

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 23-cv-01055-NYW-TPO

DANIEL RAY RUIZ,

Plaintiff,

v.

CAPTAIN ROETKER,
SERGEANT GUTIERREZ,
LIEUTENANT JOHN DOE,
NURSE JANE DOE, and
OFFICER STICE,

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Timothy P. O'Hara, United States Magistrate Judge.

Before the Court is Defendants Ray Roetker's, Brittany Gutierrez's, and Jacob Stice's ("Defendants") Motion to Dismiss Plaintiff's Amended Complaint. ECF 36. Defendants' Motion was referred to this Court for recommendation by District Judge Nina Y. Wang.¹

The Court has carefully considered the Motion to Dismiss [ECF 36], Plaintiff Daniel Ray Ruiz's ("Plaintiff") Response [ECF 68], Defendants' Replies [ECF 68 & 71], the entire case file, and the applicable case law in issuing this Report and Recommendation. The Court finds that oral argument will not materially assist in adjudicating the Motion. Based upon the record herein, the Court respectfully recommends the Motion be GRANTED IN PART and DENIED IN PART. For

¹ The Motion was initially referred to Magistrate Judge Scott T. Varholak. ECF 60. Upon my appointment, this Motion was reassigned to this Court for recommendation. ECF 75.

the claims where dismissal is recommended, it is this Court’s recommendation that those claims be DISMISSED WITHOUT PREJUDICE.²

FACTUAL BACKGROUND

On April 15, 2024, Plaintiff filed the operative Third Amended Complaint (“TAC”). ECF 51. The Court takes the following facts from Plaintiff’s TAC and presumes they are true for the purposes of this Recommendation. *See Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009) (citing *Moore v. Guthrie*, 438 F.3d 1036, 1039 (10th Cir. 2006); *see also Boulter v. Noble Energy*, 521 F. Supp. 3d 1077, 1082 (D. Colo. 2021) (citing *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995)).

Plaintiff was incarcerated in the custody of the Colorado Department of Corrections (“CDOC”) at the Centennial Correctional Facility. ECF 51 at p. 2.³ On March 29, 2021, Plaintiff alleges that a fellow inmate, Mr. Terry Stallings, threatened to attack him, provoked him, and “invited him into the shower to fight him.” *Id.* Plaintiff does not elaborate on the nature of the threats, specific details of their heated exchange, or what preceded Mr. Stallings’s threats to attack him. *See id.* Neither does Plaintiff claim that, during the interaction, Mr. Stallings threatened him with *future* harm. Plaintiff alleges that he and Stallings engaged in a “loud, verbal confrontation” in the showers which resulted in both being “locked down.” *Id.* at p. 7.

² To date, Plaintiff has not identified Lieutenant John Doe or Nurse Jane Doe. As a result, neither has been served or answered Plaintiff’s TAC. The Court recommends that in advance of filing his amended complaint, Plaintiff should confer with Defendants to ascertain the identity of these individuals or request the information in writing from defense counsel.

³ The page numbers cited are as designated by the electronic case filing (“ECF”) system and not as numbered in the documents themselves.

After the altercation, Plaintiff “wrote out a thorough kite/letter” requesting to be separated from Mr. Stallings, for Mr. Stallings to be removed from the pod, or for Mr. Stallings to be “regressed for program non-compliance, and non-compliance with his medications.”⁴ *Id.* Plaintiff submitted his “kite” request to avoid future conflict with Stallings. *Id.* Plaintiff’s kite was submitted to Corrections Officer Wendt, and Plaintiff alleges that, at the time, Defendant Gutierrez was on duty and in the office with Officer Wendt. *Id.* at pp. 7 and 9. It is unclear whether Defendant Gutierrez was present when Plaintiff submitted his kite. *See id.* at p. 7.

Plaintiff met with “Clinician Dalton” later that day and urged Dalton to help with his conflict with Mr. Stallings and request to be separated. *Id.* “Computerized” notes and records were documented during the meeting. *Id.*

Plaintiff acknowledges that the Defendants did not ignore his concern. Upon returning to his pod, he was informed that Defendant John Doe, a lieutenant, had entered the pod to speak to Mr. Stallings “concerning the threats of assault.” *Id.* According to Plaintiff, Defendant John Doe’s representations to Stallings made Plaintiff “look like a rat.” *Id.* Plaintiff was not present for the conversation between Defendant John Doe and Mr. Stallings. *See id.* Following the conversation, though, Plaintiff does not allege that he had any ongoing fear of Mr. Stallings or that there were any other incidents between Plaintiff and Mr. Stallings for the next two months.

Then, on May 23, 2021, Mr. Stallings allegedly attempted to assault another inmate (“Chucky”) in the pod. *Id.* Defendant Stice yelled “Lock Down!” in response to the attempted assault. *Id.* Plaintiff was concerned about his safety but moved towards his cell to comply with Defendant Stice’s order. *Id.* Mr. Stallings then redirected his attention to Plaintiff. *Id.* Despite

⁴ Other than calling it “thorough,” Plaintiff does not identify any other specific details from the kite. For example, it is unclear what medication(s) Mr. Stallings was taking and how Plaintiff was aware of his compliance with those medication(s).

Plaintiff's efforts to avoid Mr. Stallings and back away, Mr. Stallings "attacked him and began to viciously and violently beat him" for approximately three minutes. *Id.* During those three minutes, Plaintiff alleges that Defendant Stice did not initially subdue Mr. Stallings or intervene in the alleged assault. *Id.*

Then, while Plaintiff was "incapacitated on the ground," Defendant Stice sprayed Plaintiff in the face with O.C. spray. Plaintiff does not state he was fighting back or resisting the efforts of Defendant Stice to lock down the unit in any way. After being sprayed by Defendant Stice, Plaintiff alleges that, for about thirty to forty-five minutes, he "couldn't breathe right" due to his "respiratory issues." *Id.* at pp. 5 & 7. After the assault, Plaintiff was escorted to the shower. *Id.* at p. 7.

Due to the alleged assault by Mr. Stallings, Plaintiff sustained a "3/4 in. – 1 in. long head gash/wound" on his head. *Id.* at p. 8. Plaintiff was medically examined after the O.C. spray was rinsed out of his eyes, and Defendant Jane Doe, a nurse, cleared Plaintiff to return to his pod without stitching his wound. *Id.* at p. 11. According to Plaintiff, the head wound "continued to bleed into the night leaving a blood stain about the size of a large orange" on his pillow. *Id.* As it healed, the wound also "left a disfigured scar." *Id.*

Plaintiff alleges that, after the assault, Corrections Officer Marmolejo teased that Plaintiff "needed to learn to 'block' or 'duck & dodge.'" *Id.* at p. 8. Officer Marmolejo remarked that he "knew that was gonna happen!" *Id.* Defendant Roetker made a similar comment to Plaintiff following the incident: "I guess you were right." *Id.* at p. 9.

Plaintiff's TAC asserts two claims pursuant to 42 U.S.C. § 1983 against Defendants Roetker, Gutierrez, and Stice.⁵ First, Plaintiff claims Defendants violated his Eighth Amendment rights, under the Cruel and Unusual Punishment Clause, by failing to protect him from being assaulted by Mr. Stallings. *Id.* at p. 7. As part of the failure to protect claim against Defendant Stice, Plaintiff alleges that Defendant Stice sprayed him in the face with O.C. spray while he was "incapacitated on the ground." *Id.* at p. 5. Second, he claims Defendants violated his 14th Amendment Equal Protection rights "by depriving the Plaintiff of reasonable safety by the failure of utilizing [their] Official Powers to separate the Plaintiff away from Offender Stallings" despite his "pleas and urgent request" and despite the facility in "similar situations" separating the offender by entirely removing the individual from the pod. *See id.* at pp. 8-12. As a result of Defendants' failure to protect Plaintiff from the assault and alleged equal protection violations, Plaintiff asserts that he is entitled to relief. *Id.* at pp. 7-8. Plaintiff demands from each Defendant \$200,000 in compensatory damages and \$100,000 in punitive damages. *Id.* at p. 13.

LEGAL STANDARDS

I. Treatment of a Pro Se Plaintiff's Complaint

A pro se plaintiff's "pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005) (quoting *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991)). "Th[e] court, however, will not supply additional factual allegations to round out a plaintiff's complaint or construct a legal theory on the plaintiff's behalf." *Smith v. United States*,

⁵ Plaintiff also alleges: (1) deliberate indifference by Defendant Jane Doe due to the inadequate medical care (Claim Three) and (2) failure to protect and violation of equal protection against Defendant John Doe (Claims One and Two). ECF 51 at pp. 7-12. As stated above, since these Defendants are not part of the lawsuit, their claims will not be addressed here.

561 F.3d 1090, 1096 (10th Cir. 2009) (quoting *Whitney v. New Mexico*, 113 F.3d 1170, 1173-74 (10th Cir. 1997)). The Tenth Circuit has interpreted this rule to mean that if a court “can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, [it] should do so despite the plaintiff’s failure to cite proper legal authority, [their] confusion of various legal theories, [their] poor syntax and sentence construction, or [their] unfamiliarity with pleading requirements.” *Diversey v. Schmidly*, 738 F.3d 1196, 1199 (10th Cir. 2013) (quoting *Hall*, 935 F.2d at 1110). However, it is not “the proper function of the district court to assume the role of advocate for the pro se litigant.” *Garrett*, 425 F.3d at 840 (quoting *Hall*, 935 F.2d at 1110).

II. Fed. R. Civ. P. 12(b)(6) Motion to Dismiss

Under Rule 12(b)(6), a court may dismiss a claim for “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). Rule 12(b)(6) motions “test the sufficiency of the allegations within the four corners of the complaint after taking those allegations as true.” *Mobley v. McCormick*, 40 F.3d 337, 340 (10th Cir. 1994) (citing *Williams v. Meese*, 926 F.2d 994, 997 (10th Cir. 1991)). “The court’s function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff’s complaint alone is legally sufficient to state a claim for which relief may be granted.” *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1201 (10th Cir. 2003) (citations and quotation marks omitted).

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A plaintiff’s claims are plausible when the well-pleaded facts allow “the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* “The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted

unlawfully.” *Id.* When considering a 12(b)(6) motion, a court must “presume[] all of plaintiff’s factual allegations are true and construe[] them in the light most favorable to the plaintiff.” *Hall*, 935 F.2d at 1109.

However, the court need not accept as true mere legal conclusions asserted with “threadbare recitals of the elements of a cause of action, supported by mere conclusory statements.” *Iqbal*, 556 U.S. at 678. (citing *Twombly*, 550 U.S. at 555). The court “must determine whether the complaint sufficiently alleges facts supporting all the elements necessary to establish an entitlement to relief under the legal theory proposed.” *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1160 (10th Cir. 2007). If a plaintiff’s factual allegations have not “nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.” *Twombly*, 550 U.S. at 570.

III. Consideration of Information Outside the Complaint

While consideration of a Rule 12(b)(6) motion is generally limited to the four corners of the Complaint, there are three exceptions. First, “attached exhibits and documents incorporated into the complaint by reference” may be considered. *See Denver Health & Hosp. Auth. v. Beverage Distribs. Co.*, 843 F. Supp. 2d 1171, 1177 (D. Colo. 2012) (quoting *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009)) (internal quotation marks omitted). Second, the Court may take judicial notice of information, “such as certain documents contained in the public record.” *See Sweesy v. Sun Life Assur. Co. of Canada*, 643 F. App’x 785, 789 (10th Cir. 2016) (unpublished) (first citing *In re Gold Res. Corp. Sec. Litig.*, 776 F.3d 1103, 1108 (10th Cir. 2015); and then citing *Binford v. United States*, 436 F.3d 1252, 1256 n. 7 (10th Cir. 2006)). Third are documents “central to the plaintiff’s claim and the parties do not dispute the documents’ authenticity.” *Alvarado v.*

KOB-TV, L.L.C., 493 F.3d 1210, 1215 (10th Cir. 2007) (quoting *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941 (10th Cir. 2002)) (quotation marks omitted).

Attached to Plaintiff's Reply is an Affidavit written and signed by Mr. Andrew T. Romero. ECF 69-1. Notably, the affiant adds relevant information about Mr. Stallings' generally threatening and intimidating tendencies: "[m]any inmates as well as staff wanted Terry Stallings moved before someone was attacked or seriously assaulted." *Id.* at p. 1. However, this information was not contained in Plaintiff's TAC. And since the information is not contained in the public record, nor have the Defendants explicitly agreed to its consideration, the Court will not consider the contents of the affidavit in forming its Recommendation.⁶

ANALYSIS

Defendants Roetker, Gutierrez, and Stice seek dismissal under Rule 12(b)(6), asserting that Plaintiff fails to state a claim or identify a constitutional violation under the Eighth or Fourteenth Amendments, and, in any event, Defendants are entitled to qualified immunity. *See* ECF 58 pp. 5-13. Plaintiff's response reiterates his legal theories under the Eighth Amendment, citing several cases in support of his request to deny Defendants' Motion. *See generally* ECF 69. Plaintiff does not address Defendants' arguments that he failed to state an equal protection claim or that qualified immunity applies. *Id.* Defendants' reply maintains that Plaintiff fails to allege an Eighth Amendment violation for failure to protect, fails to allege a Fourteenth Amendment equal protection claim, and fails to overcome qualified immunity. *See generally* ECF 71.

⁶ As described below, Plaintiff's ability to plead additional facts from the Affidavit as part of another amended complaint weighs heavily in favor of dismissing Plaintiff's TAC without prejudice.

Claim I: Eighth Amendment

First, Plaintiff claims that all three Defendants failed to protect him from the alleged assault, which violated his Eighth Amendment right to be free from cruel and unusual punishment. *See* ECF 51 at pp. 7-12. To proceed under his first claim, Plaintiff must plausibly plead that the prison officials' deliberate indifference to his safety created an inhumane condition of confinement in violation of the Eighth Amendment's Cruel and Unusual Punishment clause.

The Eighth Amendment's prohibition of "cruel and unusual punishment" imposes duties upon prison officials to protect prisoners and ensure that their basic needs are adequately met. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). The Eighth Amendment mandates that prison officials provide "humane conditions of confinement guided by 'contemporary standards of decency.'" *Penrod v. Zavaras*, 94 F.3d 1399, 1405 (10th Cir. 1996) (quoting *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)). Included in this mandate is the "obligation to take reasonable measures to guarantee the safety of the inmates themselves." *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984); *see Barney v. Pulsipher*, 143 F.3d 1299, 1310 (10th Cir. 1998). Prison officials must also take reasonable measures to protect inmates from fellow inmates. *Farmer*, 511 U.S. at 833-34. "Being violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses to society.'" *Id.* at 834 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981)).

However, an Eighth Amendment violation does not arise from every incidence of violence perpetrated by one prisoner against another. *Id.* Deliberate indifference is a higher standard than "either simple negligence or heightened negligence." *Rider v. Werholtz*, 548 F. Supp. 2d 1188, 1195 (D. Kan. 2008) (citing *Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 407-410 (1997)). Eighth Amendment liability requires "more than ordinary lack of due care for the prisoner's interests or safety." *Farmer*, 511 U.S. at 835 (quoting *Whitley v. Albers*, 475 U.S. 312 (1986)).

To hold an official liable for denying humane conditions of confinement, the prisoner must establish two requirements: one objective, one subjective. *Barney*, 143 F.3d at 1310; *Farmer*, 511 U.S. at 847. First, the objective component is met when the alleged deprivation is “sufficiently serious” and deprives the inmate of the minimal civilized measures of life’s necessities. *Barney*, 143 F.3d at 1310. (citations and quotations omitted); see *Whitley v. Albers*, 475 U.S. 312, 319-20 (1986) (discussing the wantonness of conduct necessary to meet the objective standard); see also *Wilson v. Seiter*, 501 U.S. 294, 302-303 (1991) (applying *Whitley*’s wantonness characterization in a condition of confinement case). If an inmate claims a prison official’s conduct failed to prevent them from harm, “the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm.” *Farmer*, 511 U.S. at 834 (citation omitted).

Second, for the subjective component, the prison official must have acted with “deliberate indifference” to the inmate’s health or safety. *Id.* (citations omitted). An official’s conduct is deliberately indifferent if they are subjectively “aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists,” and the official drew the inference. *Verdecia v. Adams*, 327 F.3d 1171, 1175 (10th Cir. 2003) (quoting *Craig v. Eberly*, 164 F.3d 490, 495 (10th Cir. 1998)). If the risk of harm is obvious, a court may infer the official’s subjective state of mind. See *Farmer*, 511 U.S. at 842 (citations omitted). However, “an obvious risk cannot conclusively establish an inference that the official subjectively knew of the substantial risk of harm, because a prison official may show that the obvious escaped him.” *Martinez v. Beggs*, 563 F.3d 1082, 1089 (10th Cir. 2009) (quoting *Farmer*, 511 U.S. at 843 n. 8) (quotation marks omitted). If subjective knowledge is established, the official must also have disregarded the risk by failing to take reasonable measures to prevent the harm. *Id.* Even those prison officials that “actually knew

of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the ultimate harm was not averted.” *Farmer*, 511 U.S. at 844.

Defendants Roetker & Gutierrez

Plaintiff’s TAC alleges that each Defendant had the “requisite knowledge of the substantial risk of harm” after he submitted his kite, such that their failure to separate the two inmates violated his Eighth Amendment rights. *See* ECF 51 at pp. 7-9. Specifically, he alleges that Defendant Roetker was the housing Captain and had “complete knowledge” of the kite detailing his concerns regarding Mr. Stallings. Defendant Roetker also “had power to move Stallings or [Plaintiff],” because he was the “Designated Housing Supervisor of Centennial Correctional Facility,” but he “did not take any action.” *Id.* at p. 4. Plaintiff does not detail whether Defendant Roetker was present when Plaintiff submitted his kite or whether he personally denied the request. *See id.* However, Plaintiff’s allegation that Defendant Roetker remarked after the assault, “I guess you were right,” *id.*, at this stage, demonstrates Defendant Roetker’s actual, subjective knowledge of Plaintiff’s concerns.

Plaintiff alleges that Defendant Gutierrez was on duty on March 29, 2021, when he was involved in the verbal confrontation with Mr. Stallings in the showers. *Id.* at p. 9. Defendant Gutierrez also was present in the office when the kite was submitted, and together with Correctional Officer Wendt, called Lt. John Doe. *Id.* at p. 4. Following their call, Lt. John Doe went to speak with Mr. Stallings. According to Plaintiff’s TAC, Defendant Gutierrez had knowledge of the risk of harm and had the power to move Plaintiff and/or Mr. Stallings, but she “took no measures to do so in the days and weeks to come.” *Id.*

Plaintiff’s TAC fails both the objective and subjective requirements of the deliberate indifference analysis against both Defendants Roetker and Gutierrez.

a) Objective

Based on the allegations in Plaintiff's TAC, construing them in his favor, as of March 29, 2021, there may have been *a* risk that Mr. Stallings would assault Plaintiff, but that risk was by no means *substantial*. There is no indication that Mr. Stallings had threatened Plaintiff before or that Mr. Stallings was known to be a violent or dangerous individual prior to their altercation. And during the March 2021 incident, while Mr. Stallings "was inviting [Plaintiff] into the shower to fight [him] and beat [him] up," ECF 51 at p. 4, no such fight occurred, and no threats of future harm were alleged. In the two months following the March incident, there is no indication that Mr. Stallings had made ongoing threats or committed any other violence against Plaintiff or any other inmate. Plaintiff submitted no additional kites to be separated from Mr. Stallings.

Furthermore, the May 2021 assault is described as a random act of violence, not one in which Mr. Stallings deliberately targeted Plaintiff. In fact, Mr. Stallings had been attempting to assault *another inmate* when he redirected his attention and "aggressively approached" Plaintiff, who was trying to avoid the danger. ECF 51 at p. 7. Plaintiff also does not allege that Defendants Roetker or Gutierrez were even present on the day of the May 2021 assault.

Thus, based on the factual allegations contained in Plaintiff's TAC, the Court determines there was no objective, substantial risk of serious harm of which Defendants Roetker and Gutierrez were aware following the March 2021 altercation.

b) Subjective

Even if there was an objective, substantial risk of serious harm to Plaintiff, the TAC also fails the subjective analysis as it relates to Defendants Roetker and Gutierrez. The Eighth Amendment only requires an assurance of "reasonable safety," and even prison officials that knew of a substantial risk to inmate safety may be found free from liability if they responded reasonably.

Farmer, 511 U.S. at 844. Based on Plaintiff’s TAC, Defendants responded reasonably. The same day that Plaintiff and Mr. Stallings had the argument, Defendants Roetker and Gutierrez acted on the kite and deployed a lieutenant to speak to Mr. Stallings. *Id.* at p. 5. While the Defendants did not move either inmate to a different pod, it appears that the reaction was commensurate with an ordinary prison altercation between two inmates. *See Farmer*, 511 U.S. at 845 (describing the “unenviable task of keeping dangerous men in safe custody under humane conditions.”). Prison officials are under no obligation to move every inmate that requests to be relocated every time such a request is made.

Therefore, because Plaintiff fails to satisfy either the objective or subjective component, Plaintiff fails to plead a claim for deliberate indifference based on a failure to protect. The Court’s review of the record, some of which is contained outside the TAC, suggests that there is more to the story regarding the danger that Mr. Stallings posed to Plaintiff. However, the Court must only consider the allegations contained in Plaintiff’s TAC, which do not plausibly exceed the threshold of negligence, which is not a basis for an Eighth Amendment violation under §1983. *Farmer*, 511 U.S. at 835. Thus, this Court recommends that Claim One of the Complaint be dismissed as it relates to Defendants Roetker and Gutierrez.

Defendant Stice – Failure to Protect

The claim against Defendant Stice for failure to protect is different than the claims against Defendants Roetker and Gutierrez. Plaintiff does not allege Defendant Stice was involved prior to May of 2021. Although Plaintiff alleges that Defendant Stice had “access” to the kite that he wrote about Mr. Stallings, ECF 51 at p. 11, Plaintiff fails to allege that Defendant Stice had any personal knowledge of Plaintiff’s issues with Mr. Stallings. Instead, he alleges that on May 23, 2021, Defendant Stice’s order to lock-down while two inmates were fighting in front of his cell put him

in harm's way. *Id.* at p. 4. He also alleges Defendant Stice failed to protect him because he "made no attempt to neutralize Stallings" after Mr. Stallings began assaulting him, only assisting after approximately three minutes of what is alleged as a one-sided pommeling. ECF 51 at p. 7. In essence, he alleges that Defendant Stice failed to arrive quickly enough to prevent his injuries.

Like his failure to protect claims against Defendants Roetker and Gutierrez, Plaintiff fails to include sufficient facts to support a claim that Defendant Stice failed to protect him on May 23, 2021. While Plaintiff sufficiently alleges an objective, substantial risk of serious harm once the assault began on May 23, 2021, he has not plausibly established that Defendant Stice was subjectively aware of a substantial risk of harm to support a deliberate indifference claim.

a) Objective

Plaintiff fails to provide facts to support that there was an objective, substantial risk of serious harm to Plaintiff on May 23, 2021, prior to the onset of the assault. According to Plaintiff's TAC, Mr. Stallings and Plaintiff were merely in close proximity that day. They had been in a verbal altercation two months earlier, without any subsequently reported issues between the two. Mr. Stallings attempted to assault another inmate, and then after Detective Stice called for a lock-down, without warning, Mr. Stallings redirected his attention to Plaintiff. There was no objective, substantial risk of serious harm to Plaintiff leading up to the assault.

However, once the assault began, Plaintiff sufficiently pleads an objective, substantial risk of serious harm. Being attacked by another inmate "is sufficiently 'serious' to satisfy the objective prong." *See Wilson v. Pauls*, No. 20-cv-00609-PAB-SKC, 2023 WL 2574375, *4 (D. Colo. Mar. 20, 2023) (citing *Martinez v. Beggs*, 563 F.3d 1082, 1088 (10th Cir. 2009); *Woodyard v. Ala. Dept. of Corr.*, 700 F. App'x 927, 933 (11th Cir. 2017) (finding a substantial risk of serious harm when one inmate stabbed another inmate with a knife).

b) Subjective

Plaintiff fails in the TAC to allege sufficient facts to demonstrate that Defendant Stice was aware of an excessive risk and acted in purposeful disregard of that risk. Plaintiff's TAC does not allege that Defendant Stice was aware of any issues between the two inmates. He merely yelled "Lock Down" in response to a different altercation, which caused Plaintiff to walk by Mr. Stallings, who then, unprovoked and without warning, attacked him. ECF 51 at p. 5. After Mr. Stallings attacked Plaintiff, Plaintiff's TAC alleges that Defendant Stice "allowed the fight to go on for 2.5 to 3 minutes." *Id.* Yet Plaintiff fails to allege when Defendant Stice even became aware that Mr. Stallings had begun attacking him. Without any allegation that Defendant Stice was aware of the assault from the onset, at most, Plaintiff has alleged that Defendant Stice's conduct reaches negligence, but negligence cannot rise to an Eighth Amendment violation. *Farmer*, 511 U.S. at 836 (deliberate indifference lies "somewhere between the poles of negligence at one end and purpose or knowledge at the other . . ."). As a result, Plaintiff has failed to allege an Eighth Amendment claim for failure to protect against Defendant Stice.

Defendant Stice – Excessive Force

Plaintiff does state a claim when he alleges that while he was "incapacitated on the ground," Defendant Stice "O.C. sprayed [Plaintiff] in the face and [he] couldn't breathe right for about ½ hour to 45 minutes." *Id.* at p. 5. Although not explicitly titled as such, this Court interprets these allegations as a claim against Defendant Stice for the excessive use of force—O.C. spray deployed on a defenseless and incapacitated inmate—in violation of the Eighth Amendment.⁷ See *Hall*, 935

⁷ The Court is cognizant that Defendants have not responded to a claim of excessive force. Since it is expected that Plaintiff will amend the TAC, Defendants may respond as part of a renewed Motion to Dismiss to this claim if they see fit. Or if there is no amended complaint by the Plaintiff, this Court does not find the argument waived for purposes of a Rule 56 motion.

F.2d at 1110 (if the court can “reasonably read the pleadings to state a valid claim . . . it should do so . . .”).

While the use of O.C./pepper spray against an inmate is not per se unconstitutional, *Pittman v. Pickett*, No. 22-cv-02566-KAS, 2024 WL 1239943, *5 (D. Colo. Mar. 22, 2024), there is “a robust consensus of persuasive authority” finding “the use of pepper spray by prison officials against a detained person when that person is no longer resisting and no longer presents any reasonable safety threat is an Eighth Amendment violation.” *Segrain v. Duffy*, 118 F. 4th 45, 66 (1st Cir. 2024) (quoting *Irish v. Fowler*, 979 F.3d 65, 76 (1st Cir. 2020)). “Where no legitimate penological purpose can be inferred from a prison employee’s alleged conduct . . ., the conduct itself constitutes sufficient evidence that force was used ‘maliciously and sadistically for the very purpose of causing harm.’” *DeSpain v. Uphoff*, 264 F.3d 965, 978 (10th Cir. 2001) (citing *Giron v. Corrections Corp. of Am.*, 191 F.3d 1281, 1289 (10th Cir. 1999)).

Excessive force claims also require an objective and subjective analysis. A plaintiff must establish that “the alleged wrongdoing was objectively harmful enough to establish a constitutional violation, and that the defendant applied force maliciously and sadistically, rather than in a good faith effort to maintain or restore discipline.” *Lehman v. McKinnon*, No. 18-cv-00952-PAB-NRN, 2020 WL 6119537, *4 (cleaned up) (quoting *Smith v. Cochran*, 339 F.3d 1205, 1212 (10th Cir. 2003)). To determine whether a prison official acted with “wantonness,” the Court may consider a number of non-exclusive factors: (1) the need for the force, (2) whether the officers used a disproportionate amount of force, and (3) the extent of the injury inflicted.” *Id.* (citing *Whitley v. Albers*, 475 U.S. 312, 319 (1986)).

Based on the facts alleged in the TAC, and applying the *Whitley* factors, the Court determines Plaintiff has plausibly alleged Defendant Stice’s use of force on May 23, 2021 was

excessive. When Defendant Stice sprayed Plaintiff in the face, Plaintiff had been under attack for 2.5-3 minutes by Mr. Stallings, and he “was incapacitated on the ground.” *Id.* at p. 5. Plaintiff has not alleged this was a mutual combat-type situation. There was no need to deploy such force on a debilitated Plaintiff. Next, the allegations in the TAC demonstrate that Plaintiff complied with Defendant Stice’s direct orders to lock down. There is no indication that Plaintiff punched Mr. Stallings or that he resisted Defendant Stice’s commands in any way. Under these circumstances, Defendant Stice pepper spraying Plaintiff in the face was a grossly disproportionate use of force against him. Finally, because of Plaintiff’s predisposition and sensitivity to O.C. spray, Plaintiff has sufficiently alleged that the extent of the injury is more than a de minimis injury. *Segrain*, 118 F.4th at 61 (“in certain cases, the type of physical reaction an incarcerated person has to the pepper spray could establish the force used was greater than de minimis.”) (emphasis in original) (quoting *Tedder v. Johnson*, 527 F. App’x 269, 274 (4th Cir. 2013)); *see also DeSpain*, 264 F.3d at 978-79 (Plaintiff’s burning eyes, lung congestion, and ongoing anxiety were not de minimis); *Mitchell v. Maynard*, 80 F.3d 1433, 1440 (10th Cir. 1996) (plaintiff need not claim “significant physical injury to state a cause of action.”). It is not necessary that Defendant Stice knew of Plaintiff’s respiratory issues to make this finding.

While this Court has not identified a Tenth Circuit case precisely mirroring the facts of this present case, the Court is guided by the robust consensus of persuasive authority discussed in *Segrain*. There, the First Circuit conducted an exhaustive survey of cases from the Fourth, Seventh, Eighth, Ninth, and Eleventh Circuits before it determined that the correctional officer’s use of pepper spray constituted an Eighth Amendment violation. This guidance supports the Court’s conclusion that Plaintiff has plausibly pleaded that Defendant Stice demonstrated an “unnecessary and wanton infliction of pain” by using O.C. spray against an “incapacitated” inmate. Cases

finding the use of pepper spray to not constitute an Eighth Amendment violation are factually distinct enough to hold little weight. *See e.g., Lehman*, 2020 WL 6119537, at *4 (plaintiff attacked a correctional officer, causing a facial fracture, concussion, prior to the deployment of pepper spray); *Redmond v. Crowther*, 882 F.3d 927, 937 (10th Cir. 2018) (officers used pepper spray in one part of a jail that inadvertently traveled to other parts of the jail through the ventilation system); *Gargan v. Gabriel*, 50 Fed. App'x 920, 923 (10th Cir. 2002) (pepper spray deployed on an inmate during a cell extraction lacked any reliable inference that it was used “unnecessarily, excessively, or wantonly”); *Santiago v. Walls*, 599 F.3d 749 (7th Cir. 2010) (pepper spray used on plaintiff that was actively involved in a mutual combat type fight). Thus, resolving all reasonable inferences in the Plaintiff's favor, *Greer v. Moon*, 83 F. 4th 1283, 1292 (10th Cir. 2023), and considering plaintiffs need only “nudge[] their claims across the line from conceivable to plausible,” *id.* (citing *Twombly*, 550 U.S. at 570), Plaintiff has sufficiently stated a claim against Defendant Stice for an Eighth Amendment violation based on excessive force.

Qualified Immunity

Defendants further argue that Defendants Roetker, Gutierrez, and Stice are entitled to qualified immunity for all claims. ECF 58 at pp. 12-13. “Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was ‘clearly established’ at the time of the challenged conduct.” *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The doctrine of qualified immunity protects “all but the plainly incompetent or those who knowingly violate the law.” *Grisson v. Roberts*, 902 F.3d 1162, 1167 (10th Cir. 2018) (citing *Kisela v. Hughes*, 584 U.S. 100, 104 (2018) (quotation marks

omitted)). Qualified immunity is not merely a defense, but an immunity from suit. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (citations and quotation marks omitted).

At the motion to dismiss stage, qualified immunity may “spare [government officials] the ordeal of discovery if the complaint fails to allege a constitutional violation or if the alleged violation was not clearly established.” *Robbins v. Oklahoma*, 519 F.3d 1242, 1249 (10th Cir. 2008) (citing *Behrens v. Pelletier*, 516 U.S. 299, 306 (1996)). Plaintiffs must plead sufficient factual allegations, taken as true, to plausibly overcome the qualified immunity hurdle. *See id.*; *cf. Grisson*, 902 F.3d at 1167 (discussing the purpose of qualified immunity in protecting state officials from liability and the “heavy burden” plaintiffs must meet to overcome qualified immunity at summary judgment). Because qualified immunity is designed to “spare [government officials] the ordeal of discovery,” *Robbins*, 519 F.3d at 1242 (citation omitted), there is a public interest in resolving qualified immunity defenses “at the earliest possible stage of a litigation.” *Id.* (citing *Anderson v. Creighton*, 483 U.S. 635, 646 n. 6 (1987) (citations omitted)). The order of analysis for the two-pronged qualified immunity inquiry is within the district court’s discretion. *Al-Kidd*, 563 U.S. at 735 (citing *Pearson v. Callahan*, 555 U.S. 223, 236 (2009)).

Failure to Protect Claim – all Defendants

Because Plaintiff does not plead an Eighth Amendment right with adequate specificity for any Defendants’ failure to protect, the Court need not decide whether the right was clearly established as required for the qualified immunity inquiry. *See Elliott v. Martinez*, No. 21-cv-02358-STV, 2022 WL 4969956, *4-5 (D. Colo. Oct. 3, 2022) (finding Plaintiff failed to allege facts sufficient to allege Defendant violated his clearly established constitutional rights and not addressing the Eighth Amendment violation)); *see also Janny v. Harford*, No. 17-cv-00050-PAB-SKC, 2019 WL 4751761, *4 (D. Colo. Sept. 30, 2019) (addressing first the “clearly established”

right question at summary judgment and not reaching the Eighth Amendment issue). Since this Court recommends that Plaintiff be given leave to amend the TAC, Plaintiff may potentially cure the pleading defects to state plausible claims for relief. In that case, the Court will analyze whether the alleged rights violated are clearly established. Because it is premature to determine whether the three Defendants are entitled to qualified immunity on the failure to protect claim, the Court need not rule on this issue at this time.

Excessive Force Claim – Defendant Stice

Regarding Plaintiff's excessive force allegation based on Defendant Stice's use of O.C. spray to the face, Plaintiff's Eighth Amendment claim should survive and overcome qualified immunity. He sufficiently alleges that Defendant Stice deployed O.C. spray in his face while he was "incapacitated on the ground." ECF 51 at p. 5. As discussed above, there is a "robust consensus of persuasive authority" that would make the use of pepper spray by a correctional officer against a non-resisting, incapacitated inmate a clearly established violation of the Eighth Amendment. *See Segrain*, 118 F. 4th at 66. Because of Plaintiff's "respiratory issues," "serious breathing issues," and asthma, *see* ECF 51 at pp. 7 & 12, the impact of Defendant Stice's conduct on Plaintiff was serious. As it must, the Court takes as true Plaintiff's allegations that he was "incapacitated" and was, at all times prior to and during the assault, making every effort to comply with Defendant Stice's orders. Accepting Plaintiff's allegations as true, Detective Stice's conduct falls within the range of conduct described in *Farmer*, beyond negligent and either intentional or so reckless that it constitutes deliberate indifference. Therefore, with the understanding that Defendants may raise this issue in the future, this Court recommends denying the Motion to Dismiss as it relates to Defendant Stice's Eighth Amendment excessive force claim.

Claim II: 14th Amendment Equal Protection

Plaintiff also makes general allegations that all three Defendants violated his Fourteenth Amendment right to Equal Protection. ECF 51 at pp. 8-12. “The Equal Protection Clause of the Fourteenth Amendment commands that no State shall ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is essentially a direction that all persons similarly situated should be treated alike.” *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). Equal Protection does not “guarantee equal results for all,” or that “the law may never draw distinctions between persons in meaningfully dissimilar situations.” *SECSYS, LLC v. Vigil*, 666 F.3d 678, 684 (10th Cir, 2012) (citing *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 271-23 (1979)). Instead, it “ensure[s] that any classifications the law makes are made ‘without respect to persons,’ that like cases are treated alike, [and] that those who ‘appear similarly situated’ are not treated differently without . . . at the very least, a rational reason for the difference.” *Id.* (quoting *Engquist v. Oregon Dep’t of Agric.*, 553 U.S. 591 (2008) (quotation marks omitted)).

Generally, “[t]o be similarly situated’ an individual ‘must be prima facie identical in all relevant respects or directly comparable in all material respects; although this is not a precise formula, it is nonetheless clear that similarly situated individuals must be very similar indeed.” *Ebonie S. ex rel. Mary S. v. Pueblo School Dist.* 60, 819 F. Supp. 2d 1179, 1190 (D. Colo 2011) (citing *U.S. v. Moore*, 543 F.3d 891 (7th Cir. 2008)). In the prison context, a plaintiff must allege with sufficient factual support that they were treated “differently than other similarly situated prisoners.” *Requena v. Roberts*, 893 F.3d 1195, 1210 (10th Cir. 2018). General or conclusory allegations of differential or discriminatory treatment are insufficient to establish an equal

protection violation. *See id.* Fellow inmates are not “similarly situated” just because they are also imprisoned in the same correctional facility.

As an initial matter, because Plaintiff appears to allege that he was treated differently as an individual and not as a member of a “protected class,” the “class of one” doctrine is how his claim must be analyzed. *Johnson v. Soucie*, No. 17-cv-03093-GPG, 2018 WL 10230984, *3 (D. Colo. March 19, 2016) (citing *Shifrin v. Toll*, 483 F. App’x 446, 449 (10th Cir. 2012)) (applying the “class of one” doctrine to dismiss a Prisoner Complaint as frivolous where a plaintiff alleged he was denied equal protection because the prison officials failed to provide a cleaning kit even though other prisoners received them); *Rivera v. Maldonado*, No. 21-cv-01119-CMA-NYW, 2022 WL 870596, *18 (D. Colo. March 11, 2022) (applying “class-of-one” analysis to the plaintiff’s equal protection claim where he had not alleged that he is a member of a protected class). The two-step “class of one” analysis is largely the same as the “traditional” Equal Protection analysis. *SECYS*, 666 F.3d at 688-89. First, the plaintiff must establish they—individually as opposed to as a member of a class—were “intentionally treated differently from others similarly situated.” *Id.* (quoting *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (internal quotation marks omitted)). Second, if the first element is met, “the plaintiff must prove there is no ‘rational basis’ for it.” *Id.* (citing *Olech*, 528 U.S. at 564-65). “[T]he first element is especially important in class-of-one cases, and a class-of-one plaintiff must provide a specific and detailed account of the nature of the preferred treatment of the favored class.” *Soucie*, 2018 WL 10230984 at *3 (quoting *Jennings v. City of Stillwater*, 383 F.3d 1199, 1213-14 (10th Cir. 2004) (internal quotation marks omitted)). It is generally a difficult burden for plaintiffs to meet. *Id.* Essentially, a plaintiff’s failure to show they were treated differently than similarly situated individuals is failure to establish intentional discrimination. *See SECYS*, 666 F.3d at 689. The Tenth Circuit, in analyzing what

makes inmates “similarly situated,” has required more specific factual support than merely alleging that other inmates received better treatment. *See Requena*, 893 F.3d at 1209-10 (distinguishing the plaintiff from another as not “similarly situated” because plaintiff asked to use the *defendant’s* phone, and the other individual requested to use the *prisons’* telephone).

Plaintiff’s “class-of-one” equal protection claim alleges that he was treated differently from other prisoners in his pod who submitted kites requesting separation from other inmates and were separated from the other inmate. Conclusory allegations that other prisoners’ kites in “similar situations have had the effect of removing an offender entirely from the pod/unit at the urging of a handwritten ‘kite,’” ECF 51 at pp. 9-12, do not sufficiently plead a class-of-one equal protection claim. There is no indication that his kite was ignored because *he* submitted the kite, or that there was a particular reason that he was intentionally discriminated against and his request for separation denied. For the purported “similarly situated” inmates, Plaintiff does not detail how their kites or how the circumstances underlying their requests were similar. It is unclear whether the inmates whose kites resulted in separation were in a *prima facie* identical situation, so the Court cannot determine that they were “similarly situated.” *See A.B. ex rel. B.S. v. Adams-Arapahoe 28J School Dist.*, 831 F. Supp. 2d 1226, 1253-1254 (D. Colo. 2011) (discussing the “exacting burden” of the “similarly situated” inquiry). Instead, the allegations suggest that the request was denied arbitrarily, and not intentionally in a manner that discriminated against Plaintiff. The Court notes that Defendants did respond to Plaintiff’s kite by speaking with the offender on the same day as the first incident. ECF 51 at p. 7. Although Plaintiff was not separated from Mr. Stallings as he requested, Plaintiff does not plead that the facility’s response of mediating the dispute instead of immediately separating the inmates was intentionally different treatment.

The Court finds that Plaintiff fails to plead that Defendants intentionally treated him differently than other inmates who were similarly situated to him in all material aspects. Because Plaintiff's equal protection claims only broadly state allegations against all Defendants and does not plead "a specific and detailed account of the nature of the preferred treatment of the favored class," *Soucie*, 2018 WL 10230984 at *3 (citation and quotations omitted), this Court respectfully recommends that Plaintiff's second claim be dismissed without prejudice for failure to state a claim under Rule 12(b)(6).

Because the Court recommends dismissal of Claim Two for failure to state an equal protection claim, as discussed above, the Court need not conduct the qualified immunity inquiry.

Dismissal Without Prejudice

Because the case has been pending for some time, a review of the procedural history is important in determining whether to dismiss with or without prejudice. Plaintiff filed his initial Complaint on April 26, 2023, as a pro se inmate. ECF 1. On May 18, 2023, United States Magistrate Judge Susan Prose ordered Plaintiff to file an amended complaint that complied with the pleading requirements of Rule 8 of the Federal Rules of Civil Procedure, which he filed on November 6, 2023. ECFs 6 and 21. On November 9, 2023, Judge Prose ordered Plaintiff to file a second amended complaint, which he filed on January 11, 2024. ECFs 22 and 27. Magistrate Judge Prose then issued a Recommendation to dismiss Plaintiff's claims asserted against Defendants in the official capacities. ECF 30. District Judge Lewis T. Babcock adopted the Recommendation [ECF 32], and this case was drawn to Magistrate Judge Varholak. ECFs 32 and 33. On April 15, 2024, Plaintiff filed the TAC, which is the operative pleading to date.

The Court recommends dismissal without prejudice for several reasons. First, although there has been significant judicial involvement in the case over the last 18 months, this is the first

instance where the Court ruled on a motion to dismiss that addressed all the pending claims. Prior recommendations dealt with pleading rules generally [ECF 6] and Plaintiff's claims against Defendants in their official capacities [ECF 30]. Second, Plaintiff has submitted an affidavit in support of his response which contains a statement from a fellow inmate. The affidavit states that Mr. Stallings previously displayed signs of aggressions and made "threats of attack." ECF 69-1. Based on the allegations in the affidavit, Plaintiff may be able to plead additional factual allegations that could cure his pleading deficiencies regarding the Defendants' knowledge of the risk that Mr. Stallings posed to Plaintiff and other inmates at the time he submitted the kite. Should Plaintiff file an amended Complaint, the Fourth Amended Complaint, the Court emphasizes to Plaintiff his pleading burden: to provide sufficient factual allegations to plausibly state a claim for relief for each claim. Finally, the Tenth Circuit recommends that efforts be made to allow parties to amend, especially pro se plaintiffs, to ensure that justice is served. *See* Fed. R. Civ. P. 15(a)(2) ("[t]he court should freely give leave when justice so requires."); *see also Oxendine v. Kaplan*, 241 F.3d 1272, 1275 (10th Cir. 2001) (holding that when a plaintiff is proceeding pro se, dismissal with prejudice is only appropriate "where it is obvious that the plaintiff cannot prevail on the facts he has alleged and it would be futile to give him opportunity to amend." (quoting *Perkins v. Kansas Dep't of Corrections*, 165 F.3d 803, 806 (10th Cir. 1999) (quotation marks omitted)); *Reynoldson v. Shillinger*, 907 F.2d 124, 127 (10th Cir. 1990) (holding prejudice should not attach to dismissal when plaintiff has made allegations "which, upon further investigation and development, could raise substantial issues"). Futility is not obvious at this stage, and so amendment is appropriate.

CONCLUSION

For the reasons set forth above, the Court respectfully **RECOMMENDS** that Defendant's Motion to Dismiss [ECF 58] be **GRANTED IN PART and DENIED IN PART**.⁸

- 1) As to Plaintiff's first claim against Defendants Roetker and Gutierrez, this Court recommends that Defendants' Motion is **GRANTED** and Count One of Plaintiff's TAC [ECF 51] be **DISMISSED WITHOUT PREJUDICE**.⁹
- 2) As to Plaintiff's first claim against Defendant Stice, this Court recommends that Defendants' Motion be **DENIED** due to Plaintiff's allegation of excessive force.
- 3) As to Plaintiff's second claim against all Defendants, Defendants' Motion is **GRANTED** and Count Two of Plaintiff's TAC will be **DISMISSED WITHOUT PREJUDICE**.

As it relates to claims against Defendants John and Jane Doe, since no Motion to Dismiss has been filed by them, the claims remain pending.

⁸ Should the District Judge dismiss some or all of Plaintiff's claims without prejudice, this Court recommends that Plaintiff be given 30 days to file a Fourth Amended Complaint.

⁹ Within fourteen days after service of a copy of this Recommendation, any party may serve and file written objections to the Magistrate Judge's proposed findings and recommendations with the Clerk of the United States District Court for the District of Colorado. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *Griego v. Padilla (In re Griego)*, 64 F.3d 580, 583 (10th Cir. 1995). A general objection that does not put the district court on notice of the basis for the objection will not preserve the objection for *de novo* review. "[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for *de novo* review by the district court or for appellate review." *United States v. 2121 East 30th Street*, 73 F.3d 1057, 1060 (10th Cir. 1996). Failure to make timely objections may bar *de novo* review by the District Judge of the Magistrate Judge's proposed findings and recommendations and will result in a waiver of the right to appeal from a judgment of the district court based on the proposed findings and recommendations of the Magistrate Judge. *See Vega v. Suthers*, 195 F.3d 573, 579-80 (10th Cir. 1999) (holding that the district court's decision to review Magistrate Judge's recommendation *de novo* despite lack of an objection does not preclude application of "firm waiver rule"); *Int'l Surplus Lines Ins. Co. v. Wyo. Coal Refining Sys., Inc.*, 52 F.3d 901, 904 (10th Cir. 1995) (finding that cross-claimant waived right to appeal certain portions of Magistrate Judge's order by failing to object to those portions) *Ayala v. United States*, 980 F.2d 1342, 1352 (10th Cir. 1992) (finding that plaintiffs waived their right to appeal certain portions of Magistrate Judge's orders by failing to object to those portions); *Ayala v. United States*, 980 F.2d 1342, 1352 (10th Cir. 1992) (finding that plaintiffs waived their right to appeal the Magistrate Judge's ruling by failing to file objections). *But see, Morales-Fernandez v. INS*, 418 F.3d 1116, 1122 (10th Cir. 2005) (holding that firm waiver rule does not apply when the interests of justice require review).

DATED at Denver, Colorado, this 5th day of February, 2025.

BY THE COURT:

A handwritten signature in black ink, appearing to read "T. O'Hara", written over a horizontal line.

Timothy P. O'Hara
United States Magistrate Judge