IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

THERESA YOHN,	:	**Civil No. 3:20-CV-565**
Plaintiff,	:	**(Judge Mariani)**
v.	:	**(Magistrate Judge Carlson)**
SELECTIVE INSURANCE COMPANY OF AMERICA,	:	
Defendant.	:	

REPORT AND RECOMMENDATION

I. Statement of Facts and of The Case

This case, which comes before us for consideration of a motion to dismiss the bad faith claim set forth in the plaintiff's complaint, (Doc. 4), involves a dispute relating to a claim under an automobile insurance policy and began its life as an action filed in state court that was later removed to federal court. The plaintiff's initial complaint, which was filed in the Court of Common Pleas of Schuylkill County, names Selective Insurance Company of America as the defendant and brings a claim for breach of an insurance contract between the parties, (Doc. 1, Count 1), along with a companion claim for breach of a state statutory duty of good faith by Selective in investigating and paying this insurance claim in violation of 42 Pa. Cons. Stat. § 8371. (Doc. 1, Count 2).

In support of these legal claims, the plaintiff's complaint contains a 28-

paragraph factual recital. (Id., ¶¶ 1-28). These well-pleaded allegations guide us in assessing the legal sufficiency of the complaint, and allege, in part, as follows:

> 3. On March 27, 2018, at approximately 4:13 p.m., Plaintiff was the operator of a 2009 Dodge Caravan, owned by D&S Transportation Services and insured by Selective, driving westbound on Main Street in Gilberton, Schuylkill County.
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> 4. On March 27, 2018, at approximately 4:13 p.m., Gary Walters was operating his 2008 Jeep Patriot eastbound on Main Street in Gilberton, Schuylkill County, when he attempted to make a left tum onto the State Route 924 ramp.
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> 5. Gary Walters negligently and carelessly operated his vehicle so as to attempt a left tum without proper clearance and turned directly into the path of travel of Plaintiff causing a violent collision.
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> 6. At the time of the crash, Gary Walters was insured by Nationwide Mutual Insurance Company with bodily injury liability limits of $15,000, which were promptly tendered to Plaintiff.
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> 7. Gary Walter's bodily injury liability limits are not adequate to compensate Plaintiff for the injuries she sustained as a result of this accident.
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> 8. At the time of the accident, Plaintiff was driving a vehicle owned by her employer, D&S Transportation Services, and insured by Selective. Despite numerous requests for a true and correct copy of the insurance policy, same has not been provided by Selective.
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> 9. As is customary with automobile insurance policies in the Commonwealth of Pennsylvania, Selective is responsible to pay compensatory damages for Plaintiffs injuries sustained while operating an underinsured motor vehicle.
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> 10. As is customary with automobile insurance policies in the Commonwealth of Pennsylvania, D&S Transportation Services selected underinsured motorist benefits under their Selective policy,

and Selective accepted premium payments from D&S Transportation Services in exchange therefore.

11. On countless occasions since Plaintiff's underinsured motorist claim has been established, Plaintiff provided to Selective medical records and reports concerning her injuries, condition, treatment, prognosis and recommended treatment plan.

12. The documentation provided to Selective clearly establishes Plaintiff continues to suffer from severe injuries, including but not limited to, complex regional pain syndrome.

13. On June 27, 2019, a formal written demand for available policy limits was mailed to Selective. On July 18, 2019, a Selective representative, Zach Zuber, confirmed via telephone he had received the aforementioned demand package. On September 6, 2019, Mr. Zuber admitted he had not reviewed the demand package, but would make a formal settlement offer by September 17, 2019. On November 5, 2019, O'Connor Law provided Zach Zuber with notice of our arbitrator (as is customary with automobile insurance policies in the Commonwealth of Pennsylvania) and requested Selective provide notice of their arbitrator. O'Connor Law followed-up via certified letter dated November 12, 2019 which was received by Selective on November 18, 2019.

14. On February 6, 2020, Zach Zuber from Selective tendered an offer of $50,000 for resolution of this matter. This offer does not fairly compensate Plaintiff for the injuries she has sustained.

15. Selective has not made a reasonable offer of settlement to Plaintiff and has forced her to file litigation pursuant to the policy, in an effort to further delay payment of underinsured motorist benefits under the policy to which Plaintiff is rightly owed.

(Doc. 1 ¶¶ 3-15).

The complaint went on to allege statutory bad faith violations under Pennsylvania law in the following terms:

24. The action of Selective in the handling of Plaintiff's

> underinsured motorist claim constitutes bad faith as defined under 42 Pa. C.S.A. 8371 as follows:
>
> a. Failing to objectively and fairly evaluate Plaintiff's claim;
> b. Failing to objectively and fairly re-evaluate Plaintiff's claim based on new information;
> c. Engaging in dilatory and abusive claims handling;
> d. Failing to adopt or implement reasonable standards in evaluating Plaintiff's claim;
> e. Acting unreasonably and unfairly in response to Plaintiff's claim;
> f. Failing to attempt in good faith to effectuate a fair, prompt ad [sic] equitable settlement of plaintiff's claim in which Selective' liability under the policy had become reasonably clear;
> g. Subordinating the interests of its insured to its own financial interests;
> h. Failing to promptly offer reasonable payment to Plaintiff;
> i. Failing to reasonably and adequately investigate Plaintiff's claim;
> j. Failing to reasonably and adequately review and evaluate the medical documentation in Selective's possession;
> k. Violating the fiduciary duty owed to Plaintiff;
> l. Acting unreasonably and unfairly by withholding underinsured motorist benefits justly due and owing to Plaintiff;
> m. Failing to make an honest, intelligent and objective settlement offer to Plaintiff;
> n. Causing Plaintiff to expend money to present her claim; and
> o. Causing Plaintiff to bear the stress and anxiety associated with litigation.

(Doc. 1, ¶ 24).

Presented with this state court complaint, Selective removed this action to federal court, (Doc. 1), and moved to dismiss this statutory bad faith claim in its entirety, arguing that this Count of the complaint fails to state claim upon which relief may be granted. (Doc. 4). For her part, the plaintiff responded to this motion

to dismiss by arguing that this complaint sufficiently states a statutory bad faith claim under Pennsylvania law. The motion is fully briefed by the parties and is, therefore, ripe for resolution. For the reasons set forth below, we recommend that the motion to dismiss be denied without prejudice to submission of a motion for summary judgment based upon a fully developed factual record.

II. Discussion

A. Motion to Dismiss–Standard of Review

A motion to dismiss tests the legal sufficiency of a complaint. Rule 12(b)(6) of the Federal Rule of Civil Procedure provides for the dismissal of a complaint, in whole or in part, if the plaintiff fails to state a claim upon which relief can be granted. The moving party bears the burden of showing that no claim has been stated, Hedges v. United States, 404 F.3d 744, 750 (3d Cir. 2005), and dismissal is appropriate only if, accepting all of the facts alleged in the complaint as true, the plaintiff has failed to plead "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). The facts alleged must be sufficient to "raise a right to relief above the speculative level." Twombly, 550 U.S. 544, 555. This requirement "calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence" of necessary elements of the plaintiff's cause of action. Id. at 556. Furthermore, in order to satisfy federal pleading requirements, the plaintiff must "provide the grounds of his entitlement to relief," which "requires

more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Phillips v. County of Allegheny, 515 F.3d 224, 231 (3d Cir. 2008) (brackets and quotation marks omitted) (quoting Twombly, 550 U.S. at 555).

In practice, consideration of the legal sufficiency of a complaint entails a three-step analysis: "First, the court must 'tak[e] note of the elements a plaintiff must plead to state a claim.' Iqbal, 129 S. Ct. at 1947. Second, the court should identify allegations that, 'because they are no more than conclusions, are not entitled to the assumption of truth.' Id. at 1950. Finally, 'where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief.' Id." Santiago v. Warminster Tp., 629 F.3d 121, 130 (3d Cir. 2010).

As the Court of Appeals has observed: "The Supreme Court in Twombly set forth the 'plausibility' standard for overcoming a motion to dismiss and refined this approach in Iqbal. The plausibility standard requires the complaint to allege 'enough facts to state a claim to relief that is plausible on its face.' Twombly, 550 U.S. at 570, 127 S. Ct. 1955. A complaint satisfies the plausibility standard when the factual pleadings 'allow[ ] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.' Iqbal, 129 S. Ct. at 1949 (citing Twombly, 550 U.S. at 556, 127 S. Ct. 1955). This standard requires showing 'more than a sheer

possibility that a defendant has acted unlawfully.' Id. A complaint which pleads facts 'merely consistent with' a defendant's liability, [ ] 'stops short of the line between possibility and plausibility of "entitlement of relief." ' " Burtch v. Milberg Factors, Inc., 662 F.3d 212, 220-21 (3d Cir. 2011) cert. denied, 132 S. Ct. 1861, 182 L. Ed. 2d 644 (2012).

In considering a motion to dismiss, the court generally relies on the complaint, attached exhibits, and matters of public record. Sands v. McCormick, 502 F.3d 263, 268 (3d Cir. 2007). The court may also consider "undisputedly authentic document[s] that a defendant attached as an exhibit to a motion to dismiss if the plaintiff's claims are based on the [attached] documents." Pension Benefit Guar. Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir. 1993). Moreover, "documents whose contents are alleged in the complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered." Pryor v. Nat'l Collegiate Athletic Ass'n, 288 F.3d 548, 560 (3d Cir. 2002); see also U.S. Express Lines, Ltd. v. Higgins, 281 F.3d 382, 388 (3d Cir. 2002) (holding that "[a]lthough a district court may not consider matters extraneous to the pleadings, a document integral to or explicitly relied upon in the complaint may be considered without converting the motion to dismiss in one for summary judgment."). However, the court may not rely on other parts of the record in determining a motion to dismiss. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20

F.3d 1250, 1261 (3d Cir. 1994).

B. Legal Standards Governing Statutory Bad Faith Claims

Pennsylvania law provides for a cause of action by insurance customers against insurance companies that engage in bad faith claims handling, stating that:

> In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions: (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%; (2) Award punitive damages against the insurer; (3) Assess court costs and attorney fees against the insurer.

42 Pa. Cons. Stat. § 8371.

Under Pennsylvania law, "[b]ad faith is a frivolous or unfounded refusal to pay, lack of investigation into the facts, or a failure to communicate with the insured." Frog, Switch & Mfg. Co., Inc. v. Travelers Ins. Co., 193 F.3d 742, 751 (3d Cir. 1999) (citing Coyne v. Allstate Ins. Co., 771 F. Supp. 673, 678 (E.D. Pa. 1991) (bad faith is failure to acknowledge or act promptly on the claims or refusing to pay without reasonable investigation of all available information); Romano v. Nationwide Mut. Fire Ins. Co., 646 A.2d 1228 (1994)). "Ultimately, in order to recover on a bad faith claim, the insured must prove: (1) that the insurer did not have a reasonable basis for denying benefits under the policy; and (2) that the insurer knew of or recklessly disregarded its lack of a reasonable basis in denying the claim." Nw. Mut. Life Ins. Co. v. Babayan, 430 F.3d 121, 137 (3d Cir. 2005). Case law sets exacting standards for any bad faith claim. As the Court of Appeals has observed:

> In the primary case construing bad faith under 42 Pa.C.S.A. § 8371, Terletsky v. Prudential Property & Casualty Co., the Superior Court of Pennsylvania explained:
>
> > "Bad faith" on [the] part of [an] insurer is any frivolous or unfounded refusal to pay proceeds of a policy; it is not necessary that such refusal be fraudulent. For purposes of an action against an insurer for failure to pay a claim, such conduct imports a dishonest purpose and means a breach of a known duty (i.e., good faith and fair dealing), through some motive of self-interest or ill will; mere negligence or bad judgment is not bad faith.
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> 649 A.2d 680, 688 (Pa. Super. 1994) (quoting Black's Law Dictionary 139 (6th ed. 1990)). Terletsky held that, "to recover under a claim of bad faith," the insured must show that the insurer "did not have a reasonable basis for denying benefits under the policy and that the insurer knew of or recklessly disregarded its lack of reasonable basis in denying the claim." Id. Thus, an insurer may defeat a claim of bad faith by showing that it had a reasonable basis for its actions. Horowitz v. Federal Kemper Life Assurance Co., 57 F.3d 300, 307 (3d Cir. 1995). Our Court has described "the essence of a bad faith claim" as "the unreasonable and intentional (or reckless) denial of benefits." UPMC Health Sys. v. Metro. Life. Ins. Co., 391 F.3d 497, 506 (3d Cir. 2004). Bad faith "must be proven by clear and convincing evidence and not merely insinuated." Terletsky, 649 A.2d at 688 (collecting cases). As the District Court noted, this heightened standard requires the insured to provide evidence "so clear, direct, weighty and convincing as to enable a clear conviction, without hesitation, about whether or not the defendants acted in bad faith." Bostick v. ITT Hartford Grp., 56 F. Supp. 2d 580, 587 (E.D. Pa. 1999) (citations omitted).

Amica Mut. Ins. Co. v. Fogel, 656 F.3d 167, 179 (3d Cir. 2011).

These same exacting standards apply to assessing the sufficiency of complaints alleging bad faith claims under § 8371. When considering whether a proposed statutory bad faith claim under § 8371 fails as a matter of law,

> Many federal district courts have recently been called upon to evaluate bad faith complaints in light of Iqbal and Twombly. Under these Supreme Court decisions, plaintiffs must plead sufficient facts to make out a plausible claim for relief against the defendant. See Iqbal, 129 S. Ct. at 1949 (quoting Twombly, 550 U.S. at 557). In the bad faith context, district courts have required more than "conclusory" or "bare-bones" allegations that an insurance company acted in bad faith by listing a number of generalized accusations without sufficient factual support. See, e.g., Liberty Ins. Corp. v. PGT Trucking, Inc., Civ. A. No. 11–151, 2011 WL 2552531, at *4 (W.D. Pa. Jun. 27, 2011); Pfister v. State Farm Fire & Cas. Co., Civ. A. No. 11–799, 2011 WL 3651349 (W.D. Pa. Aug. 18, 2011); Atiyeh, 742 F. Supp. 2d at 599 ("However, these averments are merely conclusory legal statements and not factual averments.").

Palmisano v. State Farm Fire & Cas. Co., CIV.A. 12-886, 2012 WL 3595276 (W.D. Pa. Aug. 20, 2012); see Yohn v. Nationwide Ins. Co., 1:13-CV-024, 2013 WL 2470963 (M.D. Pa. June 7, 2013) (collecting cases).

"Bad faith claims are fact specific and depend on the conduct of the insurer *vis à vis* the insured." Padilla v. State Farm Mut. Auto. Ins. Co., 31 F. Supp. 3d 671, 675 (E.D. Pa. 2014) (quoting Condio v. Erie Ins. Exchange, 899 A.2d 1136, 1143 (Pa. Super. 2006)). On this score, a host of factors may constitute evidence of bad faith. For example, "[a]n insurer's failure to investigate claims adequately may . . . show bad faith." Padilla v. State Farm Mut. Auto. Ins. Co., 31 F. Supp. 3d 671, 676

(E.D. Pa. 2014) (citing O'Donnell ex rel. Mitro v. Allstate Ins. Co., 734 A.2d 901, 906 (Pa. Super. 1999)). Likewise, "[d]elay is a relevant factor in determining whether bad faith has occurred . . . ." Id. (quoting Kosierowski v. Allstate Ins. Co., 51 F. Supp. 2d 583, 588 (E.D. Pa. 1999)). Similarly, "[t]he failure of the insurer to communicate with the claimant may be a basis for a bad faith claim." Id. (citing Romano v. Nationwide Mut. Fire Ins. Co., 646 A.2d 1228, 1232 (Pa. Super. 1994)).

Thus, assessment of the sufficiency of a particular complaint often turns on the specificity of the pleadings and calls for recital of specific factual allegations from which bad faith may be inferred in order to defeat a motion to dismiss. Compare Sypeck v. State Farm Mut. Auto. Ins. Co., 3:12-CV-324, 2012 WL 2239730 (M.D. Pa. Jun. 15, 2012) with Zimmerman v. State Farm Mut. Auto. Ins. Co., 3:11-CV-1341, 2011 WL 4840956 (M.D. Pa. Oct. 12, 2011). Where a complaint's § 8371 bad faith claim simply relies upon breach of contract allegations, coupled with a conclusory assertion that the failure to pay under an insurance policy was "unreasonable" or made in bad faith, courts have dismissed such claims, but typically have afforded litigants an opportunity to further amend and articulate their bad faith claims. See, e.g., Wanat v. State Farm Mut., Auto. Ins. Co., 4:13-CV-1366, 2014 WL 220811 (M.D. Pa. Jan. 21, 2014); Cacciavillano v. Nationwide Ins. Co. of Am., 3:12-CV-530, 2012 WL 2154214 (M.D. Pa. Jun. 13, 2012). In contrast, when a complaint couples general allegations of bad faith with well-pleaded assertions of

unreasonable delay, unreasonable claims processing, and failures to communicate, a complaint adequately states a claim under § 8371 and is not subject to dismissal on the pleadings alone. Padilla v. State Farm Mut. Auto. Ins. Co., 31 F. Supp. 3d 671, 676 (E.D. Pa. 2014).

C. The Defense Motion Should be Denied Without Prejudice to Renewal of Any Dispositive Motion at the Close of Discovery.

Judged against these legal benchmarks, while we regard this as a somewhat close case, we recommend that Selective's motion to dismiss be denied without prejudice to renewal as a motion for summary judgment upon the completion of discovery. In its motion to dismiss, Selective asserts that the plaintiff's complaint fails to meet the exacting standard of pleading required for a statutory bad faith claim under § 8371. However, at this stage of the proceedings, where our review is cabined by the well-pleaded facts in the complaint, we are constrained to disagree.

In reaching this conclusion, we find that while paragraph 24 of the complaint, standing alone, is simply a recital of the elements of a bad faith claim, the complaint, taken as a whole, goes beyond a mere boilerplate recital of the elements of the statute. Rather, as we construe the complaint, it provides the following chronology detailing a failure by Selective to honor this underinsured motorist claim: First, the plaintiff alleges that: "On countless occasions since Plaintiff[']s underinsured motorist claim has been established, Plaintiff provided to Selective medical records and reports concerning her injuries, condition, treatment, prognosis and

recommended treatment plan. (Doc. 1, ¶ 11). According to Yohn, this "documentation provided to Selective clearly establishes Plaintiff continues to suffer from severe injuries, including but not limited to, complex regional pain syndrome." (Id. ¶ 12).

Yohn then describes what she alleges were months of indifference, delay, and failure to investigate on Selective's part, stating that:

> On June 27, 2019, a formal written demand for available policy limits was mailed to Selective. On July 18, 2019, a Selective representative, Zach Zuber, confirmed via telephone he had received the aforementioned demand package. On September 6, 2019, Mr. Zuber admitted he had not reviewed the demand package, but would make a formal settlement offer by September 17, 2019. On November 5, 2019, O'Connor Law provided Zach Zuber with notice of our arbitrator (as is customary with automobile insurance policies in the Commonwealth of Pennsylvania) and requested Selective provide notice of their arbitrator. O'Connor Law followed-up via certified letter dated November 12, 2019 which was received by Selective on November 18, 2019.

(Id. ¶ 13).

Yohn further avers that this course of conduct continued for many months, until February of 2020 when Selective made an offer which, according to Yohn, "does not fairly compensate Plaintiff for the injuries she has sustained" and "has forced her to file litigation pursuant to the policy, in an effort to further delay payment of underinsured motorist benefits under the policy to which Plaintiff is rightly owed." (Id. ¶¶ 14-15).

In our view, these averments, while spare, go beyond the type of mere

boilerplate allegations that courts have found to be too conclusory to sustain a bad faith claim. On this score, we recognize that a bad faith denial of an insurance claim may constitute a violation of § 8371, but in this setting, "[i]n order to show bad faith, a claimant must ultimately establish by clear and convincing evidence both that: 1) 'the insurer lacked a reasonable basis for denying benefits;' and 2) 'the insurer knew or recklessly disregarded its lack of reasonable basis.' Klinger v. State Farm Mut. Auto. Ins. Co., 115 F.3d 230, 233 (3d Cir. 1997) (discussing Terletsky v. Prudential Property and Cas. Ins. Co., 649 A.2d 680, 688 (1994))." Padilla v. State Farm Mut. Auto. Ins. Co., 31 F. Supp. 3d 671, 675 (E.D. Pa. 2014).

While this is an exacting burden of proof, these bad faith determinations are often fact-bound decisions that are not amenable to resolution on the pleadings alone. Instead, "[i]n deciding whether an insurer had a reasonable basis for denying benefits, a court should examine what factors the insurer considered in evaluating a claim. See Terletsky, 649 A.2d at 688–89. 'Bad faith claims are fact specific and depend on the conduct of the insurer *vis à vis* the insured.' Condio v. Erie Ins. Exchange, 899 A.2d 1136, 1143 (Pa. Super. 2006) (citing Williams v. Nationwide Mutual Ins. Co., 750 A.2d 881, 887 (Pa. Super. 2000))." Padilla, 31 F. Supp. 3d at 675. Moreover, fairly construed, the complaint alleges failures by Selective to communicate and timely investigate this claim, coupled with allegations of unreasonable delay in claims processing and payment by Selective. Such allegations

as a matter of law are sufficient to state a bad faith claim under Pennsylvania law. Id.

Thus, while Selective vigorously disputes these averments of bad faith and argues that the facts alleged by the plaintiff support a prudent effort on its part to thoroughly examine and resolve a claim, this argument invites us to go beyond the pleadings themselves and resolve essentially factual questions. This is a task which, in our view, may not be performed on consideration of a motion to dismiss, where we must simply assess the adequacy of the pleadings. Accordingly, we should decline Selective's invitation to resolve this bad faith claim as a matter of law on the pleadings but deny this motion without prejudice to renewal of a summary judgment motion at the close of discovery. See Baltzley v. State Farm Mut. Auto. Ins. Co., No. 3:18-CV-00959, 2018 WL 6977709, at *1 (M.D. Pa. Dec. 11, 2018), report and recommendation adopted, No. 3:18-CV-959, 2019 WL 122990 (M.D. Pa. Jan. 7, 2019) (denying motion to dismiss bad faith claim without prejudice to summary judgment consideration) (Mariani, J.)

III. Recommendation

For the foregoing reasons, IT IS RECOMMENDED that Selective's Motion to Dismiss, (Doc. 4), be DENIED without prejudice to renewal through a motion for summary judgment upon a fully developed factual record.

The Parties are further placed on notice that pursuant to Local Rule 72.3:

Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Submitted this 27th day of July 2020.

S/ Martin C. Carlson
Martin C. Carlson
United States Magistrate Judge