

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>UNITED STATES OF AMERICA</b>	:	<b>CRIMINAL ACTION</b>
	:	
v.	:	
	:	<b>No. 19-142</b>
<b>BRAHEEM BAILEY</b>	:	
	:	

**MEMORANDUM**

Defendant Braheem Bailey moves to dismiss counts 2, 4, and 6 of the Indictment, which charge Defendant with violations of 18 U.S.C. § 924(c)(1)(A)(ii), claiming that the predicate offense of Hobbs Act robbery is not a “crime of violence,” as defined by 18 U.S.C. § 924(c)(3)(A) and required by § 924(c)(1)(A)(ii). ECF No. 14. Therefore, Defendant contends the Government has failed to state an offense pursuant to Federal Rule of Criminal Procedure 12(b)(3)(B)(v) and counts 2, 4, and 6 of the Indictment must be dismissed. *Id.*

**I. BACKGROUND**

The Indictment charges Defendant Braheem Bailey with seven counts: three counts for Hobbs Act robbery, 18 U.S.C. § 1951(a), three counts for brandishing a gun during or in relation to a crime of violence in violation of § 924(c)(1)(A)(ii) based on the predicate offense of Hobbs Act robbery, and a count for violation of 18 U.S.C. § 922(g)(1), having been convicted in Pennsylvania state court of a

crime punishable by imprisonment for a term exceeding one year, for knowingly possessing in and affecting interstate commerce a firearm. ECF No. 1.

Counts 1, 3, and 5 are based on a violation of 18 U.S.C. § 1951(a), Hobbs Act robbery, which prohibits anyone from “in any way or degree obstruct[ing], delay[ing], or affect[ing] commerce or the movement of any article or commodity in commerce, *by robbery* or extortion or attempt[ing] or conspir[ing] so to do, or commit[ting] or threaten[ing] physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section.” 18 U.S.C. § 1951(a) (emphasis added). “Robbery” under the Hobbs Act is defined as “the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.” 18 U.S.C. § 1951(b)(1).

Counts 2, 4, and 6 are based on a violation of 18 U.S.C. § 924(c)(1)(A)(ii), which provides that “any person who, during and in relation to any *crime of violence* . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of

violence . . . (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years . . . .” 18 U.S.C. § 924(c)(1)(A)(ii) (emphasis added).

A “crime of violence” is defined under 18 U.S.C. § 924(c)(3) as “an offense that is a felony and— (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another,” referred to as the “elements clause,” “or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense,” the “residual clause.” 18 U.S.C. § 924(c)(3). The Supreme Court in *United States v. Davis* recently held that the residual clause of § 924(c)(3) is unconstitutionally vague. 204 L. Ed. 2d 757 (2019). Therefore, the only way to determine whether a predicate offense meets the definition of “crime of violence” for a violation of § 924(c)(1)(A)(ii) is through the elements clause of § 924(c)(3). Defendant contends that Hobbs Act robbery is not a crime of violence as defined by § 924(c)(3)(A) and, therefore, counts 2, 4, and 6 of the Indictment must be dismissed for failure to state an offense. ECF No. 14.

## **II. STANDARD**

An indictment must “be a plain, concise, and definite written statement of the essential facts constituting the offense charged.” Fed. R. Crim. P. 7(c)(1). An indictment is facially sufficient if it “(1) contains the elements of the offense

intended to be charged, (2) sufficiently apprises the defendant of what he must be prepared to meet, and (3) allows the defendant to show with accuracy to what extent he may plead a former acquittal or conviction in the event of a subsequent prosecution.” *United States v. Huet*, 665 F.3d 588, 595 (3d Cir. 2012) (quoting *United States v. Vitillo*, 490 F.3d 314, 320 (3d Cir. 2007)).

Federal Rule of Criminal Procedure 12(b)(3) allows a court to dismiss an indictment prior to trial if the indictment fails to state an offense. Fed. R. Crim. P. 12(b)(3)(B)(v). This allows a district court to “ensur[e] that legally deficient charges do not go to a jury.” *United States v. Bergrin*, 650 F.3d 257, 268 (3d Cir. 2011). “Although the Government is not required to set forth its entire case in the indictment, ‘if the specific facts’ that are alleged ‘fall beyond the scope of the relevant criminal statute, as a matter of statutory interpretation,’ the indictment fails to state an offense.” *Huet*, 665 F.3d at 595 (quoting *United States v. Panarella*, 277 F.3d 678, 685 (3d Cir. 2002)).

### **III. DISCUSSION**

Defendant contends that Hobbs Act robbery, the predicate offense for the § 924(c)(1)(A)(ii) counts, is not a “crime of violence” as defined by § 924(c)(3)(A) because “certain factual circumstances exist that make out the offense of Hobbs Act robbery but do not involve any use or threat of force.” ECF No. 14 at 5. To support this contention, Defendant asserts that (i) Hobbs Act robbery can be

consummated with no physical force at all by placing another in fear of injury to intangible property and in fear of future injury to property; (ii) that even if physical force were required, Hobbs Act robbery does not necessarily involve the level of violent force required by § 924(c)(3) and (iii) that the mens rea required for Hobbs Act robbery is broader than that required for § 924(c)'s element-of-force clause.<sup>1</sup>

*Id.*

Both Defendant and the government agree that the Third Circuit's reasoning in *U.S. v. Robinson*, 844 F.3d 137 (3d Cir. 2016), concluding that Hobbs Act robbery is a crime of violence under § 924(c)(3)(A) is abrogated following the Supreme Court's decision in *Davis*. See ECF No. 14 at 9-11; ECF No. 17 at 3-4. In *Robinson*, the Third Circuit concluded that Hobbs Act robbery is a crime of violence under the elements clause of § 924(c)(3), but it explicitly did not apply the categorical approach in making this determination. 844 F.3d at 141. Instead, the Third Circuit stated that it

“do[es] not agree that the categorical approach applies here. When the predicate offense, Hobbs Act robbery, and the § 924(c) offense are contemporaneous and tried to the same jury, the record of all necessary facts are before the district court. The jury's determination of the facts of the charged offenses unmistakably shed light on whether the predicate offense was committed with ‘the use, attempted use, or threatened use of physical force against the person

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<sup>1</sup> While Defendant presented this argument, he noted that the Third Circuit in *United States v. Wilson*, 880 F.3d 80, 85-86 (3d Cir. 2018), rejected a similar argument in the context of unarmed bank robbery, 18 U.S.C. § 2113(a), but raised the point in his motion to dismiss for purposes of preservation. ECF No. 14 at 8-9.

or property of another.’ The remedial effect of the ‘categorical’ approach is not necessary.” *Id.*

Both the government and Defendant contend that the Supreme Court in *Davis* held that the categorical approach must be used in applying the elements clause,<sup>2</sup> and therefore the Third Circuit’s failure to use the categorical approach in determining whether Hobbs Act robbery is a crime of violence under § 924(c)(3)(A) means the analysis in *Robinson* is abrogated. See ECF No. 14 at 10; ECF No. 17 at 3. The government contends, however, that Hobbs Act robbery is still a crime of violence because (1) the text and history of the Hobbs Act establishes that Hobbs Act robbery requires physical force, (2) the text and history of § 924(c) establish that the elements clause encompasses Hobbs Act robbery and (3) the hypothetical situations Defendant provides in his Motion to Dismiss to argue that Hobbs Act robbery is not a crime of violence lack merit. ECF No. 17.

The Supreme Court in *Davis* granted certiorari to resolve the question of whether § 924(c)’s residual clause is constitutionally vague. 139 S.Ct. at 2325. In *Davis*, two defendants were convicted on two § 924(c) counts, among others, one of which charged Hobbs Act robbery as a predicate crime of violence and one that

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<sup>2</sup> See *Davis*, 139 S. Ct. at 2328 (2019) (“And everyone agrees that, in connection with the elements clause, the term ‘offense’ carries the first, ‘generic’ meaning.”); see also *Davis*, 139 S. Ct. at 2339 (Kavanaugh, J., dissenting) (“The first prong of § 924(c)(3) is the elements prong. That prong, the Government concedes here, asks whether the underlying crime categorically fits within § 924(c) because of the elements of the crime.”)

charged Hobbs Act robbery *conspiracy* as a predicate crime of violence. *Id.* On appeal, both defendants argued that the residual clause of § 924(c)(3) was unconstitutionally vague, and the § 924(c) counts that charged them with Hobbs Act robbery *conspiracy* as a predicate crime of violence depended on this residual clause of § 924(c)(3). *Id.* Therefore, defendants argued, these counts should be vacated. *Id.* The Supreme Court in *Davis* determined that, based on the language of § 924(c)(3) and the Supreme Court’s rulings on other nearly identical statutes, Courts must apply the categorical approach in analyzing whether a predicate offense fits the residual clause’s definition of crime of violence and that, in applying the categorical approach to the residual clause, the result is unconstitutional. *Id.* Therefore, the Supreme Court found that § 924(c)(3)(B) is unconstitutionally vague. *Id.* at 2336.

However, here, Defendant contends that Hobbs Act robbery is not a crime of violence under § 924(c)(3)(A), the elements clause, which the Supreme Court did not directly consider. ECF No. 14. Yet, even if the majority opinion in *Robinson* is abrogated based on *Davis*, as Defendant and the government contend, the analysis put forth by Judge Fuentes in his concurring opinion in *Robinson*,<sup>3</sup> the many Circuit Courts who have cited this concurrence favorably,<sup>4</sup> as well as the

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<sup>3</sup> 844 F.3d at 147 (Fuentes, J. concurring)

<sup>4</sup> See e.g., *United States v. St. Hubert*, 909 F.3d 335, 349 (11th Cir. 2018), cert. denied, 139 S. Ct. 1394, 203 L. Ed. 2d 625 (2019); *United States v. Hill*, 890 F.3d 51, 56 (2d Cir. 2018), cert.

Court’s own analysis and the plain language of § 924(c) and § 1951(b)(1) lead this Court to conclude that Hobbs Act robbery is a crime of violence under § 924(c)(3)(A) using the categorical approach.

First, because the Third Circuit did not apply the categorical approach to § 924(c)(3)(A), Judge Fuentes issued a concurring opinion in *Robinson* wherein he concluded that Hobbs Act robbery was a crime of violence under § 924(c)(3)(A) using the categorical approach alone. 844 F.3d at 147 (Fuentes, J. concurring). Judge Fuentes found that the Hobbs Act is a “divisible statute,” because “a person may violate the Hobbs Act by either robbery or extortion.” *Robinson*, 844 F.3d at 150. There, as here, the parties did not ask the court to decide whether a Hobbs Act violation is a crime of violence under § 924(c)(3)(A), but whether Hobbs Act robbery, as defined by § 1951(b)(1), is a crime of violence. *Id.* at 149-150. Therefore, Judge Fuentes found that, while the Hobbs Act was a divisible statute, between robbery and extortion, Hobbs Act robbery was “not a divisible statute” because the means of committing Hobbs Act robbery, “**actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property,**” are simply a “disjunctive list of ‘factual means of committing a single element,’” which does “not render a statute divisible.” *Id.* (emphasis added).

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denied, 139 S. Ct. 844, 202 L. Ed. 2d 612 (2019); *United States v. Gooch*, 850 F.3d 285, 292 (6th Cir.), cert. denied, 137 S. Ct. 2230, 198 L. Ed. 2d 670 (2017).

Therefore, Judge Fuentes determined that “a strict categorical approach is the appropriate method for determining whether Hobbs Act robbery is a ‘crime of violence’ under Section 924(c)(3).” *Id.*

Using a strict categorical approach, Judge Fuentes ultimately concluded that Hobbs Act robbery is a “crime of violence,” under § 924(c)(3)(A) because

“all the alternative means of committing a Hobbs Act robbery, ‘actual or threatened force, or violence, or fear of injury,’ can satisfy Section 924(c)(3)(A)’s requirement of ‘use, attempted use, or threatened use of physical force’ because the Supreme Court has already defined ‘physical force,’ in the context of defining a violent felony, to be simply ‘force capable of causing physical pain or injury to another person.’ In other words, by definition, a jury could have found ‘actual or threatened force, or violence, or fear of injury’ only if the defendant used, attempted to use, or threatened to use physical force because ‘fear of injury’ cannot occur without at least a threat of physical force, and vice versa.” *Id.* at 151. (quoting *United States v. Hill*, 832 F.3d 35 (2d Cir. 2016)).

Many circuit courts have cited Judge Fuentes’s concurring opinion favorably and have similarly found that Hobbs Act robbery is categorically a crime of violence under § 924(c)(3)(A). *See supra* n. 4. Even the majority in *Robinson*, despite finding that the categorical approach did not apply, concluded that the language of Hobbs Act robbery alone “would seem adequate in and of itself to satisfy the ‘elements’ clause of § 924(c)(2)(B),” because “[b]oth definitions refer to the use or threatened use of force against person or property, and the robbery definition goes so far as to include the term ‘violence.’” *Id.* at 144.

This Court not only agrees with Judge Fuentes’s analysis, but, in applying its own analysis, concludes that Hobbs Act robbery is a crime of violence under § 924(c)(3)(A) using the categorical approach.

In employing the categorical approach to determine whether Hobbs Act robbery falls within the elements clause of “crime of violence,” the court must “ascertain the least culpable conduct hypothetically necessary to sustain a conviction under the statute,” and determine whether that conduct satisfies § 924(c)(3)(A). *United States v. Dahl*, 833 F.3d 345, 350 (3d Cir. 2016); *see also Gould v. Attorney Gen. of U.S.*, 480 F. App’x 713, 717 (3d Cir. 2012).

Hobbs Act robbery is defined as “the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.” 18 U.S.C. § 1951(b)(1).

Defendant argues that the least culpable conduct on which one can be convicted of Hobbs Act robbery is where one takes or obtains property from another, against his will, by means of fear of injury to property, immediate or future, which Defendant claims does not require the use of force. ECF No. 14 at 6.

Defendant cites as an example where “the defendant got the owner of a takeout restaurant to hand over \$20 by threatening to complain in front of other customers that an order was infested with vermin, thus causing the owner to fear injury to the value of business goodwill.” *Id.*

First, Defendant’s example comports more closely with the definition for Hobbs Act extortion, which is defined as “the obtaining of property from another, *with his consent, induced* by wrongful use of actual or threatened force, violence, or fear, or under color of official right,” § 1951(b)(2) (emphasis added), as opposed to Hobbs Act robbery, which requires a taking or obtaining of property from another *against his will* by means of, among other ways, fear of *injury*. § 1951(b)(1) (emphasis added).

Second, Defendant contends that the Hobbs Act does not define “property,” and that the Third Circuit has found “property” under the Hobbs Act means both tangible and intangible property, including the “value of business goodwill,” as in Defendant’s example. ECF No. 14 at 6. However, the case cited by Defendant for support, *United States v. Local 560 of International Brotherhood of Teamsters*, considers only the language of Hobbs Act extortion, not Hobbs Act robbery. 780 F.2d 267, 281 (3d Cir. 1985). Furthermore, though the Third Circuit noted in *Local 560* that “other circuits which have considered this question are unanimous in extending the Hobbs Act to protect intangible, as well as tangible, property,” all

cases cited do so in the context of Hobbs Act extortion exclusively. *Id.* (citing *United States v. Zemek*, 634 F.2d 1159 (9th Cir.1980), cert. denied, 450 U.S. 916 (1981); *United States v. Santoni*, 585 F.2d 667 (4th Cir.1978), cert. denied, 440 U.S. 910 (1979); *United States v. Nadaline*, 471 F.2d 340 (5th Cir.), cert. denied, 411 U.S. 951 (1973); *United States v. Tropiano*, 418 F.2d 1069 (2d Cir.1969), cert. denied, 397 U.S. 1021 (1970)).

However, even if Hobbs Act robbery contemplated fear of injury to both tangible and intangible property, § 924(c)(3)(A) does not define “property” either, and there is no reason why this Court should not apply the more expansive reading of “property” to both statutes. *See United States v. Clarke*, 171 F. Supp. 3d 449, 454 (D. Md. 2016) (“[I]f it is possible to commit Hobbs Act robbery by threatening harm to intangible property (a dubious proposition . . . ) it is presumably also possible to commit a crime of violence by threatening harm to such property.”)

Furthermore, Defendant, outside of providing this simplistic example, does not describe any realistic way that this hypothetical Hobbs Act robbery would occur without physical force. *See United States v. Hill*, 890 F.3d 51, 57 (2d Cir. 2018), cert. denied, 139 S. Ct. 844, 202 L. Ed. 2d 612 (2019) (holding that the defendant “failed to show any realistic probability that a perpetrator could effect such a robbery in the manner he posits without employing or threatening physical force . . .”).

Ultimately, the language of § 1951(b)(1) alone indicates that “fear of injury” must involve actual or threatened physical force, and not simply monetary or non-physical injury to property. That Hobbs Act robbery is committed by taking or obtaining another’s property from the person or in the *presence* of another, *against his will*, by means of *fear of injury* necessarily requires a threat of physical force. Many circuit courts agree. *See, e.g. Hill*, 890 F.3d at 58 (Defendants’ “hypotheticals then—to the degree that they would indeed satisfy the Hobbs Act’s ‘fear of injury’ standard—do not fail to involve the use or threatened use of physical force.”); *United States v. St. Hubert*, 909 F.3d 335, 350 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1394 (2019) (Defendant “does not offer a plausible scenario, and we can think of none, in which a Hobbs Act robber could take property from the victim against his will and by putting the victim in fear of injury (to his person or property) without at least threatening to use physical force capable of causing such injury.”); *United States v. Howard*, 650 F. App’x 466, 468 (9th Cir. 2016), as amended (June 24, 2016) (“Because bank robbery by ‘intimidation’—which is defined as instilling fear of injury—qualifies as a crime of violence, Hobbs Act robbery by means of ‘fear of injury’ also qualifies as crime of violence.”); *United States v. Rivera*, 847 F.3d 847, 849 (7th Cir.), *cert. denied*, 137 S. Ct. 2228 (2017) (“Because each of the means by which to satisfy the ‘against his

will’ element requires physical force, the ‘against his will’ element [of § 1951(b)(1)] itself requires physical force.”)

Defendant next contends that even if physical force is required, § 924(c)(3) requires a “level of violent force” that is not necessarily involved in Hobbs Act robbery. ECF No. 14 at 7. However, as Judge Fuentes and Defendant note, the Supreme Court has already considered the amount of force required for “physical force” in the context of defining a violent felony, that is, “force capable of causing physical pain or injury to another person.” *Robinson*, 844 F.3d at 151 (Fuentes, J., concurring); ECF No. 14 at 7 (quoting *Johnson v. United States*, 559 U.S. 133, 140 (2010)). While Defendant contends that “[n]othing in the Hobbs Act requires violent force,” ECF No. 14 at 7, since the Court has already found that Hobbs Act robbery involves at least a threat of physical force, it therefore must also involve at least a threat of “force capable of causing *physical* pain or *injury* to another person.” *Johnson*, 559 U.S. at 140 (emphasis added). Therefore, Defendant’s arguments as to why Hobbs Act robbery is not a crime of violence under § 924(c)(3)(A) fail.<sup>5</sup>

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<sup>5</sup> Defendant also contends that, while § 924(c) requires more than negligent use of force, “the Hobbs Act imposes liability whenever a reasonable person would perceive the defendant’s conduct as threatening force or injury.” ECF No. 14 at 8. Defendant, however, admits that the Third Circuit in *United States v. Wilson* “rejected a similar argument in the context of unarmed bank robbery,” stating that ““the defendant must have knowingly robbed or attempted to rob a bank—in other words, the defendant had to know he was taking money from a financial institution that was not simply giving it away.”” *Id.* (quoting 880 F.3d 80, 85-86 (3d Cir.)).

Lastly, while this motion is at the pretrial level, “[n]early all the cases addressing whether Hobbs Act robbery qualifies as a crime of violence involve sentencing determinations rather than pre-trial motions to dismiss.” *United States v. Rodriguez*, 2017 WL 1398334, at \*2 (E.D. Pa. Apr. 18, 2017), aff’d, 770 F. App’x 18 (3d Cir. 2019). Yet, in those cases determining pre-trial motions to dismiss, courts have agreed that Hobbs Act robbery is a crime of violence under § 924(c)(3).

In *Rodriguez*, prior to *Davis*, Judge Stengel disagreed that the Courts should be required to “apply the categorical approach to pre-trial motions to dismiss,” since “crime of violence” was an “element of the offense rather than a sentencing factor,” however Judge Stengel “conclude[d] that Hobbs Act robbery is a ‘crime of violence’ under *either* the categorical or the modified categorical approach.” *Id.* (emphasis added).

Post-*Davis*, considering a motion to dismiss identical to the one filed in this matter, Judge DuBois found that “under the categorical approach, Hobbs Act robbery constitutes a crime of violence under § 924(c)(3)(A)” and “thus denie[d] defendant[’s] Motion to Dismiss Count Two of the Indictment.” *Unites States v. Smith et al.*, No. 19 Civ. 350-03 (E.D.P.A. Aug. 26, 2019), ECF No. 57 at 5. Judge

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Defendant admits that, “[i]n light of *Wilson*, the point is raised here for purposes of preservation.” *Id.* Therefore, the Court will not consider this argument.

DuBois similarly concluded that “[s]everal United States Courts of Appeals have applied the categorical approach in determining that Hobbs Act robbery has ‘as an element the use, attempted use, or threatened use of physical force,’ and “[i]n doing so, those courts rejected arguments similar to the ones advanced by defendants.” *Id.* at 3 (citing *United States v. Jones*, 919 F.3d 1064 (8th Cir. 2019); *United States v. Garcia-Ortiz*, 904 F.3d 102, 108 (1st Cir. 2018); *United States v. Melgar-Cabrera*, 892 F.3d 1053 (10th Cir. 2018); *Hill*, 890 F.3d at 57–58; *United States v. Fox*, 878 F.3d 574 (7th Cir. 2017); *United States v. Buck*, 847 F.3d 267 (5th Cir. 2017); *In re St. Fleur*, 824 F.3d 1337 (11th Cir. 2016)).

Therefore, this Court finds, with support from other courts in this district as well as many other circuit courts, that Hobbs Act robbery is categorically a “crime of violence” under § 924(c)(3)(A).

#### **IV. CONCLUSION**

For the foregoing reasons, Defendant’s Motion to Dismiss (ECF No. 14) is denied.

**BY THE COURT:**

**DATE: 10/07/2019**

**/s/ Chad F. Kenney  
CHAD F. KENNEY, JUDGE**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>UNITED STATES OF AMERICA</b>	:	<b>CRIMINAL ACTION</b>
	:	
v.	:	
	:	<b>No. 19-142</b>
<b>BRAHEEM BAILEY</b>	:	
	:	

**ORDER**

**AND NOW**, this 7<sup>th</sup> day of **October 2019**, upon consideration of Defendant's Motion to Dismiss (ECF No. 14) and the government's Response thereto (ECF No. 17), it is hereby **ORDERED** and **DECREED** Defendant's Motion to Dismiss (ECF No. 14) is **DENIED**.

**BY THE COURT:**

**DATE: 10/07/2019**

*/s/ Chad F. Kenney*  
**CHAD F. KENNEY, JUDGE**