

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

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JOEY ADAMS,

Plaintiff,  
v.

Civil Action No.  
5:13-CV-0745 (DNH/DEP)

JONATHAN BACK,

Defendant.

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APPEARANCES:

FOR PLAINTIFF:

JOEY ADAMS, *Pro Se*  
7607 Fountain Avenue, #3  
Los Angeles, CA 90046

FOR DEFENDANT:

[NONE]

DAVID E. PEEBLES  
U.S. MAGISTRATE JUDGE

REPORT, RECOMMENDATION, AND ORDER

*Pro se* plaintiff Joey Adams has commenced this action against defendant Jonathan Back, asserting state law breach of contract and fraud claims arising from allegations that defendant misrepresented the conditions of a rental property located in St. John, U.S. Virgin Islands, and owned by defendant. Plaintiff's complaint, together with an accompanying application

for leave to proceed *in forma pauperis* ("IFP"), have been referred to me for review. For the reasons set forth below, plaintiff's IFP application is granted, but, because jurisdiction in this case appears to be based upon diversity of citizenship, and plaintiff's complaint does not allege facts plausibly suggesting that the amount in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, I recommend that the complaint be dismissed for the lack of subject matter jurisdiction.

I. BACKGROUND

Plaintiff, a resident of California, commenced this action against the defendant, who resides in New York and within this district, on June 25, 2013. Dkt. No. 1. While plaintiff's complaint does not specify the basis for this court's jurisdiction over his claim, it appears that he relies upon diversity of citizenship, pursuant to 28 U.S.C. § 1332, to support this court's subject matter jurisdiction.<sup>1</sup> See generally *id.* Plaintiff's complaint was accompanied by an application for leave to proceed IFP. Dkt. No. 2.

Plaintiff's complaint centers upon a written agreement between he and defendant, entered into on or about December 1, 2011, for the rental of

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<sup>1</sup> Plaintiff's complaint appears to cite 18 U.S.C. § 1341, a criminal mail fraud statute, as a basis for his claim. Dkt. No. 1 at 11. As a criminal provision, however, that section does not provide for a civil remedy, and accordingly cannot serve as a predicate for this court's jurisdiction.

vacation property owned by defendant and located on St. John in the U.S. Virgin Islands. Dkt. No. 1 at ¶¶ 2-4. Under the agreement, the weekly rental rate for the property was set at \$2,160.00. *Id.* at ¶ 4. Plaintiff alleges that, upon his arrival at the premises, he discovered that the property was not in the condition represented by the defendant, and was essentially uninhabitable. *Id.* at ¶ 7. Plaintiff maintains that, as a direct and proximate result of the rental property's condition, he incurred unforeseen expenses, including the cost of arranging for alternative hotel accommodations, the expense associated with repairing two vehicles that were damaged while driving to the vacation property, and medical expenses associated with his mother's exposure to mold and mycostatin contamination. *Id.* at ¶¶ 9, 12, 15. In total, plaintiff's complaint seeks recovery of damages in the amount of \$6,000 plus interest, fees, costs and disbursements. *Id.* at ¶ 25.

## II. DISCUSSION

### A. Application to Proceed *In forma Pauperis*

When a civil action is commenced in a federal district court, the statutory filing fee, currently set at \$400, must ordinarily be paid. 28 U.S.C. §§ 1914(a). A court is authorized, however, to permit a litigant to proceed IFP if it determines that he is unable to pay the required filing fee. 28 U.S.C.

§ 1915(a)(1).<sup>2</sup> In this instance, the facts alleged in plaintiff's complaint gives the court reason to pause when considering plaintiff's IFP application. Specifically, in light of the *pro se* plaintiff's ability to secure and pay for a week's vacation in the U.S. Virgin Islands, a finding of indigency would appear to be undeserved. See *Gregory v. N.Y. City Health and Hosp. Corp.*, No. 07-CV-1531, 2007 WL 1199010, at \*1 (E.D.N.Y. Apr. 17, 2007) ("Section 1915 . . . authorizes a court to dismiss a case brought by a plaintiff requesting to proceeding IFP if the allegation of poverty is untrue." (quotation marks omitted)). Nonetheless, a careful review of plaintiff's IFP application reveals that, regardless of his financial status in December 2011, he is currently unemployed, and his only source of income is through receipt of unemployment insurance benefits. Dkt. No. 2 at 1. Based upon the totality of circumstances and the facts reflected in plaintiff's IFP application, I conclude that he meets the requirements for IFP status, and therefore grant

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<sup>2</sup> The language of that section is ambiguous, in that it suggests an intent to limit availability of IFP status to prison inmates. See 28 U.S.C. § 1915(a)(1) (authorizing the commencement of an action without prepayment of fees "by a person who submits an affidavit that includes a statement of all assets such prisoner possesses"). Courts have construed that section, however, as making IFP status available to any litigant who can meet the governing financial criteria. *Hayes v. United States*, 71 Fed. Cl. 366, 367 (Fed. Cl. 2006); see also *Fridman v. City of New York*, 195 F. Supp. 2d 534, 536 n.1 (S.D.N.Y. 2002).

his application for leave to proceed IFP.<sup>3</sup>

B. Sufficiency of Plaintiff's Complaint

Because I have found that plaintiff meets the financial criteria for commencing this case IFP, I must next consider the sufficiency of the claims set forth in his complaint in light of 28 U.S.C. § 1915(e).

1. Governing Standard

Section 1915(e) directs that, when a plaintiff seeks to proceed IFP, “the court shall dismiss the case at any time if the court determines that . . . the action . . . (i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2)(B). In deciding whether a complaint meets this standard and states a colorable claim, a court must extend a certain measure of deference in favor of *pro se* litigants, *Nance v. Kelly*, 912 F.2d 605, 606 (2d Cir. 1990) (per curiam), and extreme caution should be exercised in ordering *sua sponte* dismissal of a *pro se* complaint before the adverse party has been served and the parties have had an opportunity to address the sufficiency of plaintiff's allegations, *Anderson v.*

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<sup>3</sup> Plaintiff is reminded that, although his IFP application has been granted, he will still be required to pay fees that he incurs in this action, including copying and/or witness fees.

*Coughlin*, 700 F.2d 37, 41 (2d Cir. 1983). Nonetheless, the court also has an overarching obligation to determine that a claim is not legally frivolous before permitting a *pro se* plaintiff's complaint to proceed. See, e.g., *Fitzgerald v. First East Seventh St. Tenants Corp.*, 221 F.3d 362, 363 (2d Cir. 2000) (holding that a district court may *sua sponte* dismiss a frivolous complaint, notwithstanding the fact that the plaintiff paid the statutory filing fee). "Legal frivolity . . . occurs where 'the claim is based on an indisputably meritless legal theory [such as] when either the claim lacks an arguable basis in law, or a dispositive defense clearly exists on the face of the complaint.'" *Aguilar v. United States*, Nos. 99-MC-0304, 99-MC-0408, 1999 WL 1067841, at \*2 (D. Conn. Nov. 8, 1999) (quoting *Livingston v. Adirondack Beverage Co.*, 141 F.3d 434, 437 (2d Cir. 1998)); see also *Neitzke v. Williams*, 490 U.S. 319, 325 (1989) ("[D]ismissal is proper only if the legal theory . . . or factual contentions lack an arguable basis."); *Pino v. Ryan*, 49 F.3d. 51, 53 (2d Cir. 1995) ("[T]he decision that a complaint is based on an indisputably meritless legal theory, for the purposes of dismissal under section 1915(d), may be based upon a defense that appears on the face of the complaint.").<sup>4</sup>

When reviewing a complaint under section 1915(e), the court looks to

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<sup>4</sup> Copies of all unreported decisions cited in this document have been appended for the convenience of the *pro se* plaintiff.

applicable requirements of the Federal Rules of Civil Procedure for guidance. Specifically, Rule 8 of the Federal Rules of Civil Procedure provides that a pleading must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). The purpose of Rule 8 “is to give fair notice of the claim being asserted so as to permit the adverse party the opportunity to file a responsive answer, prepare an adequate defense and determine whether the doctrine of res judicata is applicable.” *Powell v. Marine Midland Bank*, 162 F.R.D. 15, 16 (N.D.N.Y. 1995) (McAvoy, J.) (internal quotation marks and italics omitted).

A court should not dismiss a complaint if the plaintiff has stated “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Although the court should construe the factual allegations in a light most favorable to the plaintiff, “the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.” *Iqbal*, 556 U.S. at 678. “Threadbare recitals of the elements of a cause of action, supported by mere

conclusory statements, do not suffice.” *Id.* (citing *Twombly*, 550 U.S. at 555). Thus, “where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—‘that the pleader is entitled to relief.’” *Id.* at 679 (quoting Fed. R. Civ. P. 8(a)(2)).

## 2. Subject Matter Jurisdiction

Federal district courts are courts of limited jurisdiction. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). In accepting matters for adjudication, district courts must insure that the subject matter requirement is met, and may raise the question of jurisdiction *sua sponte* at any point in the litigation. See *Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp., Div. of Ace Young Inc.*, 109 F.3d 105, 107 (2d Cir. 1997) (“[A] challenge to subject matter jurisdiction . . . may be raised . . . *sua sponte*.” (quotation marks and alterations omitted)). “Where jurisdiction is lacking, . . . dismissal is mandatory.” *United Food & Commercial Workers Union, Local 919, AFL-CIO v. Centermark Props. Meriden Square, Inc.*, 30 F.3d 298, 301 (2d Cir. 1994); see also Fed. R. Civ. P. 12(h)(3) (“If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.”).

In this case, it appears that the only plausible basis for this court’s subject matter jurisdiction is diversity of citizenship, pursuant to 28 U.S.C. § 1332. Under that provision, district courts have “original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between . . . citizens of different states.” 28 U.S.C. § 1332(a)(1). Although plaintiff’s complaint alleges that the parties are citizens of different states, Dkt. No. 1 at ¶¶ 1-2, it fails to allege facts plausibly suggesting that the matter in controversy exceeds \$75,000. Indeed, the *ad damnum* clause in the complaint seeks damages in the amount of \$6,000, plus interest from December 26, 2011, as well as fees, costs and disbursements. *Id.* at 11. Accordingly, because plaintiff’s complaint fails to support a finding of subject matter jurisdiction based upon diversity of citizenship, it is subject to dismissal.

### 3. Whether to Permit Leave to Amend

Ordinarily, a court should not dismiss a complaint filed by a *pro se* litigant without granting leave to amend at least once “when a liberal reading of the complaint gives any indication that a valid claim might be stated.” *Branum v. Clark*, 927 F.2d 698, 704-05 (2d Cir.1991). An opportunity to amend is not required, however, where “the problem with [the plaintiff’s]

causes of action is substantive" such that "better pleading will not cure it." *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000); see also *Cortec Indus. Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991) ("Of course, where a plaintiff is unable to allege any fact sufficient to support its claim, a complaint should be dismissed with prejudice."). Stated differently, "[w]here it appears that granting leave to amend is unlikely to be productive, . . . it is not an abuse of discretion to deny leave to amend." *Ruffolo v. Oppenheimer & Co.*, 987 F.2d 129, 131 (2d Cir. 1993); accord, *Brown v. Peters*, No. 95-CV-1641, 1997 WL 599355, at \*1 (N.D.N.Y. Sept. 22, 1997) (Pooler, J.).

In this instance, liberally construed, plaintiff's complaint asserts state law breach of contract and fraud causes of action based on allegations that the rental property underlying the parties' contract was not accurately represented by defendant prior at the time of their agreement, and, as a result of the rental property's uninhabitable condition upon arrival, plaintiff was forced to unexpectedly make repairs to vehicles, pay medical expenses for his mother who became sick at the rental property, and find alternative lodging. Based on these allegations, it is difficult to conceive of circumstances that would support an award of damages exceeding \$75,000, exclusive of interest and costs. Nonetheless, mindful of my obligation to

extend special solicitude to *pro se* plaintiffs, I recommend that plaintiff in this case be given an opportunity to amend his complaint to cure that jurisdictional deficiency.<sup>5</sup> *Tracy v. Freshwater*, 623 F.3d 90, 101 (2d Cir. 2010).

#### IV. SUMMARY AND RECOMMENDATION

Based upon a review of plaintiff's application, I conclude that he is entitled to proceed IFP in this action. The allegations in plaintiff's complaint, however, give rise to a finding that this court lacks subject matter jurisdiction over the claims asserted therein. Although it is unclear at this juncture that plaintiff can amend his complaint to satisfy the jurisdictional requirements set forth in 28 U.S.C. § 1332, out of special deference to his *pro se* status, I recommend plaintiff be provided an opportunity to cure the deficiencies identified above. Accordingly, it is

ORDERED that plaintiff's application to proceed *in forma pauperis* (Dkt. No. 2) is GRANTED; and it is further respectfully

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<sup>5</sup> In the event that plaintiff chooses to file an amended complaint, he is informed that any such amended complaint will replace the existing complaint, and must be a wholly integrated and complete pleading that does not rely on or incorporate by reference any pleading or document previously filed with the court. See *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994) ("It is well established that an amended complaint ordinarily supersedes the original, and renders it of no legal effect." (quotation marks omitted)).

RECOMMENDED that plaintiff's complaint in this action (Dkt. No. 1) be DISMISSED unless, within thirty days of any decision and order adopting this report, plaintiff files an amended complaint that satisfies the jurisdictional requirements identified above.

NOTICE: Pursuant to 28 U.S.C. § 636(b)(1), the parties may lodge written objections to the foregoing report. Such objections must be filed with the clerk of the court within FOURTEEN days of service of this report.

FAILURE TO SO OBJECT TO THIS REPORT WILL PRECLUDE APPELLATE REVIEW. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72; *Roldan v. Racette*, 984 F.2d 85 (2d Cir. 1993).

Dated: September 17, 2013  
Syracuse, New York



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David E. Peebles  
U.S. Magistrate Judge

Not Reported in F.Supp.2d, 2007 WL 1199010 (E.D.N.Y.)

(Cite as: 2007 WL 1199010 (E.D.N.Y.))

## C

Only the Westlaw citation is currently available.

United States District Court,

E.D. New York.

Deborah A. GREGORY, Plaintiff,

v.

NEW YORK CITY HEALTH AND HOSPITALS  
CORPORATION, Bellevue Hospital Center, Defendant.  
No. 07-CV-1531 (BMC).

April 17, 2007.

Deborah A. Gregory, Brooklyn, NY, pro se.

### MEMORANDUM AND ORDER

COGAN, United States District Judge.

\*1 Plaintiff Deborah Gregory, brings this *pro se* action against defendant alleging violations of Title VII of the Civil Rights Act of 1964. Plaintiff seeks to proceed *in forma pauperis* (IFP) pursuant to [28 U.S.C. § 1915](#). For the reasons that follow, plaintiff is directed to pay the statutory filing fee of \$350 within ten (10) days of the date of this Order in order to proceed with this action.

The purpose of the statute permitting litigants to proceed IFP is to insure that indigent persons have equal access to the judicial system. [Cuoco v. U.S. Bureau of Prisons](#), 328 F.Supp.2d 463, 467 (S.D.N.Y.2004); [Hobbs v. County of Westchester, et al.](#), No. 00 Civ. 8170(JSM), 2002 WL 868269, at \*1 (S.D.N.Y. May 3, 2002). [Section 1915 of Title 28 of the United States Code](#) authorizes a court to dismiss a case brought by a plaintiff requesting to proceed IFP if the “allegation of poverty is untrue.” [28 U.S.C. § 1915\(e\)\(2\)\(A\)](#). Courts have found that the “purpose of this provision is to ‘weed out the litigants who falsely underestimate their net worth in order to obtain [IFP] status when they are not entitled to that status based on their true net worth.’ “ [Hobbs](#), 2002 WL 868269, at \*2 (quoting [Attwood v. Singletary](#), 105 F.3d 610, 613 (11th Cir.1997)); accord [Mathews v. Gaither](#), 902 F.2d 877, 881 (11th Cir.1990). The question of whether a plaintiff qualifies for IFP status is within the discretion of the

district court. [Choi v. Chemical Bank](#), 939 F.Supp. 304, 308-09 (S.D.N.Y.1996).

The financial declaration form that plaintiff has submitted does not satisfy the Court that she is unable to pay the Court's filing fee to commence this action. Plaintiff's financial declaration alleges that she is presently employed by the Woodhull Hospital Center with a monthly salary of \$2,022.78. Plaintiff also states that she has a part-time job earning \$9.00 an hour. In addition, plaintiff states that she has \$1,525.23 in a checking account. For expenses, plaintiff alleges that she pays \$812.67 per month for rent and is helping to support her fiance by giving him \$300 in support a month. Plaintiff's declaration establishes that she has sufficient resources to pay the \$350 filing fee to commence this action, and her request to proceed IFP is therefore denied.

Accordingly, plaintiff must pay the \$350 filing fee within ten (10) days of the date of this Order in order to proceed with this action. No summons shall issue at this time and all further proceedings shall be stayed for ten (10) days or until plaintiff has complied with this Order. If plaintiff fails to pay the filing fee within the time allowed, the instant complaint shall be dismissed without prejudice. The Court certifies pursuant to [28 U.S.C. § 1915\(a\)\(3\)](#) that any appeal would not be taken in good faith and therefore IFP status is denied for the purpose of any appeal. [Copedge v. United States](#), 369 U.S. 438, 444-45 (1962).

SO ORDERED.

E.D.N.Y.,2007.

Gregory v. New York City Health and Hospitals Corp.  
Not Reported in F.Supp.2d, 2007 WL 1199010  
(E.D.N.Y.)  
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Not Reported in F.Supp.2d, 1999 WL 1067841 (D.Conn.)

(Cite as: 1999 WL 1067841 (D.Conn.))



Only the Westlaw citation is currently available.

United States District Court, D. Connecticut.

Francisco AGUILAR, Plaintiff,  
v.

UNITED STATES OF AMERICA, Defendant.  
Nos. 3:99-MC-304 (EBB), 3:99-MC-408 (EBB).

Nov. 8, 1999.

*Dismissal of Plaintiff's Complaints*

BURNS, Senior J.

\*1 Francisco Aguilar, pro se, seeks leave to proceed in forma pauperis ("IFP") to press two meritless complaints against the government, which is prosecuting related civil forfeiture actions against his properties. Although Aguilar is otherwise financially eligible, the court dismisses these complaints *sua sponte* pursuant to [28 U.S.C. § 1915\(e\)\(2\)\(B\)](#) because the purported claims are frivolous, baseless and irremediable.

#### *Background*

Would-be plaintiff Aguilar is no stranger to this court. He is currently serving a forty-year sentence for drug trafficking at the federal penitentiary in Leavenworth, Kansas. *See United States v. Tracy*, 12 F.3d 1186, 1189 (2d Cir.1993) (affirming conviction and sentence). In connection with his conviction for narcotics offenses, the government filed civil forfeiture actions pursuant to [21 U.S.C. § 881\(a\)](#) in 1990 and 1991 against four of Aguilar's Connecticut properties, which have since been sold. With the help of CJA-appointed counsel, Aguilar has vigorously defended each of these four actions, three of which remain pending before this court, and are scheduled for trial in January 2000.[FNI](#)

FNI. *See United States v. One Parcel Of Property Located At 2030-32 Main St.*, No. 5:90-cv-544(EBB) (pending); *United States v. One Parcel Of Property Located At 8 Drumlin Rd.*, No. 5:90-cv-545 (EBB) (pending); *United States v. One Parcel Of Property Located At*

*2034-38 Main St.*, No. 5:90-cv-546(EBB) (pending); *see also United States v. One Parcel Of Property Located At 414 Kings Hwy.*, No. 5:91-cv-158(EBB) (closed).

Now Aguilar seeks to take the offensive by filing these purported claims against the government, and serving the current property owners as well as the Assistant United States Attorney who is prosecuting the related forfeiture cases. This court denied without prejudice Aguilar's initial complaint, which was erroneously captioned "United States v. One Parcel Of Property Located At 414 Kings Hwy.," one of the cases already docketed and then pending. *See Order of June 15, 1999*. Upon refiling an amended complaint (the "Amended Complaint") with the appropriate caption, Aguilar also filed a second complaint (the "Second Complaint"), seeking the same relief and asserting essentially the same claims against the government for bringing the other three forfeiture cases. The clerk returned these pleadings because Aguilar failed to complete the IFP forms. *See Order of August 25, 1999*. After Aguilar cured these pleading deficiencies, miscellaneous docket numbers were assigned to the complaints.

In Aguilar's Amended Complaint—the one originally filed against his own property at 414 Kings Highway—Aguilar seeks return of the property, compensatory damages and \$100,000,000 in punitive damages "to deter the United States of America from committing a similar Abuse of Power." Aguilar pleads his case in four "Articles," asserting sundry state and federal "constitutional" claims, including conversion, false pretenses, mail fraud, and breach of fiduciary duty. The Amended Complaint also suggests an allegation that the government falsified and deliberately omitted known material facts from its probable cause affidavit in "disregard" of [19 U.S.C. § 1615](#), the statute outlining the burden of proof in administrative forfeiture proceedings.

The Second Complaint—the one related to the government's seizure of the other three properties—seeks similar equitable and monetary relief, including return of

Not Reported in F.Supp.2d, 1999 WL 1067841 (D.Conn.)  
(Cite as: 1999 WL 1067841 (D.Conn.))

the properties, compensation for “suffering,” “usurpation,” denial of his use and enjoyment of the properties and lost rents, and one billion dollars in punitive damages. Liberally construed, the Second Complaint simply repeats the claims of the Amended Complaint except for one additional allegation: that Aguilar was entitled to, and did not receive, a hearing prior to the seizure and sale of his properties.

#### *Discussion*

##### A. § 1915(e)(2)(B) Standards

\*2 The Prisoner Litigation Reform Act (“PLRA”) mandates dismissal of an IFP action if it: “(i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2)(B) (as amended in 1996). Prior to the adoption of the PLRA, district courts had discretion to dismiss frivolous actions; now they are required to do so. See Pub.L. 104-134, 110 Stat. 1321 (1996) (making dismissal of frivolous actions mandatory, and also requiring dismissal for failing to state a claim or seeking damages from an immune defendant). Because Aguilar’s claims qualify for dismissal under all three of these prongs, the standards for each are set out in turn.

##### *1. Frivolous or Malicious*

A complaint is frivolous if “it lacks an arguable basis either in law or in fact.” Neitzke v. Williams, 490 U.S. 319, 325, 109 S.Ct. 1827, 1831–32, 104 L.Ed.2d 338 (1989) (interpreting § 1915(d), later redesignated as § 1915(e)(2)(B)(i), to preclude “not only the inarguable legal conclusion, but also the fanciful factual allegation”). Factual frivolity occurs where “the ‘factual contentions are clearly baseless,’ such as when allegations are the product of delusion or fantasy.” Livingston v. Adirondack Beverage Co., 141 F.3d 434, 437 (2d Cir.1998) (quoting Neitzke, 490 U.S. at 327, 109 S.Ct. at 1833). Legal frivolity, by contrast, occurs where “the claim is based on an indisputably meritless legal theory [such as] when either the claim lacks an arguable basis in law, or a dispositive defense clearly exists on the face of the complaint.” Livingston, 141 F.3d at 327 (internal quotes

and citation omitted); *see also Tapia-Ortiz v. Winter*, 185 F.3d 8, 11 (2d Cir.1999) (upholding dismissal as frivolous where “[t]he complaint’s conclusory, vague, and general allegations ... d[id] not [ ] suffice to establish” plaintiff’s claims).

In addition to frivolous claims, the court must also dismiss any malicious claims, i.e., where “[t]he manifest purpose of appellant’s complaint [i]s not to rectify any cognizable harm, but only to harass and disparage.” Tapia-Ortiz, 185 F.3d at 11.

##### *2. Failure To State A Claim*

An IFP action must also be dismissed *sua sponte* if it fails to state a claim on which relief may be granted. *See 28 U.S.C. § 1915(e)(2)(B)(ii); see also Star v. Burlington Police Dep’t*, 189 F.3d 462, 1999 WL 710235 (2d Cir.1999) (summarily affirming dismissal made pursuant to § 1915(e)(2)(B)(ii) of purported due process challenge that failed to state a claim). As in a motion to dismiss under Fed.R.Civ.P. 12(b)(6), a § 1915(e)(2)(B)(ii) dismissal is warranted only if “it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232, 81 L.Ed.2d. 59 (1984).

\*3 Pro se complaints, such as these, however, must be read broadly, *see Haines v. Kerner*, 404 U.S. 519, 520–21, 92 S.Ct. 594, 595–96, 30 L.Ed.2d 652 (1972) (per curiam), and may not be dismissed “simply because the court finds the plaintiff’s allegations unlikely.” Denton v. Hernandez, 504 U.S. 25, 33, 112 S.Ct. 1728, 1733, 118 L.Ed.2d 340 (1982) (construing pre-PLRA complaint as frivolous). Therefore,

a pro se plaintiff who is proceeding *in forma pauperis* should be afforded the same opportunity as a pro se fee-paid plaintiff to amend his complaint prior to its dismissal for failure to state a claim [under § 1915(e)(2)(B)(ii)], unless the court can rule out any possibility, however unlikely it might be, that an amended complaint would succeed in stating a claim.

Gomez v. USAA Federal Sav. Bank, 171 F.3d 794, 796 (2d Cir.1999) (per curiam) (vacating § 1915(e)(2)(B)(ii) dismissal where “the district court did

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(Cite as: 1999 WL 1067841 (D.Conn.))

not give th[e] pro se litigant an opportunity to amend his complaint, and because [the court] cannot rule out the possibility that such an amendment will result in a claim being successfully pleaded”).

### 3. Relief Against An Immune Defendant

Dismissal of an IFP case is also required where plaintiff seeks monetary damages against a defendant who is immune from such relief. *See 28 U.S.C. § 1915(e)(2)(B)(iii); see also, Spencer v. Doe, 139 F.3d 107, 111 (2d Cir.1998)* (affirming dismissal pursuant to § 1915(e)(2)(B)(iii) of official-capacity claims in § 1983 civil rights action because “the Eleventh Amendment immunizes state officials sued for damages in their official capacity”). Here, even if Aguilar’s claims had any merit, the complaints must be dismissed nevertheless because each seeks monetary damages from the United States, which is immune from such relief. *See Presidential Gardens Assocs. v. United States, 175 F.3d 132, 139 (2d Cir.1999)* (noting “[t]he sovereign immunity of the United States may only be waived by federal statute”).

### B. Dismissal Standards Applied

Aguilar’s complaints are devoid of any arguable basis in law or fact. Most of his factual allegations—to the extent they are even comprehensible—are conclusory, vague and baseless. For example, he purports to allege: “The United States of America has misused its power against the Francisco Aguilar’s Intangible Rights.” (Amended Complaint at 2); and “The United States of America overpassed its bound of its authority and make a tyrannic use of its powers.” (Second Complaint at 4). Even the Second Circuit has recognized Aguilar’s prior handiwork to be “so indisputably lacking in merit as to be frivolous within the meaning of 28 U.S.C. § 1915(e).” *See United States v. One Parcel Of Property Located At 414 Kings Hwy., No. 97-6004* (2d Cir. April 23, 1997) (mandate [Doc. No. 167] dismissing appeal of Aguilar’s motion to enjoin state default proceedings).

Only two allegations asserted by Aguilar are even arguably actionable: the lack-of-probable-cause argument in the Amended Complaint and the due process claim in the Second Complaint. Both of these, however, must be dismissed because each fails to state a claim for which relief may be granted.

#### 1. Probable Cause

\*4 The one potentially cogent legal claim that can be derived from a liberal reading of the Amended Complaint has already been conclusively decided by the court and is therefore barred from relitigation. *See United States v. One Parcel Of Property Located At 414 Kings Hwy., No. 5:91-cv-158* (denying lack-of-probable-cause argument in motion to dismiss [Doc. No. 64] in 1993, and in motions for summary judgment [Doc. Nos. 55, 96] in 1996). Here again, Aguilar reiterates his allegation that the government’s affidavit in support of probable cause was tainted because it failed to disclose that the 414 Kings Highway property was subject to a mortgage held by People’s Bank, and therefore could not have been purchased with funds traceable to drug sales.

After the government voluntarily dismissed that forfeiture action, this court initially ordered the sale proceeds of the property disbursed to Aguilar. *See id.*, Order of Oct. 25, 1996 [Doc. No. 151]. The bank appealed the order and, during the pendency of the appeal, secured a default judgment in state court against Aguilar. *See People’s Bank v. Aguilar, No. CV-96-0337761-S* (Conn.Super.Ct.1997). On the Bank’s appeal from this court’s disbursal of proceeds to Aguilar, the Second Circuit reversed and remanded. *See United States v. One Parcel Of Property Located At 414 Kings Hwy., 128 F.3d 125, 128 (2d Cir.1997)*. On remand, in accordance with the Second Circuit mandate, this court disbursed the proceeds from the sale of 414 Kings Highway to the bank in partial satisfaction of Aguilar’s debt owed on the defaulted mortgage. *See United States v. One Parcel Of Property Located At 414 Kings Hwy., No. 5:91-cv-158, 1999 WL 301704 (D.Conn. May 11, 1999)*.

Because the lack-of-probable-cause claim, perfunctorily adverted to in Aguilar’s otherwise meritless Amended Complaint, has already been addressed in the 414 Kings Highway forfeiture case, the court will not consider it again. As such, it must be dismissed because it fails to state a claim for which this court could grant further relief.

#### 2. Due Process

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In addition to his now-stale probable cause allegation about 414 Kings Highway, Aguilar claims in the Second Complaint that he was wrongfully denied a hearing prior to the seizure and sale of the other three properties. However, the constitutional right to a preseizure hearing in civil forfeiture proceedings was not recognized until 1993, two years after the seizure in this case. *See United States v. James Daniel Good Real Property, 510 U.S. 43, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993)* (holding that Fifth Amendment Due Process protections apply to civil forfeiture proceedings against real property). Even if such due process protections applied retroactively, Aguilar's challenge to the sale of the properties would lack merit because exigent circumstances required their interlocutory sale.

In civil forfeiture proceedings “[u]nless exigent circumstances are present, the Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture.” *Id. at 62, 114 S.Ct. at 505*; *see also United States v. One Parcel Of Property Located At 194 Quaker Farms Rd., 85 F.3d 985, 988 (2d Cir.1996)* (“[a]bsent exigent circumstances, a hearing, with notice to record owners, is held before seizure.”). “To establish exigent circumstances, the Government must show that less restrictive measures—i.e., a lis pendens, restraining order, or bond—would not suffice to protect the Government's interest in preventing the sale, destruction, or continued unlawful use of the real property.” *Id. at 62, 114 S.Ct. at 505*.

\*5 Aguilar's properties addressed in the Second Complaint were seized because there was probable cause that each had been used to facilitate the offenses for which he was convicted. *See 21 U.S.C. § 881(a)(7) (1999)*. This civil forfeiture statute authorizes interlocutory sale of seized properties by two methods, which are incorporated by reference into the statute. *See 21 U.S.C. § 881(b)* (authorizing seizure of property subject to civil forfeiture upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims; *21 U.S.C. § 881(d)* (authorizing seizure and summary sale governed by the customs laws codified in the Tariff Act of 1930, *19 U.S.C. §§ 1602–1619*). Though the source of authority differs, the standards for sale under each are virtually indistinguishable.

Rule E(9)(b) of the Maritime Rules permits the interlocutory sale of seized property if such property

is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the action, or if the expenses of keeping the property is [sic] excessive or disproportionate, or if there is unreasonable delay in securing the release of property....

Supplemental Rule for Certain Admiralty and Maritime Claims E(9)(b). Section 1612(a) of the customs laws, by contrast, provides for seizure and summary sale whenever it appears that such property

is liable to perish or to waste or to be greatly reduced in value by keeping, or that the expense of keeping the same is disproportionate to the value thereof....

19 U.S.C. § 1612(a) (1999).

Here, the Chief Deputy United States Marshal certified that the properties located at both 2030–32 Main St., Bridgeport (No. 5:90-cv-544), and 8 Drumlin Rd., Westport (No. 5:90-cv-545), were abandoned and therefore subject to vandalism, deterioration and depreciation. *See* 2/20/91 Declaration in Support of Motion for Interlocutory Sale [Doc. Nos. 28 (5:90-cv-544), 31 (5:90-cv-545)] at ¶¶ 4, 5. The marshal also certified that the mortgage obligations exceeded by over \$ 1,000 per month the rental income of the 2034–38 Main St., Bridgeport (No. 5:90-cv-546), property, which was several months in arrears and had little or no equity. *See* 2/21/90 Declaration in Support of Motion for Interlocutory Sale [Doc. No. 27 (5:90-cv-546)] at ¶ 4. This court found these reasons sufficiently exigent to order the interlocutory sales. *See* 8/1/90 Order for an Interlocutory Sale [Doc. Nos. 34 (5:90-cv-544), 50 (5:90-cv-545), 31 (5:90-cv-546)]. Interlocutory sale was thus warranted under both Rule E(9)(b) and § 1612(a) because the two abandoned properties were liable to deteriorate or lose value and the mortgage liabilities of the rented property were disproportionate in comparison to its value. Cf. *United States v. Esposito, 970 F.2d 1156, 1161 (2d Cir.1992)* (vacating order of interlocutory sale of forfeited home where “there was no finding that t[he amount expended for maintenance and repairs] was

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excessive or disproportionate”).

\*6 Aguilar's claim that he was wrongfully denied an opportunity to be heard prior to the sale of his properties is therefore not a cognizable due process challenge because the exigency of the properties' abandonment and disproportionate cost of upkeep required their interlocutory sale. Thus, *sua sponte* dismissal is warranted because Aguilar's due process claim fails to state a remediable cause of action.

### 3. Other Claims

The remainder of Aguilar's claims are frivolous and can be disposed of readily. To the extent Aguilar's claim invoking [19 U.S.C. § 1615](#) can be construed as challenging the constitutionality of shifting the burden to the claimant upon the government's showing of probable cause, the Second Circuit has “h[e]ld that it does not violate due process to place the burden of proving an innocent owner affirmative defense on the claimant.” [194 Quaker Farms Rd., 85 F.3d at 987](#). In addition, the tort claims for false pretenses and conversion are not actionable as these are intentional torts to which the limited waiver of sovereign immunity of the Federal Tort Claims Act (“FTCA”) is inapplicable. *See 28 U.S.C. § 2680(h); see also Bernard v. United States, 25 F.3d 98, 104 (2d Cir.1994)* (“the FTCA does not authorize suits for intentional torts based on the actions of Government prosecutors”). Furthermore, because the United States government is not a fiduciary and owes no associated duties to Aguilar, his breach of fiduciary duty allegation against the government fails to state a claim. Finally, Aguilar also fails to state a valid mail fraud claim as that criminal code provision, [18 U.S.C. § 1341](#), may only be prosecuted by the government, not against it.

### Conclusion

For the foregoing reasons, Aguilar's complaints [Nos. 3:99-mc-304 and 3:99-mc-408] are dismissed pursuant to [28 U.S.C. § 1915\(e\)\(2\)\(B\)](#) because they present frivolous allegations, none of which state a cognizable claim, and seek monetary relief from an immune defendant. Because the court cannot definitively rule out the possibility that amendment to the pleadings might result in an actionable claim, *see Gomez, 171 F.3d at 796,*

these dismissals are made without prejudice and may be replead after the conclusion of the related forfeiture proceedings.

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## H

Only the Westlaw citation is currently available.

United States District Court, N.D. New York.

Kenneth BROWN, Plaintiff,

v.

Andrew PETERS, Warden, Watertown Correctional Facility; Joseph Williams, Warden, Lincoln Work-Release Center; Francis J. Herman, Senior Parole Officer Interstate Bureau; T. Stanford, Senior Parole Officer; Deborah Stewart, Parole Officer; John Doe # 1, Parole Agent, Watertown Correctional Facility; John Doe # 2, Parole Agent, Lincoln Work Release Center; Susan Bishop, Director of Interstate Compact, South Carolina; Cecil Magee, Parole Officer, South Carolina; Frank Barton, Parole Officer, South Carolina; John McMahan, Parole Officer, South Carolina, Defendants.

No. Civ.A. 95CV1641RSPDS.

Sept. 22, 1997.

Kenneth Brown, State Court Institute-Greene, Waynesburg, PA, plaintiff, pro se.

Dennis C. Vacco, New York State Attorney General, The Capitol Albany, NY, for defendants Peters, Herman Stewart, Doe # 1, Doe # 2, and Williams, Jeffrey M. Dvori, Assistant Attorney General, Carl N. Lundberg, Chief Legal Counsel, South Carolina Department of Probation, Columbia, SC, for defendants Bishop, Magee, Barton, McMahan, and Stanford, Carl N. Lundberg, of Counsel.

## DECISION AND ORDER

POOLER, J.

\*1 The above matter comes to me following a Report-Recommendation by Magistrate Judge Daniel Scanlon, Jr., duly filed on April 17, 1997. Following ten days from the service thereof, the Clerk has sent me the entire file, including any and all objections filed by the parties herein.

Plaintiff Kenneth Brown commenced this Section

1983 civil rights action on November 17, 1995. On February 12, 1996, Magistrate Judge Scanlon ordered Brown to submit an amended complaint alleging the specific acts committed by the individuals named as defendants which Brown claimed violated his constitutional rights. Brown filed an amended complaint on March 21, 1996. In his amended complaint, Brown alleged that defendants violated his rights under the Eighth and Fourteenth Amendments by failing to process properly his interstate compact paperwork, resulting in Brown being imprisoned pursuant to a parole hold when in fact he had never violated the conditions of his parole. For a more complete statement of Brown's claims, see his amended complaint. Dkt. No. 5.

On August 5, 1996, defendants Peters and Williams made a motion to dismiss for failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6). Dkt. No. 13; Dkt. No. 14, at 2. On August 19, 1996, defendants Bishop, Magee, Barton, and McMahan made a motion to dismiss the complaint against them or, in the alternative, for summary judgment. Dkt. No. 20. On October 17, 1996, defendants Herman, Stewart, and Stanford made a motion to dismiss for failure to state a claim. Dkt. No 34. On April 17, 1996, Magistrate Judge Scanlon recommended that all defendants' motions to dismiss be granted and that the complaint be dismissed. Dkt. No. 50.

On June 9, 1997, Brown filed objections to the magistrate judge's report-recommendation, having been granted additional time in which to do so. Dkt. No. 52. In addition, Brown filed on June 9, 1997, a motion for leave to file a second amended complaint and a copy of his proposed amended complaint. Dkt. No. 53. I turn first to the last motion filed, Brown's motion for leave to amend his complaint a second time.

Brown seeks to file a second amended complaint "setting forth in detail the personal involvement of each defendant and how their acts of commission and omission served to deprive plaintiff of Constitutionally secured rights." Dkt. No. 53. The district court has discretion whether to grant leave to amend. Ruffolo v. Oppenheimer

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& Co., 987 F.2d 129, 131 (2d Cir.1993). In exercising that discretion, the court should freely grant leave to amend when justice so requires. Fed.R.Civ.P. 15(a). However, the court need not grant leave to amend where it appears that amendment would prove to be unproductive or futile. Ruffolo, 987 F.2d at 131.

Here, Brown moved to amend his complaint to add additional allegations against the named defendants. However, the additional allegations fail to cure the deficiency which forms the basis of defendants' motion to dismiss—the absence of defendants' personal involvement in a constitutional deprivation. Section 1983 imposes liability upon an individual only when personal involvement of that individual subjects a person to deprivation of a federal right. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). A complaint is fatally defective if it fails to allege personal involvement sufficient to establish that a supervisor was “directly and personally responsible for the purported unlawful conduct.” Alfarro Motors, Inc. v. Ward, 814 F.2d 883, 886 (2d Cir.1987).

\*2 Brown's proposed amended complaint alleges in conclusory fashion that defendants acted “in a grossly negligent and concerted manner which breached their duties owed to Plaintiff and is the proximate cause of [the violation of plaintiff's constitutional rights].” Proposed Am. Compl., at 3. Brown continues in the same vein, stating that defendants owed duties to plaintiff to carry out their jobs in a professional manner and they failed to carry out those duties appropriately. The complaint states that defendants held specific responsibilities, such as checking for outstanding warrants, which if performed properly should have alerted them to a problem. However, nowhere does the complaint set forth allegations that these defendants either participated directly in any constitutional infraction or that they were even aware of such an infraction. The proposed amended complaint merely alleges that these defendants failed in performing their supervisory and ministerial functions. “These bare assertions do not state a claim under 42 U.S.C. § 1983.” Smiley v. Davis, 1988 WL 78306, \*2 (S.D.N.Y.).

This plaintiff previously has had the opportunity to amend his complaint for the same reason asserted here, to

allege personal involvement on the part of defendants. Brown's first amended complaint failed to accomplish that task, and it appears that even if allowed to amend again Brown would be unable to make the requisite allegations with sufficient specificity to sustain his complaint. Consequently, I find that amendment would be futile, and I deny Brown's motion for leave to amend his complaint.

I turn now to the magistrate judge's report-recommendation and defendants' motions. The magistrate judge recommends that I grant defendants' motions and dismiss the complaint as to all defendants. The report-recommendation clearly describes the grounds on which the magistrate judge recommends dismissal as to each defendant. Fed.R.Civ.P. 72(b) requires the district judge to make a *de novo* determination on “any portion of the magistrate's disposition to which specific, written objection has been made.” Brown's objections fail to address directly any of the analysis. Brown's objections state (1) that he has been deprived of his constitutional rights; (2) that he has stated a cause of action; (3) that the court wrongly refused to appoint an attorney for him and wrongly stayed discovery pending the outcome of these motions; (4) that he seeks to file an amended complaint; (5) the standard of review for a Fed.R.Civ.P. 12(b)(6) motion; (6) that he disagrees with the magistrate judge's recommendation to grant defendants' motions because the allegations in his complaint, which he repeats, show that his rights were violated; and (7) the text of the Fourteenth and Eighth Amendments.

Even affording the objections the liberal reading required for *pro se* pleadings, I find that these objections fail to state any basis whatsoever, much less a specific one, for the court not to adopt the magistrate judge's rulings. They simply re-state the relief sought and the facts on which Brown grounds his complaint and conclude that the magistrate judge's conclusions are wrong. When the parties make only frivolous, conclusive, or general objections, the court reviews the report-recommendation for clear error. *See Camardo v. General Motors Hourly-Rate Employees Pension Plan, 806 F.Supp. 380, 382 (W.D.N.Y.1992)* (court need not consider objections which are frivolous, conclusive, or general and constitute a rehashing of the same arguments and positions taken in original pleadings); Chambrier v. Leonardo, 1991 WL

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44838, \*1 (S.D.N.Y.) (restatement of allegations already before the court and assertion that valid constitutional claim exists insufficient to form specific objections); Schoolfield v. Dep't of Correction, 1994 WL 119740, \*2 (S.D.N.Y.) (objections stating that magistrate judge's decisions are wrong and unjust, and restating relief sought and facts upon which complaint grounded, are conclusory and do not form specific basis for not adopting report-recommendation); Vargas v. Keane, 1994 WL 693885, \*1 (S.D.N.Y.) (general objection that report does not address violation of petitioner's constitutional rights is a general plea that report not be adopted and cannot be treated as objection within the meaning of 28 U.S.C. § 636, *aff'd*, 86 F.3d 1273 (2d Cir.), cert. denied, 519 U.S. 895, 117 S.Ct. 240, 136 L.Ed.2d 169 (U.S.1996)). *See also Scipio v. Keane, 1997 WL 375601, \*1 (1997)* (when objections fail to address analysis directly, court reviews report-recommendation for clear error); Fed.R.Civ.P. 72(b), Advisory Comm. Note (when no specific, written objections filed, "court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation").

\*3 Because Brown fails to make specific objections or provide any basis for his general objections, I review the report-recommendation for clear error. After careful review, I conclude that the magistrate judge's report-recommendation is well-reasoned and is not clearly erroneous.<sup>FN1</sup> The magistrate judge employed the proper standard, accurately recited the facts, and reasonably applied the law to those facts. Consequently, I adopt the report-recommendation.

FN1. I note, however, that the report-recommendation would survive even *de novo* review.

### CONCLUSION

Because plaintiff's proposed amendment demonstrates that amendment would be futile, I deny plaintiff's motion for leave to amend his complaint. I approve the magistrate judge's recommendation and grant defendants' motions to dismiss. Plaintiff's complaint is dismissed in its entirety.

IT IS SO ORDERED.

### ORDER and REPORT-RECOMMENDATION

This matter was referred to the undersigned for report and recommendation by the Hon. Rosemary S. Pooler, United States District Judge, by Standing Order dated November 12, 1986. Currently before this Court are a number of motions. Defendants Peters and Williams have filed a motion to dismiss (dkt.13); defendants Bishop, Magee, Barton and McMahan have filed a motion for summary judgment, or in the alternative to dismiss (dkt.20); and defendants Herman, Stewart and Stanford also have filed a motion to dismiss (dkt.34). Plaintiff opposes these three motions (dkts.27, 29, 33, 38). Defendants Bishop, Magee and McMahan have filed a motion to stay discovery (dkt.41) and plaintiff has filed a motion to extend time (dkt.44) in which to file opposition to the latter motion for a stay of discovery.

The Court addresses these issues *seriatim*.

### BACKGROUND

Plaintiff's amended complaint, which he has brought pursuant to 42 U.S.C. § 1983, alleges the following facts. In October, 1991, plaintiff was incarcerated in the Watertown Correctional Facility in Watertown, New York. He applied for an interstate compact because he wanted to return to South Carolina to live with his common law wife, Pamela Reid. During the application process, he was interviewed by the facility's parole officer, identified only as defendant John Doe # 1. After signing the necessary papers, his application was forwarded to defendant Andrew Peters, the facility's superintendent, who reviewed, signed and forwarded the papers to the Interstate Bureau. Amend. Compl. at ¶¶ 1-2; Exs. A, B.

On or about January 15, 1992, while his compact was waiting for review at the Interstate Bureau, plaintiff was approved for work release and sent to the Lincoln Work Release Center in New York City. While at the center, plaintiff spoke to a parole officer, defendant John Doe # 2, and told him that he was seeking a compact that would return him to South Carolina upon his conditional release. Plaintiff claims the parole officer told him that he would handle the necessary paperwork, although the officer had had no experience with an interstate compact. Amend. Compl. at ¶¶ 3, 4.

\*4 Plaintiff, meanwhile, asked Reid whether any

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officials had contacted her in South Carolina regarding his prospective residence in that state. Upon discovering no one had contacted her, plaintiff asked a lawyer he knew, Navron Ponds, to inquire as to his compact status. In March, 1992, the lawyer spoke with defendant Susan Bishop, who is the director of the interstate compact program in South Carolina. Bishop allegedly told Ponds that plaintiff "was disapproved because there was a discrepancy about approving plaintiff's compact." The "discrepancy" was the fact that plaintiff owed the state of South Carolina eighty-six days of confinement from a previous sentence. Plaintiff claims Bishop told Ponds to contact defendants Cecil Magee and Frank Barton, who worked for the South Carolina Parole Department. Sometime in March, 1992, Ponds made some calls to Barton and Magee. A verbal agreement was reached, and plaintiff, upon speaking with Barton and Magee was told that his compact had been approved. He also was told that he should report to the South Carolina Department of Parole upon being released. Amend. Compl. at ¶¶ 5-7.

Prior to leaving the Lincoln Work Release Center, plaintiff processed paperwork related to his interstate compact. His paperwork was sent by Doe # 2 to defendant Joseph Williams, the superintendent of the center. Williams reviewed, signed and returned the paperwork to plaintiff. On May 1, 1992, upon his release from the center, plaintiff traveled to South Carolina. Three days later, he entered a South Carolina parole office and promptly was arrested because of the eighty-six days of confinement that he owed the state. Plaintiff's paperwork was given to defendant John McMahan, a parole officer. Plaintiff claims that McMahan never returned this paperwork to him. On May 20, 1992, the state of South Carolina revoked plaintiff's parole and plaintiff was returned to prison to serve the eighty-six days that he owed. When he asked McMahan what would happen to his one year of parole from New York, the officer allegedly told him that his New York parole would run concurrently with his South Carolina parole, and that when he finished his South Carolina parole, he would not owe any parole whatsoever. Plaintiff served the eighty-six days he owed and was released on July 31, 1992. Amend. Compl. at ¶¶ 8-10.

In February, 1993, plaintiff was arrested on robbery

charges in South Carolina. The charges ultimately were dropped, but he apparently encountered some difficulties regarding this arrest as a result of a parole hold that New York state had placed upon him. Bishop's office told him that it had nothing to do with his parole hold and that any problem that he had was between him and the state of New York. He talked to authorities in Albany, New York regarding the parole hold, but was not successful in his efforts to have the hold removed. On September 30, 1993, after he had been extradited to New York as a fugitive from justice, plaintiff was given a preliminary hearing at Riker's Island, New York. The hearing officer found no probable cause that plaintiff had violated any condition of parole. He was released. Amend. Compl. at ¶¶ 11-14; Exs. C-J.

\*5 Plaintiff claims that he would not have suffered hardships if his interstate compact had been handled correctly. He alleges that defendant Deborah Stewart failed to follow up and see whether plaintiff had arrived in South Carolina. If she had, he argues, she would have discovered that he had been arrested upon his arrival. He alleges that defendant Francis Herman, a parole officer at the Interstate Bureau failed to do his job by not investigating plaintiff's violation reports. Amend. Compl. at ¶¶ 15-17; Exs. F-I.

Plaintiff asserts that the foregoing amounts violations of his Eighth and Fourteenth Amendment rights, wherefore he both compensatory and declaratory relief.

## DISCUSSION

### A. Motion to Dismiss by Williams and Peters.

Williams and Peters have filed a motion to dismiss plaintiff's complaint pursuant to FED.R.CIV.P. 12(b)(6) on the grounds that it fails to state a claim upon which relief may be granted. In a Rule 12(b)(6) motion, all factual allegations in the complaint must be taken and construed in plaintiff's favor. See LaBounty v. Adler, 933 F.2d 121, 122 (2d Cir.1991) (citing Ortiz v. Cornette, 867 F.2d 146, 149 (1989)). The Court's role is not to assess whether plaintiffs have raised questions of fact or demonstrated an entitlement to a judgment as a matter of law, as in a motion made pursuant to FED.R.CIV.P. 56 for summary judgment, but rather to determine whether plaintiff's complaint sufficiently alleges all of the

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necessary legal elements to state a claim under the law. See *Christopher v. Laidlaw Transit, Inc.* 899 F.Supp. 1224, 1226 (S.D.N.Y.1995), (citing *Ricciuti v. New York City Transit Authority*, 941 F.2d 119, 124 (2d Cir.1991)). Factual allegations in brief or memoranda may not be considered. *Fonte v. Board of Managers of Continental Towers Condominium*, 848 F.2d 24, 25 (2d Cir.1988). The Court now turns to the issues presented.

Personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983. *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir.1994). As superintendents at New York State Correctional facilities, Williams and Peter may be found personally involved in the alleged deprivation of plaintiff's constitutionally protected rights by a showing that they: (1) directly participated in the infraction; (2) knew of the infraction, but failed to remedy the wrong; (3) created or continued a policy or custom under which unconstitutional practices occurred; or (4) were grossly negligent in managing subordinates who caused unlawful conditions or events. *Id.*, (quoting *Williams v. Smith*, 781 F.2d 319, 323-24 (2d Cir.1986)). Supervisory liability also may be imposed against Williams or Peters with a showing of gross negligence or deliberate indifference to plaintiff's constitutional rights. *Id.* Absent some personal involvement by Williams or Peters in the allegedly constitutionally infirm conduct of their subordinates, neither can be held liable under § 1983. *Gill v. Mooney*, 824 F.2d 192, 196 (2d Cir.1987).

\*6 Plaintiff has not provided any evidence linking either Williams or Peters to his alleged constitutional deprivations. All that plaintiff has alleged is that Williams and Peters, as superintendents, have reviewed and signed paperwork relating to plaintiff's compact. Though it has long been held that *pro se* complaints are held to "less stringent standards than formal pleadings drafted by lawyers" for the purpose of a motion to dismiss under Rule 12(b)(6), *Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 595-96, 30 L.Ed.2d 652 (1972), plaintiff has not explained how the ministerial conduct of these two defendants was violative of the Constitution. Their motion to dismiss should be granted.

B. Motion for Summary Judgment or to Dismiss by Bishop, Magee, Barton and McMahan.

Bishop, Magee, Barton and McMahan have filed a motion for summary judgment, or in the alternative a motion to dismiss. The Court will treat their motion as a motion to dismiss. "[C]omplaints relying on the civil rights statutes are insufficient unless they contain some specific allegations of fact indicating a deprivation of rights, instead of a litany of general conclusions that shock but have no meaning." *Barr v. Adams*, 810 F.2d 358, 363 (2d Cir.1987). Plaintiff has not alleged specifically how the conduct of these four defendants infringed upon his constitutional rights. In his amended complaint, he contends that defendants violated the Constitution by "continuously breaching [[[their] duty" to him. This language underscores the defect with the complaint: if it alleges anything at all, it alleges that defendants were negligent in handling plaintiff's interstate compact and parole. To state a cognizable § 1983 claim, the prisoner must allege actions or omissions sufficient to demonstrate deliberate indifference; mere negligence will not suffice. *Hayes v. New York City Dept. of Corrections*, 84 F.3d 614, 620 (2d Cir.1996); *Morales v. New York State Dep't of Corrections*, 842 F.2d 27, 30 (2d Cir.1988) (section 1983 does not encompass a cause of action sounding in negligence).

The Court finds that the claims against Bishop, Magee, Barton and McMahan should be dismissed.

C. Motion to Dismiss by Herman, Stewart and Stanford.

Plaintiff's claim against Stewart is that she failed to follow up and see whether plaintiff had arrived in South Carolina. Herman, he likewise asserts, failed to do his job because he did not investigate plaintiff's violation reports. Plaintiff has not alleged how these actions run afoul of the Constitution; and again, these claims seem to be grounded in negligence, which is not actionable under § 1983. *Hayes*, 84 F.3d at 620.

Plaintiff's claim against Stanford must fail because his complaint literally fails to state a claim against that defendant. Aside from naming Stanford as a defendant, and alleging that he was the appointed Senior Parole Officer at plaintiff's September 30, 1993 revocation hearing at Riker's Island, plaintiff does not detail how Stanford violated his constitutional rights. Absent some personal involvement by Stanford in the allegedly

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constitutionally infirm conduct of his subordinates, he cannot be held liable under [§ 1983](#). [Gill, 824 F.2d at 196](#).

\*7 Accordingly, the Court finds that Stanford, Stewart and Herman's motion to dismiss should be granted.

#### D. Plaintiff's "John Doe" Claims.

In so far as neither John Doe # 1 nor John Doe # 2 have been identified and served in this matter, the Court does not have jurisdiction over these parties and does not reach the merits of plaintiff's claims against them.

#### E. Discovery Motions.

Defendants Bishop, Magee and McMahan have filed a motion to stay discovery until the Court has made a ruling on their motion to dismiss. Plaintiff has filed a motion to extend the time in which he may file opposition to defendants' motion. Plaintiff, however, has filed his opposing response (dkt.47), therefore his instant discovery motion is denied as moot. In that the Court recommends granting defendants' motion to dismiss, discovery in this matter would be fruitless. Accordingly, defendants' motion for a stay of discovery pending the resolution of their motion to dismiss is granted.

#### CONCLUSION

WHEREFORE, based upon the foregoing analysis, it is hereby

ORDERED, that plaintiff's motion to extend the time to file an opposing reply (dkt.44) is denied as moot; and it is further

ORDERED, that defendants Bishop, Magee and McMahan's motion to stay discovery until their motion to dismiss is decided (dkt.41) is granted; and it is further

RECOMMENDED, that defendants Peters and Williams' motion to dismiss (dkt.13) be granted; and it is further

RECOMMENDED, that defendants Bishop, Magee, Barton and McMahan's motion to dismiss (dkt.20) be granted; and it is further

RECOMMENDED, that defendants Herman, Stewart

and Stanford's motion to dismiss (dkt.34) be granted.

Pursuant to [28 U.S.C. § 636\(b\)\(1\)](#) and Local Rule 72.1(c), the parties have ten (10) days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. **FAILURE TO OBJECT TO THIS REPORT WITHIN TEN (10) DAYS WILL PRECLUDE APPELLATE REVIEW.** [Roldan v. Racette, 984 F.2d 85, 89 \(2d Cir.1993\)](#) (citing [Small v. Secretary of Health and Human Services, 892 F.2d 15 \(2d Cir.1989\)](#)); [28 U.S.C. § 636\(b\)\(1\)](#); [FED.R.CIV.P. 6\(a\), 6\(e\)](#) and [72](#).

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