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

JEFFREY COHEN, Personally and as Sole Shareholder of RB ENTERTAINMENT VENTURES, LLC,	:	
Plaintiffs,	:	CIVIL ACTION NO. 16-mc-210
v.	:	
JOHN TINSLEY and REGULATORY INSURANCE SERVICES, INC.,	:	
Defendants.	:	

MEMORANDUM OPINION

Smith J. April 5, 2017

A *pro se* plaintiff, proceeding on behalf of himself and his limited liability company, has filed an application to proceed *in forma pauperis* and this purported independent action under Rule 60(d) of the Federal Rules of Civil Procedure. The plaintiffs seek to have the court vacate an order entered in the United States District Court for the District of Maryland in which the District of Maryland dismissed their action for improper venue. Although the court will grant the individual plaintiff leave to proceed *in forma pauperis*, the court will dismiss this purported independent action because he (1) had the opportunity to present his claims in the District of Maryland or the Fourth Circuit Court of Appeals but apparently chose not to do so, and (2) failed to demonstrate that he is entitled to relief to prevent a grave miscarriage of justice if the District of Maryland's order remains in effect.

I. PROCEDURAL BACKGROUND

The *pro se* plaintiff, Jeffrey Cohen ("Cohen"), asserts that he is the founder of Indemnity Insurance Corporation RRG ("IIC"), which provides "coverage to a niche segment of the

entertainment industry, mainly providing coverage to nightclubs, bars, restaurants, bands, and special events." Motion for Relief of J. Pursuant to FRCP Rule 60(d) ("Mot.") at 2-1.[1] Cohen is also the sole owner and shareholder of RB Entertainment Ventures, LLC ("RB"), the 99% owner of IIC. *Id.* In 2012, the Department of Insurance of the State of Delaware (the "Department") used the named defendants, John Tinsley ("Tinsley") and Regulatory Insurance Services, Inc. ("RIS"), to conduct a "target[ed] financial examination of a particular transaction with IIC." *Id.* at 2-2. Tinsley is the president and principal of RIS. *Id.*

As part of their investigation, the defendants sent agents to IIC offices in Maryland for several weeks. *Id.* The plaintiffs contend that the Department should not have used the defendants to conduct the investigation because Delaware law prohibits the Department from using for-profit contractors. *Id.* Cohen attempted to bring this issue to light, but apparently did so to no avail. *Id.* at 2-2, 2-3.

Through an affidavit prepared by the defendants, they informed the Department that IIC was "financially impaired." *Id.* at 2-3. This resulted in the Department seizing control of IIC pursuant to proceedings in the Delaware Court of Chancery. *Id.* The defendants were able to remove Cohen from control of IIC, and the Delaware court declined to allow the plaintiffs to participate in delinquency proceedings related to IIC. *Id.* at 2-4. Eventually, the Department filed a petition for liquidation, which the Delaware court granted. *Id.* at 2-3 & n.1. IIC was liquidated in April 2014. *Id.* at 2-5. The plaintiffs claim that as part of the liquidation, the defendants were required to file semiannual reports with the court. *Id.* The plaintiffs assert that the defendants have not filed any such reports. *Id.*

[1] The plaintiffs' motion is docketed at two separate document numbers, so the court uses the plaintiff's method of pagination for ease of reference.

Apparently, while the Department was involved in the delinquency and eventual liquidation of IIC, counsel for the Delaware Insurance Commissioner referred Cohen to the United States Attorney's Office in Baltimore. *Id.* at 2-6. In June 2014, federal agents arrested Cohen pursuant to an indictment charging him with fraudulent conduct related to IIC. *Id.* In December 2015, Cohen pleaded guilty to several charges and he is currently serving a sentence of 444 months incarceration. *Id.* Cohen has appealed from his judgment of sentence in the criminal matter to the Fourth Circuit Court of Appeals. *Id.*

Cohen filed a civil action on behalf of the plaintiffs in the United States District Court for the District of Maryland, which was docketed at Civil Action No. 16-3169 and assigned to the Honorable William M. Nickerson.[2] *Id.* at 1. In addition to having filed a complaint, the plaintiffs filed a motion for a preliminary injunction and sought leave to proceed *in forma pauperis*. *See Cohen, et al. v. Tinsley, et al.*, No. 16-cv-3169, Doc. Nos. 1-4. On October 5, 2016, less than a month after the plaintiffs commenced the action, Judge Nickerson entered a memorandum and order in which the court granted the application to proceed *in forma pauperis* and dismissed the action without prejudice. *See* Memorandum ("Mem."), *Cohen, et al. v. Tinsley, et al.*, No. 16-cv-3169, Doc. No. 5; Order, *Cohen, et al. v. Tinsley, et al.*, No. 16-cv-3169, Doc. No. 6.

In dismissing the action, Judge Nickerson concluded that venue was improper under 28 U.S.C. § 1391(b) because the events described in the complaint occurred in Delaware and the named defendants resided in Pennsylvania. *See* Mem. at 2-3, *Cohen v. Tinsley, et al.*, No. 16-cv-3169, Doc. No. 5. Judge Nickerson also concluded that due to the "considerable uncertainty as

[2] Although the plaintiffs are contesting the entry of an order in the District of Maryland, they have not attached any documents filed in that action, including the complaint and the complained-of order, to the instant motion. Because all of the information related to the case is publicly available through PACER, the court has endeavored to provide the proper background for this case by briefly referring to documents filed in the District of Maryland action.

to whether the appropriate venue is a Delaware state court or a different federal district court" dismissal rather than transfer under 28 U.S.C. § 1406(a) was warranted. *Id.* at 3.

On October 31, 2016, this court's clerk of court docketed this purported independent action seeking relief under Rule 60(d) of the Federal Rules of Civil Procedure.[3] Doc. No. 1. Because the plaintiffs failed to pay the filing and administrative fees or file an application to proceed *in forma pauperis*, the court entered an order on December 22, 2016, in which the court required the plaintiffs to either pay the filing and administrative fees or submit a completed application to proceed *in forma pauperis* within 30 days of the date of the order. Doc. No. 2. Cohen filed an application to proceed *in forma pauperis* with an account statement that the clerk of court docketed on January 23, 2017. Doc. No. 3. Unfortunately, the plaintiff did not include the required certification by a prison official and did not get a certified copy of his prison account statement. As such, the court entered an order on February 2, 2017, which required the plaintiffs to either pay the filing fee and administrative fee or file a completed *in forma pauperis* application that included the necessary certification and certified prison account statement within 30 days of the date of the order. Doc. No. 4. In response to the court's order, Cohen filed another application to proceed *in forma pauperis* (the "IFP Application") that the clerk of court docketed on March 6, 2017.

[3] Pursuant to the federal "prisoner mailbox rule," a *pro se* prisoner plaintiff's complaint (or petition) is deemed filed "at the time petitioner delivered it to the prison authorities for forwarding to the court clerk." *Houston v. Lack*, 487 U.S. 266, 275-76 (1988). Although this doctrine arose in the context of habeas corpus petitions, the Third Circuit has extended it to civil actions brought under 42 U.S.C. § 1983. *See Pearson v. Secretary Dep't of Corr.*, 775 F.3d 598, 600 n.2 (3d Cir. 2015) (applying rule in section 1983 action and determining that *pro se* prisoner plaintiff filed complaint on date he signed it).

Here, it appears that Cohen signed and dated the action on October 18, 2016, which would have been within two weeks of Judge Nickerson's decision dismissing the action for improper venue. *See* Mot. at 2-18. Unfortunately, this dating, in itself, generally would not inform the court of the time that Cohen placed the document in the control of prison officials for mailing to the clerk of court. It also appears that the envelope containing this action was postmarked on October 27, 2016. Doc. No. 1-1 at ECF p. 17.

II. DISCUSSION

A. The IFP Application

Regarding applications to proceed *in forma pauperis*, the court notes that

> any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor.

28 U.S.C. § 1915(a).[4] This statute

> "is designed to ensure that indigent litigants have meaningful access to the federal courts." *Neitzke v. Williams*, 490 U.S. 319, 324, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989). Specifically, Congress enacted the statute to ensure that administrative court costs and filing fees, both of which must be paid by everyone else who files a lawsuit, would not prevent indigent persons from pursuing meaningful litigation. *Deutsch*[*v. United States*, 67 F.3d 1080, 1084 (3d Cir. 1995)]. Toward this end, § 1915(a) allows a litigant to commence a civil or criminal action in federal court in *forma pauperis* by filing in good faith an affidavit stating, among other things, that he is unable to pay the costs of the lawsuit. *Neitzke*, 490 U.S. at 324, 109 S.Ct. 1827.

Douris, 293 F. App'x at 131-32 (footnote omitted).

When addressing applications to proceed *in forma pauperis* under section 1915, district courts undertake a two-step analysis: "First, the district court evaluates a litigant's financial status and determines whether [he or she] is eligible to proceed *in forma pauperis* under § 1915(a). Second, the court assesses the complaint under § 1915[(e)(2)] to determine whether it is frivolous." *Roman v. Jeffes*, 904 F.2d 192, 194 n.1 (3d Cir. 1990) (citing *Sinwell v. Shapp*, 536 F.2d 15 (3d Cir. 1976)).[5]

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[4] "The reference to prisoners in § 1915(a)(1) appears to be a mistake. *In forma pauperis* status is afforded to all indigent persons, not just prisoners." *Douris v. Middletown Twp.*, 293 F. App'x 130, 132 n.1 (3d Cir. 2008) (per curiam).

[5] The *Roman* court referenced the former version of 28 U.S.C. § 1915(d), which stated that "[t]he court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious." 28 U.S.C. § 1915(d) (1990) (redesignated as Section 1915(e) by the Prison Litigation Reform Act, Pub.L. No. 104-135, 110 Stat. 1321 (1996)). The portion of section 1915(d) which allowed the district court to dismiss frivolous *in forma pauperis* complaints is now codified at

Concerning the litigant's financial status, the litigant must establish that he or she is unable to pay the costs of suit. *Walker v. People Express Airlines, Inc.*, 886 F.2d 598, 601 (3d Cir. 1989). "In this Circuit, leave to proceed *in forma pauperis* is based on a showing of indigence. We review the affiant's financial statement, and, if convinced that he or she is unable to pay the court costs and filing fees, the court will grant leave to proceed *in forma pauperis*." *Deutsch*, 67 F.3d at 1084 n.5 (internal citations omitted).

The Third Circuit does not define what it means to be indigent. Nonetheless, "[a] plaintiff need not 'be absolutely destitute to enjoy the benefit of the statute.'" *Mauro v. New Jersey Supreme Ct., Case No. 56, 900*, 238 F. App'x 791, 793 (3d Cir. 2007) (per curiam) (quoting *Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 339 (1948)); *see also Potnick v. Eastern State Hosp.*, 701 F.2d 243 (2d Cir. 1983); *Zaun v. Dobbin*, 628 F.2d 990 (7th Cir. 1980). Some courts have explained that all a plaintiff needs to show is that because of his or her poverty, he or she cannot afford to pay for the costs of the litigation and provide himself or herself (or his or her family) with the necessities of life. *See, e.g.*, *Rewolinski v. Morgan*, 896 F. Supp. 879 (E.D. Wis. 1995) ("An affidavit demonstrating that the petitioner cannot, because of his poverty, provide himself and any dependents with the necessities of life is sufficient."); *Jones v. State*, 893 F. Supp. 643 (E.D. Tex. 1995) ("An affidavit to proceed *in forma pauperis* is sufficient if it states that one cannot, because of poverty, afford to pay for the costs of litigation and still provide for him- or herself and any dependents.").

Here, after reviewing the IFP Application, it appears that Cohen is unable to pay the costs of suit. Therefore, the court will grant Cohen leave to proceed *in forma pauperis*. This does not end the inquiry, however, because Cohen is not the only named plaintiff in this action.

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28 U.S.C. § 1915(e)(2)(B)(i). *See* 28 U.S.C. § 1915(e)(2)(B)(i) (stating frivolous nature of *in forma pauperis* complaint is ground for dismissal).

RB is a limited liability company and is not a "person" for purposes of the *in forma pauperis* statute. *See Rossmann v. Huvelle*, No. 1:12-cv-00092-EJL-REB, 2012 WL 5866236, at *3 (D. Idaho Oct. 16, 2012) ("[B]ecause Sawtooth Capital LLC is not a natural person, it cannot qualify for in forma pauperis status under § 1915." (internal footnote omitted)); *see also Brittain v. Marsh Prods., Inc.*, No. CIV. A. 86-0052, 1986 WL 1557, at *1 (E.D. Pa. Jan. 30, 1986) ("[P]laintiffs request leave to proceed *in forma pauperis*. The affidavit is signed only by [the individual plaintiff] and does not reveal the financial status of [the corporate plaintiff]. This situation is of no consequence, however, because a corporation is not a 'person' within the meaning of the 'in forma pauperis' statute[.]"). Accordingly, to the extent that the plaintiffs are seeking leave to proceed *in forma pauperis* on behalf of RB, the court will deny RB's request for *in forma pauperis* status.

B. Review of the Complaint Under 28 U.S.C. § 1915

1. Grounds for *Sua Sponte* Dismissal Under 28 U.S.C. § 1915(e)(2)(B)

Because the court has granted Cohen leave to proceed *in forma pauperis*, the court must engage in the second part of the two-part analysis and examine whether the complaint is frivolous, fails to state a claim upon which relief can be granted, or asserts a claim against a defendant immune from monetary relief. *See* 28 U.S.C. § 1915(e)(2)(B)(i)-(iii) (providing that "[n]otwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that-- . . . **(B)** the action or appeal-- **(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."). A complaint is frivolous under section 1915(e)(2)(B)(i) if it "lacks an arguable basis either in law or fact," *Neitzke v. Williams*, 490 U.S. 319, 325 (1989), and is legally baseless if it is "based on an indisputably

meritless legal theory." *Deutsch*, 67 F.3d at 1085. In addressing whether a *pro se* plaintiff's complaint is frivolous, the court must liberally construe the allegations in the complaint. *Higgs v. Att'y Gen.*, 655 F.3d 333, 339-40 (3d Cir. 2011).

Regarding the analysis under section 1915(e)(2)(B)(ii), the standard for dismissing a complaint for failure to state a claim pursuant to this subsection is identical to the legal standard used when ruling on Rule 12(b)(6) motions. *See Tourscher v. McCullough*, 184 F.3d 236, 240 (3d Cir. 1999) (applying Rule 12(b)(6) standard to dismissal for failure to state a claim under § 1915(e)(2)(B)). Thus, to survive dismissal, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The plaintiff's factual allegations "must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 556 (citation omitted).

2. Analysis

In the Rule 60(d) motion, Cohen raises a number of arguments in support of his contest of the District of Maryland's decision dismissing his action. *See* Mot. at 2-8 - 2-18. This court need not reach any of these arguments because Cohen has failed to establish a sufficient basis for maintaining an independent action in this district.

Rule 60(d) of the Federal Rules of Civil Procedure provides that Rule 60 "does not limit" a district court from "**(1)** entertain[ing] an independent action to relieve a party from a judgment, order, or proceeding[.]"[6] Fed. R. Civ. P. 60(d)(1). "In bringing . . . an independent action against a prior judgment, it is not necessary, in order to obtain relief, to return to the court which rendered the first judgment." *Schum v. Bailey*, 578 F.2d 493, 504 (3d Cir. 1978); *see Morrel v.*

[6] Rule 60(d) provides that Rule 60 also "does not limit a court's power to: . . . **(2)** grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or **(3)** set aside a judgment for fraud on the court." Fed. R. Civ. P. 60(d)(2)-(3). The plaintiffs do not argue that subsections (2) or (3) apply here.

Nationwide Mut. Fire Ins. Co., 188 F.3d 218, 223 (4th Cir. 1999) ("Further, and also in contrast to a motion for relief under Rule 60(b), an independent action may be brought in a court other than the one that issued the contested order: A federal court can entertain an original action to enjoin or otherwise grant relief from a judgment ... rendered not only by it, but also by another federal court." (citations and internal quotation marks omitted)); *see also Lapin v. Shulton, Inc.*, 333 F.3d 169, 172 (9th Cir. 1964) (explaining that independent actions under Rule 60 for relief from other courts' judgments are rarely permitted because of "considerations of comity and orderly administration of justice"). Nonetheless, "Rule 60(d) may not be used as a substitute for appeal." *Sharpe v. United States*, No. CIV. A. 02-771, 2010 WL 2572636, at *2 (E.D. Pa. June 22, 2010) (citing *Fox v. Brewer*, 620 F.2d 177, 180 (8th Cir. 1980)).

"[I]n determining whether to entertain independent actions for relief," courts must exercise their discretion and be guided by "traditional equitable principles." *LinkCo, Inc. v. Naoyuki Akikusa*, 615 F. Supp. 2d 130, 134 (S.D.N.Y. 2009) (quoting *Campaniello Imports, Ltd. v. Saporiti Italia S.p.A.*, 117 F.3d 655, 661 (2d Cir. 1997)). Independent actions under Rule 60 are "reserved for those cases of 'injustices which, in certain instances, are deemed sufficiently gross to demand a departure' from rigid adherence to the doctrine of res judicata." *United States v. Beggerly*, 524 U.S. 38, 46 (1998) (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944)). Thus, "an independent action should be available only to prevent a grave miscarriage of justice." *Id.* Moreover, the party prosecuting an independent action must show "that there was no 'opportunity to have the ground now relied upon to set aside the judgment fully litigated in the original action.'" *Adefumi v. City of Philadelphia*, No. CIV. A. 09-586, 2011 WL 1161727, at *4 & n.40 (E.D. Pa. Mar. 29, 2011) (quoting *Gleason v. Jandrucko*, 860 F.2d 556, 560 (2d Cir. 1988)).

As illustrated by the above language, Rule 60(d) acts as a savings clause. *United States v. Foy*, 803 F.3d 128, 134 (3d Cir. 2015). "Rule 60 by itself does not vest a district court with jurisdiction to consider such a motion or independent action." *Id.* (citations omitted). In this regard, "[o]rdinarily, it would be clear that a district court would have jurisdiction over a Rule 60 motion or an independent action seeking relief from a judgment because the court will have ancillary jurisdiction to consider a challenge to its own judgment or order." *Id.* If, however, the movant brings the Rule 60(d) action in a court that did not enter the original judgment, the movant must establish independent grounds for jurisdiction. *See id.* ("Though we recognize that there may be circumstances in which a district court has jurisdiction over . . . an independent action seeking relief from a judgment entered by another court, such as where a party to initial proceedings registers a judgment obtained in another court pursuant to 28 U.S.C. § 1963 . . . Foy does not point to such an independent ground for jurisdiction here."); *see also Peach v. Laborers' Int'l Union of N. Am.*, No. CIV. A. 09-450-GPM, 2010 WL 502767, at *3 (S.D. Ill. Feb. 9, 2010) ("Where a judgment has been affirmed on appeal, leave of the appellate court is required before a district court may entertain an action attacking the judgment."); 11 Wright, Miller & Kane, Federal Practice & Procedure: Civil § 2868 (3d ed.) ("If [the independent action] is brought in a court other than the one that gave the original judgment, independent grounds of jurisdiction are needed.").

Here, this matter presents a fundamental issue insofar as Cohen is attempting to personally proceed in a *pro se* capacity and also represent RB, a limited liability company. Concerning attempts by *pro se* litigants to represent business entities,

> "[i]t has been the law for the better part of two centuries ... that a corporation may appear in the federal courts only through licensed counsel." *Rowland v. Cal. Men's Colony*, 506 U.S. 194, 201-02, 113 S.Ct. 716, 121 L.Ed.2d 656 (1993); *see also Simbraw, Inc. v. United States*, 367 F.2d 373, 373-74 (3d Cir. 1966) (so

> holding). The same applies to LLCs, even those with only a single member, because even single-member LLCs have a legal identity separate from their members. *See United States v. Hagerman*, 545 F.3d 579, 581-82 (7th Cir. 2008); *Lattanzio v. COMTA*, 481 F.3d 137, 140 (2d Cir. 2007).

Dougherty v. Snyder, 469 F. App'x 71, 72 (3d Cir. 2012) (per curiam). Based on this well-established law, although Cohen may represent himself in this case, he may not represent the interests of RB, a separate legal entity, which must be represented by counsel.

Even if Cohen could bring this matter on behalf of the plaintiffs, he may not maintain this independent action here for two reasons.[7] First, the record demonstrates that Cohen failed to contest the decision in the District of Maryland by filing a motion under Rule 60 or even an appeal to the Fourth Circuit Court of Appeals. All of the grounds upon which Cohen challenges Judge Nickerson's decision are challenges that he could have raised in a motion under Rule 60(b) or by filing an appeal to the Fourth Circuit.[8] Cohen has not demonstrated that he lacked

[7] For purposes of the disposition of this action, the court presumes that there is an independent basis for subject-matter jurisdiction at this stage of the litigation, although the precise basis is not apparent at this point.

In the complaint, the plaintiff alleges that "[t]his Court has subject matter jurisdiction pursuant to 28 U.S.S. [sic] § 1331 (federal question jurisdiction), 28 U.S.C. § 1343 (civil rights jurisdiction); 28 U.S.C. § 1367 (supplemental jurisdiction over state law claims); and 42 U.S.C. § 1983 (civil rights jurisdiction)." Complaint at ECF p.2, *Cohen, et al. v. John Tinsley, et al.*, No. CIV. A. 16-3169-WMN (D. Md.), Doc. No. 1. As for these purported bases of jurisdiction, the only federal statutes referenced in the complaint are 42 U.S.C. § 1983 and 28 U.S.C. § 2201. For the plaintiffs to ultimately prevail in a section 1983 claim, he must establish (and not simply allege) that the defendants acted under color of state law. *See Sameric Corp. of Del., Inc. v. City of Philadelphia*, 142 F.3d 582, 590 (3d Cir. 1998). This essentially requires the plaintiff to show that the defendants were "state actors." *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 929 (1982). Although private parties generally do not act under state law and are therefore not liable under section 1983, there are certain circumstances under which the law will treat a private individual as a state actor. *See Leshko v. Servis*, 423 F.3d 337, 339-47 (3d Cir. 2005) (discussing and analyzing state action under section 1983). There might be an issue as to whether the defendants were state actors in this case.

If the plaintiffs could not establish that the defendants were state actors, they would not be able to rely on the Declaratory Judgment Act to support jurisdiction because it does not serve as an independent basis for federal subject-matter jurisdiction. *See Ragoni v. United States*, 424 F.2d 261, 264 (3d Cir. 1970) ("[T]he mere fact that a declaratory judgment is sought is not, of itself, ground for federal jurisdiction."). Thus, it would appear that the plaintiffs would have to proceed via diversity jurisdiction under 28 U.S.C. § 1332, and it appears through the allegations in the complaint that the parties would be completely diverse. *See* Complaint at 1-2.

[8] As already discussed, Cohen filed this case only two or three weeks after Judge Nickerson entered his memorandum and order on the docket. All of the grounds for relief are grounds that Cohen could have raised in a Rule 60(b) motion, and it appears that if he would have filed a Rule 60(b) motion in the District of Maryland, the court would have considered it as having been timely filed insofar as even a three-week period would appear to be reasonable and, to the extent that he is raising arguments based on subsections (b)(1), (2), or (3) of Rule 60, he filed it within one year of Judge Nickerson's order. *See* Fed. R. Civ. P. 60(c)(1) ("A motion under Rule 60(b) must be

the opportunity to have Judge Nickerson rule on the grounds raised in the instant motion or that he was otherwise prevented from doing so. Therefore, as Cohen could have raised the precise claims presented here in the District of Maryland or the Fourth Circuit and has not alleged or shown that he was prevented from doing so, permitting such an action here in this district is improper.

Second, Cohen has not satisfied his significant burden of showing that granting him relief in this case will prevent a grave miscarriage of justice. As indicated above, Cohen appears to have simply chosen to forgo seeking relief in the District of Maryland or the Fourth Circuit by filing this action here. In addition, a grave miscarriage of justice would not occur if the court does not entertain this action because any prejudice to the plaintiffs caused by Judge Nickerson's order is minimal or non-existent. Cohen appears to believe that somehow Judge Nickerson addressed the merits of his case when he simply determined that the District of Maryland lacked venue over the dispute and dismissed, rather than transferred, the action. Cohen is still free to recommence the action by filing a new complaint in a jurisdiction that would have proper venue over his claims. A request to vacate another district court's order dismissing an action without prejudice based on improper venue does not present the type of extraordinary circumstances under which an independent action under Rule 60(d)(1) is proper.[9]

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made within a reasonable time--and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding."). Thus, there was not a timeliness issue or other procedural barrier that prevented Cohen from filing the motion or the District of Maryland from considering it.

He also could have filed an appeal as of right to the Fourth Circuit. *See* Fed. R. App. P. 4(a)(1)(A)("In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from."). To the extent Cohen doubts his ability to have filed an appeal, *see, e.g.*, *Brown v. Panther II Transp., Inc.*, No. 16-2182, -- F. App'x --, 2016 WL 7414192 (4th Cir. Dec. 22, 2016) (per curiam) (affirming district court's dismissal of civil action because of improper venue).

[9] Cohen's substantive attacks on Judge Nickerson's decision also would not, in any event, provide a basis for relief. Cohen first contests Judge Nickerson's statement "[w]hether the Complaint states a federal question or a civil rights violation is unclear." Mot. at 2-9. In support of Cohen's argument that Judge Nickerson erred in this statement, he focuses on his various allegations about the case presenting a federal question or civil rights violation that constitute nothing more than conclusions of law. *See, e.g.*, *id.* ("Plaintiffs clearly pleaded that 'this court is proper for this

The court also notes that Cohen submitted a "Prologue" with his Rule 60(d) motion in which he essentially argues that he has brought this action in this district because the District of Maryland "has been unreceptive to reason and has issued judgments that are laden with mistakes of law and fact." Doc. No. 1-1 at ECF p. 15. He argues that Judge Nickerson "has taken an untenable and obstinate position that is clearly designed to prevent the matter from proceeding to discovery and to trial." *Id.* He asserts that Judge Nickerson's intent to obstruct the plaintiffs' ability to proceed to trial is demonstrated by his incorrect rulings in which "the logic of his decisions [is] so contrary to coherent rationale." *Id.* He further notes that while litigating other matters in the District of Maryland, the Fourth Circuit has reversed decisions in three of those other matters. *Id.* at ECF p. 16.

Nothing Cohen submitted in the "Prologue" alters the court's conclusion that the plaintiffs failed to satisfy their high burden of establishing that maintenance of this action is

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matter pursuant to 28 U.S.C. § 1391(b) & (b)(2)'; '28 U.S.C. § 1331'; '28 U.S.C. § 1343'; '28 U.S.C. § 1367': '42 U.S.C. § 1983.'"). While they are clear as to what the plaintiff is alleging, they are not the type of well-pleaded **factual** allegations by which a court reviews complaints to ascertain whether venue or subject-matter jurisdiction are proper. Regardless, this particular statement, even if wrong, has nothing to do with Judge Nickerson's decision and would not provide a basis for relief from his order.

Cohen's second and fourth objections to Judge Nickerson's decision appear to relate to the conclusion that the allegations in the complaint pertain to actions in Delaware. Mot. at 2-13 – 2-15. Cohen appears to believe that Judge Nickerson concluded, at least in part, that the case belonged in the Delaware Court of Chancery. This is inaccurate because Judge Nickerson references Delaware and the Delaware Court of Chancery only because the allegations in the complaint relate to actions that occurred in Delaware. At no point did Judge Nickerson state that the plaintiff could only maintain the action in the Court of Chancery in Delaware. In any event, the court cannot dispute Judge Nickerson's conclusion that despite the plaintiff's conclusory statement in the complaint that a substantial, if not all, of the events giving rise to his claims occurred in the District of Maryland, it is abundantly apparent based on a review of the allegations in the complaint that a substantial part the events occurred in Delaware. While this might not be the case, Cohen pleaded as such as is bound by the factual allegations in his own pleadings.

The final portion of Judge Nickerson's opinion of which Cohen complains is the judge's statement that the named defendants reside in Pennsylvania. Mot. at 2-15. Cohen seems to assert that by including this statement in the memorandum, Judge Nickerson was somehow attacking his allegations for purposes of diversity jurisdiction or even that it meant that the court lacked personal jurisdiction over the defendants. *See* Mot. at 2-15 – 2-18.

With this objection, Cohen once again misinterprets Judge Nickerson's decision. Judge Nickerson references the defendants residing in Pennsylvania purely for venue purposes and to support his conclusion that the District of Maryland was not the proper venue. Judge Nickerson does not mention the defendants' residence for purposes of personal jurisdiction or subject-matter jurisdiction, and he did not dismiss the action without prejudice because of a lack of subject-matter jurisdiction or personal jurisdiction. Therefore, this argument would not provide the plaintiffs with any relief.

necessary to correct a grave miscarriage of justice. As indicated above, the plaintiffs' arguments in support of their motion lack merit. In addition, Cohen recognizes that he had the ability to appeal from Judge Nickerson's decision if he disagreed with it and just chose to not do so despite allegedly having success in other appeals to the Fourth Circuit. He does not indicate that anything prevented him from filing an appeal, and it is evident from his submissions in this case that he consciously chose to file here simply to have a different court evaluate the merits of Judge Nickerson's decision. Although courts have concluded that Rule 60(d)(1) permits parties to bring actions in a court other than the one in which the order or judgment complained of was entered, this is a prime example of why considerations of comity and the orderly administration of justice result in courts rarely allowing such cases to proceed.

III. CONCLUSION

Based on the information in the IFP Application, the court will grant Cohen leave to proceed IFP, but cannot grant IFP status for RB because it is not a "person" under the *in forma pauperis* statute. The court also finds that because the plaintiffs clearly chose to pursue this action in this district despite failing to exhaust their available avenues for relief in the District of Maryland or the Fourth Circuit Court of Appeals, they have not shown that they lacked the opportunity to fully litigate in the original action the grounds now relied upon to set aside the District of Maryland's order and judgment. In addition, the plaintiffs have failed to demonstrate that this case presents the type of exceptional circumstances under which the court would properly entertain this action to prevent a grave miscarriage of justice that occurred in the District of Maryland. The order complained of does not preclude the plaintiffs from filing a new action in a proper venue, and none of the plaintiffs' arguments are potentially meritorious in any

event. Accordingly, the court will deny the Rule 60(d) motion and dismiss this purported independent action with prejudice.

BY THE COURT:

/s/ *Edward G. Smith*
EDWARD G. SMITH, J.