e). *Id.* at 13 n.12.

Also in a footnote, the Cruzan Defendants state that Garcia filed seven returns of service on November 9, 2023 purporting to demonstrate service of the Amended Complaint on Defendants "to include alleged service of process through their assigned counsel." Dkt. No. 42 at 1 n.2. They add it is "unclear" from Garcia's filings if service was effected on Defendants. *Id*. In another footnote discussing service of the initial Complaint,

the Cruzan Defendants contend that not only has Garcia failed to effect proper service on Beam and Cruzan, but he has yet to serve Daniels with any process to date, "leaving this court without personal jurisdiction over the Defendants." *Id*. at 2 n.3. Accordingly, they ask for dismissal of the Complaint under Rules 12(b)(2) and 12(b)(5) for want of personal jurisdiction and failure to properly effect service of process. *Id.*

Garcia did not respond to the March 2023 motion to dismiss, Dkt. No. 18, or the instant motion to dismiss the Amended Complaint. Because Garcia had not registered as a filing user in the Court's Electronic Filing System, on June 3, 2024, the Court ordered the Cruzan Defendants to explain whether he had been served with the instant motion to dismiss and to file their certificate of service; if Garcia had not been served, the Order directed them to serve him by certified mail and by email. Dkt. No. 50. In response, the Cruzan Defendants attached a copy of the Court's Notice of Electronic Filing of the instant motion to dismiss, showing that Garcia was served through the Court's Electronic Case Filing ("ECF") system in November 2023 by email.[3] Dkt. No. 51-1 at 2. They also state that they served the instant motion to dismiss on Garcia on June 3, 2024 by certified mail, return receipt requested (but not by email). Dkt. No. 51.

[3] The Local Rules provide that, if the Court permits, "a party to a pending civil action who is eligible to proceed pro se may register as a Filing User in the Electronic Filing System solely for purposes of the action[.]" LRCi 5.4(b)(2). Registration constitutes consent to electronic service of all documents as provided in the rules. LRCi 5.4(b)(4). If a person is not an approved Filing User, the Filing Users in the case must include a certificate of service that identifies the date and manner of service on the Non-Filing User. LRCi 5.4(i)(4). Here, Garcia never moved for permission to be a Filing User; as a result, he could not be served by the CM/ECF system. Although the November 2023 service of the instant motion to dismiss showed that Garcia was served via ECF at his email address, that was an error because he was not a registered user. As a result, he never received the document because he did not have a PACER account that would have allowed him to view the document. Therefore, the first time he was served with the motion to dismiss was in June 2024 when the Cruzan Defendants sent the motion by certified mail in response to the Court Order.

On June 10, 2024, the Court's Order directing the Cruzan Defendants to submit their certificate of service of the motion to dismiss on Garcia, or to serve him by certified mail and email, Dkt. No. 50, that had been sent to Garcia at his updated mailing address, was returned as "undeliverable, unable to forward."[4] Dkt. Nos. 52, 56.

DISCUSSION

I. Relevant Standards and Case Law

"To survive a motion to dismiss, a civil plaintiff must allege facts that 'raise a right to relief above the speculative level on the assumption that the allegations in the complaint are true (even if doubtful in fact).'" *Victaulic Co. v. Tieman*, 499 F.3d 227, 234 (3d Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Dismissal under Rule 12(b)(6) is appropriate if a complaint does not contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570); *see also Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. The complaint "must state enough facts to raise a reasonable expectation that discovery will reveal evidence of [each] necessary element" of a plaintiff's claim. *Wilkerson v. New Media Tech. Charter Sch. Inc.*, 522 F.3d 315, 321 (3d Cir. 2008) (internal quotation marks omitted).

Because Garcia is proceeding pro se, his pleading is liberally construed and his Amended Complaint, "however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94

[4] A pro se litigant is "personally responsible for supplying the court with an address that would foster direct and timely communication with the court." *Marin v. Biros*, 663 F. App'x 108, 110-11 (3d Cir. 2016).

(2007). "Notwithstanding this liberality, *pro se* litigants are not relieved of their obligation to allege sufficient facts to support a cognizable legal claim." *Walker v. USW 13,* No. 23-cv-473, 2024 WL 1984768, at *2 (W.D. Pa. Apr. 19, 2024), *report and recommendation adopted*, 2024 WL 2229990 (W.D. Pa. May 16, 2024).

"Generally, a district court ruling on a motion to dismiss may not consider matters extraneous to the pleadings. But where a document is integral to or explicitly relied upon in the complaint, it may be considered without converting the motion to dismiss into one for summary judgment under Rule 56." *Doe v. Princeton Univ.*, 30 F.4th 335, 342 (3d Cir. 2022) (internal quotation marks and citation omitted). In deciding a Rule 12(b)(6) motion, a court may consider the facts alleged on the face of the amended complaint, and "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice," *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007), as well as public records, *Doe*, 30 F.4th at 342. Courts may also consider "'an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document.'" *Steinhardt Grp. Inc. v. Citicorp.,* 126 F.3d 144, 145 (3d Cir. 1997) (quoting *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.,* 998 F.2d 1192, 1196 (3d Cir. 1993)).

II. Analysis

A. Dismissal Pursuant to Rule 12(b)(2) and Rule 12(b)(5)

The Cruzan Defendants' arguments for dismissal under Fed. R. Civ. P. 12(b)(2), for lack of personal jurisdiction, and Rule 12(b)(5), for insufficient service of process, are confined to footnotes: the first, discusses the returns of service filed by Garcia, and notes that it was "unclear" if service of the Amended Complaint was effected on Defendants, Dkt. No. 42 at 1 n.2, and the second, states that Garcia failed to effect proper service on Beam and Cruzan under Fed. R. Civ. P. 4, and had not served Daniels, *id*. at 2 n.3. They

conclude that, as a result, the Court did not have personal jurisdiction over the Defendants and the Complaint should be dismissed for want of personal jurisdiction and failure to properly effect service of process. *Id.*

Pursuant to LRCi 7.1(c)(1), a memorandum "shall contain the argument in support of the motion, including citation to relevant legal authority." Here, the conclusory footnoted argument in support of dismissal under these two Rule 12 provisions contain few (and arguably ambiguous) facts, no standard, no case law, and no analysis. The Court recommends that, to the extent the Cruzan Defendants attempted to assert dismissal on these grounds, that the District Judge decline to rule on these grounds and find that these requests for relief are insufficiently argued. *See Smajlaj v. Campbell Soup Co.*, 782 F. Supp. 2d 84, 105 (D.N.J. 2011) ("Defendants also maintain in a footnote of the brief supporting the motion to dismiss that service upon Campbell Sales Company was improper, but neither entity makes a motion pursuant to Rule 12(b)(5) or provides the grounds for such a motion. Accordingly, claims against the Campbell Soup Company will not be dismissed on this ground."); *see also Aultman v. Shoop*, No. 20-cv-3304, 2021 WL 3634730, at *3 (S.D. Ohio Aug. 17, 2021) ("Moreover, to the extent that Defendant Shoop cites Rule 12(b)(5) (or by extension Rule 12(b)(2)), he fails to set forth any serious argument challenging the sufficiency of service of process . . . . Absent a more well-developed argument on this issue, the Court cannot conclude that Defendant Shoop has raised a sufficient basis for dismissal."); *Manuel v. Aventine Renewable Energy Holdings, Inc.*, No. 15-cv-188, 2016 WL 122951, at *4 (D. Neb. Jan. 8, 2016) ("Defendants assert, in a single footnote in their brief in support of their motion, that service was defective because Manuel failed to serve them with his original complaint, and that the Court may dismiss this case because of it, pursuant to Rule 12(b)(5). . . . Nowhere in their motion do

Defendants move this Court to dismiss under Rule 12(b)(5). . . . The Court is unwilling to dismiss the case on the basis of the three-sentence footnote.").

B. Title VII and ADA Claims

In relevant part, Title VII provides:

> [i]t shall be an unlawful employment practice for an employer. . . to fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 20003-2(a)(1). To be protected from retaliation under Title VII, the protected activity must relate to employment discrimination charges brought under that statute, implicating "discrimination on the basis of race, color, religion, sex, or national origin." *Slagle v. Cnty. of Clarion,* 435 F.3d 262, 268 (3d Cir. 2006). The Americans with Disabilities Act provides that "[n]o covered entity shall discriminate against a qualified individual on the basis of disability in regard to . . . discharge of employees. . . and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). The ADA retaliation provision, 42 U.S.C. § 12203(a), states that "[n]o person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by [the ADA] or because such individual made a charge . . . under [the ADA]." *Id.*

In order to bring a Title VII or an ADA claim, a plaintiff must file a charge of discrimination with the EEOC within 300 days of an alleged incident. *See* 42 U.S.C. § 2000e-5(e)(1), 42 U.S.C. § 12117; *Commc'ns Workers of America v. New Jersey Dept. of Personnel,* 282 F.3d 213, 216 (3d Cir. 2002); *Nielsen–Allen v. Indus. Maint. Corp.,* 285 F. Supp. 2d 671 (D.V.I. 2002). If after 180 days the EEOC has not resolved the charge, it must notify the complainant, generally through the issuance of a right to sue notice. *See Waiters v. Parsons,* 729 F.2d 233, 237 (3d Cir.1984). After receiving the notice of a right to sue, a plaintiff has 90 days in which to file a lawsuit on the investigated claims, after which time

the ability to bring suit expires. *See Burgh v. Borough Council of Montrose,* 251 F.3d 465, 470 (3d Cir. 2001) ("The 90–day period for filing a court action after receipt of a right to sue notice is treated as a statute of limitation."); *Figueroa v. Buccaneer Hotel, Inc.,* 188 F.3d 172, 176 (3d Cir. 1999) (holding that plaintiff's failure to file suit within the 90–day time period completely bars her claims).

The Cruzan Defendants contend that the Title VII and ADA claims are time-barred because Garcia did not file his complaint within 90 days of receiving the Notice of Right to Sue letter from the EEOC. Dkt. No. 42 at 6. This argument is based on the Court considering Garcia's Charge to the EEOC, as well as the EEOC's Notice of Right to Sue letter, neither of which Garcia attached to his Complaint or Amended Complaint. The Cruzan Defendants, however, attached both documents to their motion to dismiss, arguing that the Court could consider them without converting the motion to one for summary judgment because Garcia's Complaint specifically referred to them. Dkt. No. 42 at 3 nn. 5, 6, citing Dkt. No. 1 at 5. Moreover, the complaint form directed him to attach the Notice of the Right to Sue letter to the Complaint (he did not do so). Dkt. No. 1 at 5.

The case law cited by the Cruzan Defendants supports their position that "an EEOC charge of discrimination and the related documents (e.g., a Determination or Notice of Right to Sue) are public records which may thus be considered without converting the motion to dismiss into a motion for summary judgment." *Elchick v. Akustica, Inc*., No. 12-cv-578, 2013 WL 1405215, at *4 (W.D. Pa. Mar. 6, 2013) (citing cases); *see also Bostic v. AT & T of Virgin Islands*, 166 F. Supp. 2d 350, 355 (D.V.I. 2001) ("I conclude that I may properly consider Bostic's EEOC Charge, at least for the limited purposes of determining the date filed and violations alleged, without converting AT & T's Motion to Dismiss into a Rule 56 motion. Obviously, the Plaintiff prepared the charge and is aware of its contents. Her claim cannot proceed unless she can demonstrate that the Charge was filed in a

timely manner. . . . There is rather less difficulty in concluding that I may also consider Bostic's Right to Sue Letter . . . . The public record exception includes letter decisions of government agencies.") (internal quotation marks omitted). Accordingly, the Court will consider the EEOC Charge and Notice of the Right to Sue, submitted by the Cruzan Defendants, in adjudicating the motion to dismiss.

Once the Court considers those documents, it is clear that Garcia's Title VII and ADA claims must be dismissed as time-barred. A plaintiff "must commence a lawsuit within 90 days after receiving a right to sue notice from the EEOC." *Wolfgramm v. Communica'n Workers of Am. Local 13301*, 525 F. Supp. 3d 556, 559 (E.D. Pa. 2021); *see also* EEOC Right to Sue letter, Dkt. No. 42-2 at 2, 3 (providing that "[y]our lawsuit **must be filed WITHIN 90 DAYS of your receipt of this notice**, or your right to sue based on this charge will be lost."). The Third Circuit has required strict adherence to the 90-day deadline, holding that a claim filed "even one day beyond this 90-day window is untimely and may be dismissed absent an equitable reason for disregarding this statutory requirement." *Wolfgramm,* 525 F. Supp. 3d at 559 (citing *Figueroa*, 188 F.3d at 176).

The 90-day filing period begins to run upon receipt of the Right to Sue letter, not from the date on the notice. *Id*. If the complaint does not indicate the date the plaintiff received the notice, courts "presume that a plaintiff received [his] right-to-sue letter three days after the EEOC mailed it." *Seltzinger v. Reading Hosp. & Med. Ctr.*, 165 F.3d 236, 239 (3d Cir. 1999). The right-to-sue letter was dated October 18, 2021. Dkt. No. 42-2 at 2. The Complaint did not indicate when Garcia received it, so the Court will presume he received it on October 21, 2021. *Seltzinger*, 165 F.3d at 239. Garcia filed his Complaint on February 13, 2023—by the Cruzan Defendants' count, 483 days after receipt of the Right to Sue letter. Dkt. No. 42 at 3. Thus, it is untimely, and the Title VII and ADA claims must be

dismissed if there is no equitable reason that would excuse his untimely filing. *Wolfgramm*, 525 F. Supp. 3d at 559.

Among the equitable doctrines that may excuse an untimely filing, are waiver, estoppel and equitable tolling. *Zipes v. Trans World Airlines, Inc*, 455 U.S. 385, 393 (1982) (Title VII); *Simko v. United States Steel Corp*., 992 F.3d 198, 204 & n.5 (3d Cir. 2021) (ADA).[5] Here, Garcia's Complaint provides no insight or explanation why he waited over a year after receipt of the Right to Sue letter—which had the 90-day deadline clearly marked—to file his Complaint in district court. None of the grounds for equitable tolling, waiver, or estoppel appear to apply. Moreover, Garcia had an opportunity to respond to the Cruzan Defendants' motion to dismiss in which he could have contested the application of the 90-day deadline and explained the circumstances surrounding his late filing, which may have raised an equitable issue to excuse his late filing. But he did not file a response to the motion to dismiss served on June 3, 2024. As a result, the Court recommends that his Title VII and ADA claims be dismissed against the Cruzan Defendants as time-barred.

Having made this recommendation, it follows that, although the Union Defendants did not interpose a motion to dismiss, the Title VII and ADA claims against them should

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[5] A court may apply equitable tolling:

> (1) when a claimant received inadequate notice of her right to file suit, (2) where a motion for appointment of counsel is pending, (3) where the court has misled the plaintiff into believing that she has done everything required of her, (4) when the defendant has actively misled the plaintiff, (5) when the plaintiff in some extraordinary way was prevented from asserting her rights, or (6) when the plaintiff timely asserted her rights in the wrong forum. This list is explicitly illustrative, and not exclusive; thus, it in no way displaces traditional equitable principles. But restrictions on equitable tolling have to be scrupulously observed because this remedy is available only sparingly and in extraordinary situations.

Keller v. Sierra-Cedar, LLC, No. 22-cv-00013, 2024 WL 345501, at *3 (M.D. Pa. Jan. 30, 2024) (internal quotation marks and footnotes omitted).

be dismissed for the exact same reason—the failure of Garcia to file his Complaint in federal court within 90 days of receiving the Right to Sue letter. Given that this ground for dismissal is common to both sets of Defendants, and Garcia had an opportunity to respond to the Cruzan Defendants' arguments raised in the motion to dismiss but declined to do so, the Court recommends sua sponte dismissal of the Title VII and ADA claims against the non-moving Union Defendants as well. *See Coulter v. Unknown Prob. Officer,* 562 F. App'x 87, 89 n.2 (3d Cir. 2017) (affirming district court's sua sponte dismissal of non-moving defendant where the grounds raised by the moving defendants were common to all defendants and the plaintiff had an opportunity to respond to the moving defendants' arguments); *Sims v. Gregg,* No. 15-cv-5426, 2017 WL 783748, at *7 (E.D. Pa. Feb. 28, 2017) (sua sponte dismissing complaint against both moving and non-moving defendants where claims were time barred); *Fleck v. Univ. of Pa.,* No. 12-cv-3765, 2013 WL 12141349, at *7 (E.D. Pa. Feb. 20, 2013) ("Plaintiffs' failure to offer any facts of 'other similarly situated individuals or groups' is fatal to their Equal Protection claims against all defendants in this matter, and since plaintiffs were adequately noticed of this possible basis for the dismissal of this claim in the Penn defendants' motion to dismiss, we will dismiss it against all moving and non-moving defendants[.]").

Nevertheless, because Garcia is proceeding pro se, it is further recommended that the Title VII and ADA claims be dismissed without prejudice, and that the District Judge permit him to file a Second Amended Complaint within a circumscribed period of time in which he will have an opportunity to plead facts justifying why equitable tolling or other equitable doctrines may apply to excuse filing his Complaint beyond the 90-day period after receiving his Notice of Right to Sue letter. *See Taylor v. Comput. Sciences Corp.*, No. 20-cv-1848, 2021 WL 3464790, at *5 (D.N.J. Aug. 6, 2021) ("[A]lthough [Plaintiff] has not alleged facts that would warrant any sort of equitable tolling of the limitations period,

this Court cannot say that he is wholly incapable of doing so. Thus, dismissal without prejudice is appropriate." (internal quotation marks omitted)); *see also Simmons v. UHaul Legal Dep't*, No. 23-cv-20517, 2024 WL 1461196, at *5 (D.N.J. Apr. 3, 2024) ("The Court will accordingly dismiss the Complaint without prejudice and permit Plaintiff leave to amend within thirty (30) days. . . . When a plaintiff files a complaint *pro se* and is faced with a motion to dismiss, "unless amendment would be futile, the District Court *must* give a plaintiff the opportunity to amend [his] complaint." *Phillips v. County of Allegheny*, 515 F.3d 224, 228 (3d Cir. 2008) (citing *Shane v. Fauver*, 213 F.3d 113, 116 (3d Cir. 2000) (emphasis added). That is the case even when leave to amend has not been sought.").

C. The WDA Claim

In describing the contours of a WDA cause of action, the court has explained:

> The WDA states, simply, that "[a]ny employee discharged for reasons other than those stated in subsection (a) of this section shall be considered to have been wrongfully discharged[.]" 24 V.I.C. § 76(c). The referenced subsection (a) provides nine enumerated reasons justifying termination, including such conduct as incompetence, dishonesty, and the use of intoxicants. 24 V.I.C. § 76(a). The WDA as a private cause of action is authorized by 24 V.I.C. § 79, which permits "any wrongfully discharged employee [to] bring an action for compensatory and punitive damages in any court of competent jurisdiction against any employer who has violated the provisions of section 76 of this chapter." 24 V.I.C. § 79. "In this language, three elements distinguish themselves: (1) an employee has been discharged; (2) by an employer; (3) who violated the provisions of section 76." *Pedro v. Ranger American of the V.I., Inc.*, 70 V.I. 251, 275 (V.I. Super. 2019) (internal quotations omitted).

Motylinski v. Glacial Energy (VI), LLC, No. 13-cv-0127, 2021 WL 4037496, *10 (D.V.I. Sept. 3, 2021). Garcia alleges that he was discharged by the Cruzan Rum Distillery on the basis, inter alia, of his disability and in retaliation for raising various safety and health concerns. None of these reasons are protected under the WDA statute.

In arguing that Garcia did not state a claim under the WDA, the Cruzan Defendants rely on the CBA, which they appended to their motion to dismiss, Dkt. No. 42-3, and argue that (1) the WDA claim is preempted by § 301 of the Labor Management Relations Act, or

should be considered a § 301 claim,[6] Dkt. No. 42 at 8-10, and (2) Garcia's employment relationship at Cruzan was modified by the CBA, which addressed the grounds for discharge, *id.* at 10-12. Assessing their arguments requires the Court to address a preliminary question: whether the Court may consider the CBA in the first place, without converting the motion into one for summary judgment.

The Court employs the same standard it applied above when determining whether to consider the EEOC Charge and Right to Sue letter that the Cruzan Defendants attached to the motion to dismiss. Here, however, the result is different. Garcia mentioned the Charge and Right to Sue letter in his Complaint (in response to prompts on the complaint form), and case law considers these documents as public records. *See Doe*, 30 F.4th at 342 (in deciding a Rule 12(b)(6) motion, a court could consider public records without converting it into a motion for summary judgment); *Elchick*, 2013 WL 1405215, at *4 & n.19 (considering EEOC Charge and Right to Sue letter as public records). But Garcia did not mention the CBA in the Complaint/Amended Complaint at all, much less attach it, and it is not a public record. The Cruzan Defendants do not explicitly state that the CBA is "integral" to the Complaint, *Doe*, 30 F.4th at 342 ("But where a document is integral to or explicitly relied upon in the complaint, it may be considered without converting the motion to dismiss into one for summary judgment under Rule 56."). They

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[6] Section 301 provides a federal cause of action for "violation[s] of contracts between an employer and a labor organization representing employees." 29 U.S.C. § 185(a). "When resolution of a state-law claim is substantially dependent upon the analysis of the terms of a collective-bargaining agreement, that claim must either be treated as a [Section] 301 claim or dismissed as pre-empted by federal labor-contract law." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985). A claim brought under Section 301 may be "pure" or "hybrid." *Service Employees Int'l Union Local 36 v. City Cleaning Co.*, 982 F.2d 89, 94 n.2 (3d Cir. 1992). A "pure" action involves a union suing an employer for breach of a collective bargaining agreement. A "hybrid" claim is one brought by an employee against his employer for an alleged breach of a collective bargaining agreement and against his union for breaching its duty of fair representation. *See id.*

ask the Court to consider it on the motion to dismiss by pointing out its proximity to Garcia's allegations concerning the Union. They note that Garcia (a) repeatedly mentioned the Union, its President (Eugene Irish), and grievance procedures, (b) stated that the Union had a duty to provide him fair representation concerning discipline and termination; and (c) considered the Union as his "exclusive" representative as a Cruzan employee. Dkt. No. 42 at 4 n.7 (citing Dkt. No 1-1 at 2-4). They conclude that because the disposition of the WDA claim was dependent on the interpretation of the CBA between Cruzan and the Union, the CBA was appropriately before the Court to consider in addressing their motion. *Id*.

In the Court's view, this attenuated argument provides insufficient support for the Court to consider the CBA on the motion to dismiss. Garcia's references to (1) the Union and its President, (2) filing a grievance (in the context of challenging his termination), Dkt. No. 1-1 at 2; and (3) reports he sent Irish to "make him aware of the current state of employment and all these situations leading up to my termination," *id*. at 5, all related to his Union membership. It requires another step (that Garcia did not take) to show that his allegations implicitly relied on the CBA in support of his claim. In fact, many of the Cruzan Defendants' characterizations of the Garcia's allegations are overstatements: for example, Garcia did not consider the Union as his "exclusive" representative as a Cruzan employee. Rather, the Complaint describes numerous instances where Garcia himself submitted verbal and/or written complaints to OSHA, the NLRB, the plant manager, his supervisor, and the director of human resources; he was not relying on the Union to do so. While Garcia also mentioned that he was "paying for a service" (by paying Union dues) and he wanted the Union to represent him fairly and Irish to undertake an "investigation" and file a grievance to help him get his job back. *id*. at 2, these references are not enough

for the Court to conclude that the CBA was "integral" to Garcia's claims. Rather, it is integral to the Cruzan Defendants' defense.

Case law supports this conclusion. Where district courts have considered a CBA provided by a defendant in support of a motion to dismiss without converting it into a motion for summary judgment, the complaint either explicitly referred to the CBA, *Miles v. Nat'l Football League*, 641 F. Supp. 3d 91, 94 (D.N.J. 2022), or the plaintiff actually relied on it to establish integral elements of his claim, *Hess v. Cnty. of Lehigh*, No. 07-cv-5087, 2009 WL 2461734, at *1 (E.D. Pa. Aug. 10, 2009); *see also Whitehead v. City of Wilmington*, No. 09-cv-412, 2011 WL 607386, at *3 (D. Del. Feb. 10, 2011) (considering CBA after concluding that plaintiff made it an "integral" part of the amended complaint and referenced it as an exhibit to her answering brief opposing the motion to dismiss). As noted above, Garcia did not explicitly refer to it, nor was it integral to his Complaint.

If Garcia's references were insufficient to warrant consideration of the CBA in ruling on the motion to dismiss, the Cruzan Defendants ask the Court to take judicial notice of it pursuant to Fed. R. Evid. 201(b), given that matters subject to judicial notice may be considered without converting a motion to dismiss to one for summary judgment. Dkt. No. 42 at 4 n.8. "A court may take judicial notice of facts that are not subject to reasonable dispute because they are either generally known within the trial court's territorial jurisdiction or can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *Sturgeon v. Pharmerica Corp.*, 438 F. Supp. 3d 246, 257 (E.D. Pa. 2020). The cases cited for this proposition, *Crowell v. Ionics, Inc.*, 343 F. Supp. 2d 1, 15 n.7 (D. Mass. 2004) (citing, inter alia, *Oran v. Stafford*, 226 F.3d 275, 289 (3d Cir. 2000)), concern courts taking judicial notice of matters of public record—public disclosure documents filed with the SEC—which is not the case here. The Cruzan Defendants provide no evidentiary support for their position that the CBA is "not subject

to reasonable dispute" and "can be accurately and readily determined from sources whose accuracy cannot be questioned." Fed. R. Evid. 201. Moreover,

> [t]he Third Circuit has cautioned that taking judicial notice should be done sparingly at the pleadings stage. Only in the clearest of cases should a district court reach outside the pleadings for facts necessary to resolve a case at that point. Courts will, however, take judicial notice of certain matters of public record on a motion to dismiss; examples of matters of public record include "Securities and Exchange Commission filings, court-filed documents, and Federal Drug Administration reports published on the FDA website.

Sturgeon, 438 F. Supp. 3d at 257 (internal quotation marks and footnote omitted). Accordingly, the Court will not take judicial notice of the CBA in adjudicating the motion to dismiss and will not consider it. Thus, without being able to refer to the CBA to support their position that Garcia failed to state a WDA claim, the Cruzan Defendants' arguments against dismissal of that claim fail, and the claim may proceed.

D. The VICRA Claim

The VICRA provides, in pertinent part, that it is an unlawful discriminatory practice:

> [f]or an employer, because of age, race, creed, color, national origin, place of birth, sex, disability and/or political affiliation of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

10 V.I.C. § 64(1)(a). The standard for pleading claims under the VICRA is lower than that under Title VII or analogous federal statutes; instead, a plaintiff need only "plead enough facts to substantiate his claim." *See Reynolds v. Rohn*, 70 V.I. 887, 897 (V.I. 2019) (citing *Rennie v. Hess Oil Virgin Islands Corp.*, 62 V.I. 529, 552 (V.I. 2015)).

Garcia's Amended Complaint did not specify which provisions of VICRA support this cause of action. However, the Amended Complaint contains no allegations regarding age, race, creed, color, national origin, place of birth, sex, and/or political affiliation discrimination. Retaliation claims are cognizable under 24 V.I.C. § 451(a)(a), not 10 V.I.C.

§ 64(1)(a). As to disability discrimination, the VICRA does not define what constitutes a disability under the statute, there is a dearth of case law on the subject, and thus there is no pleading standard against which such a claim may be assessed. If the Court were to borrow the definition of disability from the ADA as a guide, Garcia would have to show: (1) "a physical or mental impairment that substantially limits one or more major life activities of such individual;"[7] (2) "a record of such an impairment;" or (3) "being regarded as having such an impairment." 42 U.S.C. § 12102(1)(A)-(C). Garcia alleged that he suffered from an unidentified chest/respiratory problem and a spinal injury, both of which could constitute disabilities because they affected his ability to lift and work, major life activities. He also procured a doctor's note for his chest pain and dizziness. Dkt. No. 42 at 3. His "relief" addendum, Dkt. No. 1-2, describes "spinal dislocation," "spinal bleeding," and pinched spinal nerves that he experienced, allegedly as a result of working at Cruzan Rum. He contends that because he had breathing and back problems, he was sent home, his supervisor threatened to call the police, and he was suspended. These allegations appear to be sufficient to give the Cruzan Defendants notice of his claim. The Court recommends denying the Cruzan Defendants' motion to dismiss the VICRA claim.

E. Supplemental Jurisdiction

The Court notes that if all of the claims in a complaint over which a federal court has original jurisdiction—here, the Title VII and ADA claims—are dismissed, particularly at the inception of a case, leaving only state law claims, a district judge will weigh whether the court should exercise supplemental jurisdiction over the remaining state claims. The relevant statute, 28 U.S.C. § 1367, states that the federal courts "shall have supplemental

[7] "Major life activities" include, "but are not limited to . . . lifting . . . and working." 42 U.S.C. § 12102(2)(A).

jurisdiction" over state law claims which are "part of the same case or controversy" as a claim over which the court exercises original jurisdiction. 28 U.S.C. § 1367(a). Subsection (c) of the statute provides, however, that a district court may, in its discretion, decline to exercise jurisdiction over the state law claims if "the district court has dismissed all claims over which it has original jurisdiction." § 1367(c)(3); *see also United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). The Third Circuit has held that supplemental jurisdiction "should be declined where the federal claims are no longer viable, absent 'extraordinary circumstances.'" *Shaffer v. Bd. of Sch. Dirs. of the Albert Gallatin Area Sch. Dist.*, 730 F.2d 910, 912 (3d Cir. 1984) (quoting *Tully v. Mott Supermarkets, Inc.*, 540 F.2d 187, 196 (3d Cir. 1976)); *see also Grubbs v. Univ. of Del. Police Dep't*, 174 F. Supp. 3d 839, 859 (D. Del. 2016) ("If it appears that the federal claim is subject to dismissal under Fed. R. Civ. P. 12(b)(6), then the court should ordinarily refrain from exercising jurisdiction in the absence of extraordinary circumstances.") (internal quotation marks omitted).

Here, the Court has recommended dismissal of the claims over which the federal court had original jurisdiction—the Title VII and ADA claims—against all of the Defendants and has not recommended dismissing the supplemental state law claims under the WDA and VICRA. But because the Court has also recommended permitting Garcia to amend his Complaint to address the deficiencies in his Title VII and ADA claims, the WDA and VICRA claims may be included in the Second Amended Complaint. However, the Court warns Garcia that, if he fails to file a Second Amended Complaint to address the deficiencies in the Title VII and ADA claims, thereby failing to anchor his Second Amended Complaint with claims over which the federal court has original jurisdiction, his Amended Complaint will be subject to dismissal with prejudice. This is because the Court will likely recommend that the Title VII and ADA claims be dismissed with prejudice as time-barred for failure to state a claim—meaning that Garcia cannot amend them—and the remaining

state law claims be dismissed without prejudice on the ground that the District Judge decline to exercise supplemental jurisdiction over those claims. *See Gautier-James v. Hovensa, L.L.C.,* No. 06-cv-106, 2023 WL 4532194, at *4-5 (D.V.I. July 12, 2023). Thus, it is incumbent upon Garcia to file a Second Amended Complaint within the time frame provided by the District Judge if he wants his case to proceed.

CONCLUSION

Accordingly, for the reasons set forth above, it is hereby **RECOMMENDED** that the Cruzan Defendants' Motion to Dismiss Plaintiff's Amended Complaint, Dkt. No. 41, be **GRANTED**, and the Amended Complaint be dismissed **WITHOUT PREJUDICE**.

It is **FURTHER RECOMMENDED** that the District Judge permit the pro se Plaintiff' to file a Second Amended Complaint within a prescribed amount of time in order to provide him an opportunity to remedy the deficiencies in the Amended Complaint identified in this Report & Recommendation.

It is **FURTHER RECOMMENDED** that the March 2, 2023 Report & Recommendation, Dkt. No. 11, **BE VACATED** and Objections thereto, Dkt. No. 20, be **DENIED AS MOOT**.

Any objections to this Report and Recommendation must be filed in writing within fourteen (14) days of receipt of this notice, 28 U.S.C. § 636(b)(1), and must "specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis of such objection." LRCi 72.3. Failure to file objections within the specified time shall bar the aggrieved party from attacking such Report and Recommendation before the assigned District Court Judge. *See, e.g., Thomas v. Arn*, 474 U.S. 140 (1985).

The Clerk of Court shall mail a copy of this Report and Recommendation, as well as a copy of the Cruzan Defendants' Motion to Dismiss, Dkt. Nos. 41, 42, to the pro se

Plaintiff by certified mail, return receipt requested, as well as by email at the email address indicated on the docket.

ENTER:

Dated: June 26, 2024

/s/ Emile A. Henderson III
EMILE A. HENDERSON III
U.S. MAGISTRATE JUDGE