EXHIBIT A

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

Randall SWERINGEN, David Wilson and John Doe(s), Plaintiffs,

v.

NEW YORK STATE DISPUTE RESOLUTION ASSOCIATION (N.Y.SDRA) and Attorney General Eliot Spitzer, Defendants.

No. 05-CV-428 (NAM/DRH).

Sept. 28, 2006.

John A. Aretakis, Esq., of Counsel, New York, NY, for Plaintiffs.

Hiscock & Barclay, LLP, Mark W. Blanchfield, Esq., of Counsel, Albany, NY, for Defendant NYSDRA.

Eliot Spitzer, Attorney General of the State of New York, James B. McGowan, Assistant Attorney General, of Counsel, Albany, NY, for Defendant Eliot Spitzer.

MEMORANDUM DECISION AND ORDER

NORMAN A. MORDUE, Chief U.S. District Judge.

INTRODUCTION

***1** Defendants New York State Dispute Resolution Association (N.Y.SDRA) and New York State Attorney General Eliot Spitzer move pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the complaint. Plaintiffs Randall Sweringen, David Wilson and John Doe(s) oppose defendants' motions.

THE COMPLAINT

The Court accepts as true the following facts from the complaint: Plaintiffs were sexually abused by priests as children. NYSDRA is "legally and/or contractually" involved in a dispute resolution program on behalf of the Roman Catholic Diocese of Albany, "its agencies, employees, surrogates or their lawyers with respect to childhood sexual abuse by priests."NYSDRA, *inter alia,* mediates disputes between individuals and the Albany Diocese involving childhood sexual abuse claims.

Sweringen, who was abused by a priest when he was 18, has signed up for and participated in NYSDRA's program. The John Doe plaintiffs, who were victims of childhood sexual abuse by a priest "ha[ve] an interest in" NYSDRA's program.

NYSDRA utilized print, television, and radio to advertise its efforts to mediate disputes between victims of childhood sexual abuse by priests and the Albany Diocese. NYSDRA's "own website ..., or bylaws, regulations or policies", however, "state ... that mediation by ... NYSDRA is not an option in cases or claims involving child abuse". The advertisements also represent that NYSDRA, or its partners, surrogates, agents, and/or lawyers are "independent". NYSDRA, however, has a conflict of interest because the Albany Diocese pays the law firm of Whiteman Osterman and Hanna, which has represented the Albany Diocese in "litigation adverse to clergy sexual abuse victims", $350 per hour to administer NYSDRA, and has set aside at least $500,000 to pay NYSDRA's costs. The NYSDRA has refused to reveal any contracts or other agreements with "any of the parties, lawyers, agents or principals to the program."

Pursuant to agreements with the district attorneys in the fourteen counties that comprise the Albany Diocese, the Albany Diocese is obligated to tell victims of abuse to retain an attorney. NYSDRA "stand[s] in the shoes of the Albany Diocese or is united in interest with the Albany Diocese in dealing with, or acting with regard to matters involving clergy sexual abuse claims or victims," but does not tell victims of abuse to retain an attorney. Consequently, victims have participated in NYSDRA's program

without counsel, and have been exploited or taken advantage of by NYSDRA.

One example of the "unfair and unjust" nature of NYDSRA's program is that NYSDRA, its employees, agents, attorneys, spokesmen, partners, and/or principals "have charged themselves with being and having discretionary authority in determining what matters go to or are allowed to proceed to mediation and what matters are delayed or do not go to mediation."

Further, NYSDRA's executive director, Lisa Hicks, falsely advised Sweringen that NYSDRA "was permitted to be involved in the program and that the program was appropriately vetted by the defendant NYSDRA and did not involve fraud, deception or a conflict of interest."NYSDRA, which is "making a substantial amount of money from its client or principal", advertised the program as "independent" so victims would participate in a program "that benefited ... NYSDRA and its principals."

***2** As a result of the above, plaintiffs seek injunctive relief directing NYSDRA to cease mediating claims involving childhood sexual abuse by Albany Diocese priests or compelling Attorney General Spitzer to act to remedy matters (first cause of action). Plaintiffs also allege: fraud (second cause of action); violations of the New York State General Business Law § 349 and 22-A, and of the Executive Law 62(12) (third cause of action); breach of oral contract (fourth cause of action); negligence (fifth cause of action); and breach of fiduciary duty (sixth cause of action).

JURISDICTION

Plaintiffs allege that the Court has diversity jurisdiction over this action because Sweringen and Wilson are residents and citizens of California and Florida, respectively, defendants are citizens of New York, and the John Doe plaintiffs reside or have citizenship in "different states", and the amount in controversy exceeds $75,000.

DISCUSSION

Standard Rule 12(b)(6)

When considering a motion to dismiss a complaint under Rule 12(b)(6), a court " 'must accept as true all of the factual allegations set out in plaintiff's complaint, draw inferences from those allegations in the light most favorable to plaintiff, and construe the complaint liberally.' " *Gregory v. Daly,* 243 F.3d 687, 691 (2d Cir.2001) (quoting *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957)). A court may not dismiss an action "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief." *Conley,* 355 U.S. at 45-46. " '[T]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." ' *Todd v. Exxon Corp.,* 275 F.3d 191, 198 (2d Cir.2001) (quoting *Scheuer v.. Rhodes,* 416 U.S. 232, 236 (1974)). Plaintiffs have submitted several affidavits in opposition to the motions to dismiss. The Court has not considered these affidavits in addressing defendants' motion. It is well settled that the Court may not look to evidence outside the pleadings in deciding a Rule 12(b)(6) motion to dismiss for failure to state a claim. *Kramer v. Time Warner, Inc.,* 937 F .2d 767 (2d Cir.1991) ("In considering a motion to dismiss for failure to state a claim under Fed.R.Civ.P. 12(b)(6), a district court must limit itself to facts stated in the complaint or in documents attached to the complaint as exhibits or incorporated in the complaint by reference.").

Attorney General Spitzer

Plaintiffs seek to compel Attorney General Spitzer to initiate action against or investigate NYSDRA pursuant to N.Y. Exec. Law § 63(12) and N.Y. Gen. Bus. Law § 349. The injunctive relief plaintiffs seek is in the nature of mandamus. Defendant Spitzer moves to dismiss the complaint on the basis that the decision whether to investigate or

initiate action against NYSDRA is discretionary, and thus cannot be compelled by mandamus. A mandamus to compel is appropriate "where the right to relief is 'clear' and the duty sought to be enjoined is performance of an act commanded to be performed by law and involving no exercise of discretion." *Hamptons Hospital & Medical Center, Inc. v. Moore,* 52 N.Y.2d 88, 96 (1981) (citation omitted).

***3** Section 63(12) of the Executive Law states:

Whenever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business, the attorney general *may apply,* in the name of the people of the state of New York, to the supreme court of the state of New York, on notice of five days, for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts, directing restitution and damages and, in an appropriate case, cancelling any certificate filed under and by virtue of the provisions of section four hundred forty of the former penal law or section one hundred thirty of the general business law, and the court may award the relief applied for or so much thereof as it may deem proper. The word "fraud" or "fraudulent" as used herein shall include any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions. The term "persistent fraud" or "illegality" as used herein shall include continuance or carrying on of any fraudulent or illegal act or conduct. The term "repeated" as used herein shall include repetition of any separate and distinct fraudulent or illegal act, or conduct which affects more than one person.

N.Y. Exec. Law § 63(12) (emphasis added).Section 349 of the General Business Law states, in pertinent part:

Whenever the attorney general shall believe from evidence satisfactory to him that any person, firm, corporation or association or agent or employee thereof has engaged in or is about to engage in any of the acts or practices stated to be unlawful *he may bring an action* in the name and on behalf of the people of the state of New York to enjoin such unlawful acts or practices and to obtain restitution of any moneys or property obtained directly or indirectly by any such unlawful acts or practices. In such action preliminary relief may be granted under article sixty-three of the civil practice law and rules.

N.Y. Gen. Bus. Law § 349(b) (emphasis added). These statutes, by their terms, accord the Attorney General discretion in deciding whether to initiate action. Thus, plaintiffs can prove no set of facts entitling them to the injunctive relief they seek. Accordingly, defendant Spitzer's motion to dismiss the claims against him is granted.

Fraud (Second Cause of Action)

NYSDRA moves to dismiss the second cause of action on the basis that plaintiffs failed to plead fraud with particularity as required by Rule 9(b)."In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other conditions of mind of a person may be averred generally."Fed.R.Civ.P. 9(b)."Rule 9(b) is designed to further three goals: (1) providing a defendant fair notice of plaintiff's claim, to enable preparation of defense; (2) protecting a defendant from harm to his reputation or goodwill; and (3) reducing the number of strike suits." *Di Vittorio v. Equidyne Extractive Indus., Inc.,* 822 F.2d 1242, 1247 (2d Cir.1987). To satisfy Rule 9(b), the averments must: " '(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent.' " *Shields v. Citytrust Bancorp, Inc.,* 25 F.3d 1124, 1128 (2d Cir.1994) (quoting *Mills v. Polar Molecular Corp.,* 12 F.3d 1170, 1175 (2d Cir.1993)); *see also Suez Equity Investors, L.P. v. Toronto-Dominion Bank,* 250 F.3d 87, 95 (2d Cir.2001) ("We have explained that this standard

imposes an obligation on plaintiff to 'specify the statements it claims were false or misleading, give particulars as to the respect in which plaintiff contends the statements were fraudulent, state when and where the statements were made, and identify those responsible for the statements.' ") (quoting *Cosmas v. Hassett,* 886 F.2d 8, 11 (2d Cir.1989)). As a general rule, therefore, Rule 9(b) pleadings cannot be based upon information and belief. *Segal v. Gordon,* 467 F.2d 602, 608 (2d Cir.1972). Further, under New York law,

***4** [f]raud is generally defined by reciting the five elements essential to sustain that cause of action. There must be a representation of fact, which is either untrue and known to be untrue or recklessly made, and which is offered to deceive the other party and to induce them to act upon it, causing injury.

Jo Ann Homes at Bellmore, Inc. v. Dworetz, 25 N.Y.2d 112, 119 (1969).

In this case, the complaint alleges, *inter alia,* that in a meeting on January 31, 2005, NYSDRA's executive director advised plaintiff Sweringen that the NYSDRA program did not involve fraud, deception, or a conflict of interest. Plaintiffs further allege that NYSDRA advertised its program as independent, and appended a copy of the program to the complaint. According to plaintiffs, NYSDRA is not independent (and the statements are therefore fraudulent) because the Albany Diocese funds the NYSDRA's program. Even assuming the complaint's somewhat vague allegations are sufficient to satisfy Rule 9(b)'s particularity requirements, the complaint would still fail because it does not allege scienter adequately.

Rule 9(b) provides that "[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally", therefore "allegations of scienter ... are not subjected to the more exacting consideration applied to the other components of fraud." *Breard v. Sachnof & Weaver, Ltd.,* 941 F.2d 142, 143 (2d Cir.1991) (quoting *Ouaknine v. MacFarlane,* 897 F.2d 75, 81 (2d Cir.1990)). Nevertheless, there must exist a "minimal factual basis for ... conclusory allegations of scienter." *Cohen v. Koenig,* 25 F.3d 1168, 1173 (2d Cir.1994) (quoting *Connecticut Nat'l Bank v.. Fluor Corp.,* 808 F.2d 957, 962 (2d Cir.1987))."In fact, conclusory allegations of scienter are sufficient 'if supported by facts giving rise to a strong inference of fraudulent intent.' " *IUE AFL-CIO Pension Fund v. Herrmann,* 9 F.3d 1049, 1057 (2d Cir.1993) (quoting *Ouaknine,* 897 F.2d at 80). To raise an inference of fraudulent intent, a plaintiff may either (1) allege facts showing both a motive for committing fraud and a clear opportunity for doing so, or (2) identify circumstances indicating conscious or reckless misbehavior by the defendants. *Shields,* 25 F.3d at 1128.

Here, the complaint alleges that the NYSDRA made fraudulent representations to induce more victims to participate in the program and therefore generate greater revenues. "Although the desire to enhance income may motivate a person to commit fraud, allegations that a defendant stands to gain economically from fraud do not satisfy the heightened pleading requirements of Rule 9(b)." *Primavera Familienstiftung v. Askin,* 173 F.R.D. 115, 124 (S.D.N.Y.1997); *see also Shields,* 25 F.3d at 1130 ("On a practical level, were the opposite true, the executives of virtually every corporation in the United States could be subject to fraud allegations."). Thus, the allegation that pecuniary gain motivated defendant's fraud, without more, is insufficient to give rise to an inference of fraudulent intent. Accordingly, defendant NYSDRA's motion to dismiss the second cause of action is denied.

N.Y. Gen. Bus. Law and N.Y. Exec. Law (Third Cause of Action)

***5** Plaintiffs base their third cause of action on allegations of deceptive business practices. The complaint alleges:

The defendant's deliberate and bad faith course of

conduct is aimed at the public in general and victims of abuse besides plaintiffs and has a broader impact upon consumers at large.

Defendant's conduct constitutes a representation or omission which was likely to mislead a reasonable person or consumer acting reasonably under the circumstances....

Lisa Hicks, the Executive Director of the defendant NYSDRA, publicly stated at a press conference with her principals, partners, or lawyers that: "The mediators are not an advocate for one party over another, but support each other in using the process to speak the truth, seek understanding and ask for what is wanted to begin or further the healing process."

The defendant NYSDRA, through Ms. Hicks, also falsely and deceptively claimed she was a neutral third party in the process in the September 23, 2004 Daily Gazette article.

The fraudulent statements were published and made by the defendant in NYSDRA ... in publications including but not limited to The Evangelist, the Times Union, The Gazette, The Record and other such newspapers from September 23, 2004 to October 23, 2004 and continuing to the present in some publications....

[Defendant's program] also has been described as a public relations driven fraudulent and deceptive program in an effort at restoring public trust and confidence to a church or diocese shaken ... by numerous revelations of sexual abuse of children by clergy....

The fraudulent program involving the defendant NYSDRA is not a gratuitous program, but one which deals in the resolution of legal claims with the execution of settlement funds, releases, confidentiality agreements and other such legal agreements attendant to such legal claims....

The defendants' fraud proximately caused the plaintiffs damages.

To establish a claim for deceptive trade practices under New York's General Business Law § 349, a plaintiff must demonstrate that (1) the defendant's deceptive acts were directed at consumers, (2) the acts are misleading in a material way, and (3) the plaintiff has been injured as a result. *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank,* 25 (1995).

NYSDRA argues that that the complaint fails to state a claim of deceptive trade practices because plaintiffs failed to allege how they have been injured and the wrong the complaint alleges is not a "consumer-type" transaction that "effects" the public. While it may become clear that the activities at issue were not directed at consumers, *see Azby Brokerage, Inc., v. Allstate Ins. Co.,* 681 F .Supp. 1084, 1089 (S.D.N.Y.1988) (dismissing § 349 claim because the plaintiffs did not "assert injury to consumers or to the public interest, but to a class of independent insurance brokers"), and that plaintiffs can prove no damages beyond deception, *see Small v.. Lorillard Tobacco Co.,* 94 N.Y.2d 43, 56 (1999) (finding that the plaintiffs, who "set[ ] forth deception as both act and injury", failed to show actual harm as required by § 349), the Court cannot say, at this stage of the litigation, that plaintiffs can prove no set of facts in support of their claim of deceptive business practices. Thus, defendant's motion to dismiss the third cause of action is denied.

Oral Contract (Fourth Cause of Action)

***6** Plaintiffs base their fourth cause of action on allegations of breach of oral contract. The complaint alleges:

The defendant NYSDRA in a January 31, 2005 meeting and at other subsequent times, covenanted to the plaintiffs and victims of abuse that they were able to be involved in the program and that same had been properly vetted when in fact it was not properly vetted and the program was not able to be administered or involved in by the defendant NYSDRA.

The defendant NYSDRA also covenanted to the plaintiffs and victims of abuse in general that the defendant NYSDRA would not be involved in a program if it involved a conflict of interest, which it clearly does.

Defendant NYSDRA at a January 31, 2005 meeting stated that they would not have become involved or partnered with this program if a conflict of interest was involved, if there was fraud or if it was deceptive.

The oral contract made by the defendant NYSDRA to the plaintiffs may also be illusory or fraudulent in that the defendant and their principals, agents and attorneys have unfettered and unilateral discretion implementing and administering the program, and this is manifestly unfair, unjust, deceptive, undisclosed and indicative that a conflict of interest exists.

Since the program involving the defendant NYSDRA is fraudulent, deceptive and has a conflict of interest, the defendant NYSDRA breached its contract with the plaintiffs.

Said contract contained offer and acceptance and good, valuable and sufficient consideration.

The defendant NYSDRA breached its oral contract with the plaintiffs proximately causing the plaintiffs damages.

Defendant NYSDRA moves to dismiss this cause of action for failure to state a claim on the basis that the complaint does not allege how plaintiffs were damaged by the alleged breach of contract. Defendant further asserts that plaintiffs do not set forth facts indicating that they gave consideration to form a contract.

To state a claim in federal court for breach of contract under New York law, a complaint need only allege (1) the existence of an agreement, (2) adequate performance of the contract by the plaintiff, (3) breach of contract by the defendant, and (4) damages. *Tagare v. Nynex Network Sys. Co.*, 921 F.Supp. 1146, 1149 (S.D.N .Y.1996).*See also*5 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1235 (1990). Each element need not be pleaded separately; all that is necessary is "a short and plain statement of the claims showing that the pleader is entitled to relief."Fed.R.Civ.P. 8(a)(2). Nevertheless, " 'when pleading a claim for breach of an express contract, ... the complaint must contain some allegation that the plaintiffs actually performed their obligations under the contract.' " *Reuben H. Donnelley Corp. v. Mark I Marketing Corp.*, 893 F.Supp. 285, 291 (S.D.N.Y.1995); *R.H. Damon & Co. v. Softkey Software Products, Inc.*, 811 F.Supp. 986, 991 (S.D.N.Y.1993).

*7 Here, there is no indication as to whether plaintiffs adequately performed under the contract. Indeed, the complaint states that Wilson and the "John Doe" plaintiffs have not participated in the NYSDRA program and there are no allegations indicating that they are parties to any contract. Additionally, the complaint alleges no facts showing what plaintiffs' obligations under the oral contract were, or what the consideration was for their engagement in the oral contract with the NYSRA. Accordingly, defendant's motion to dismiss the fourth cause of action is granted.

Negligence (Fifth Cause of Action)

Defendants argue for dismissal of plaintiff's negligence claim on the basis that the complaint does not allege that defendants' negligence proximately caused damages to them.

To establish a *prima facie* case of negligence under New York law, "a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom." *Solomon ex rel. Solomon v. City of New York*, 66 N.Y.2d 1026, 1027 (1985); *see also King v. Crossland Sav. Bank*, 111 F.3d 251, 259 (2d Cir.1997). In this case, the complaint alleges that:

The defendant NYSDRA, having instituted and set out a program which involved the plaintiffs, had a duty to act reasonably, and pursuant to its own rules, regulations, bylaws, guidelines, policies and relevant statutory law.

The defendant NYSDRA breached its duty of care and proximately caused damages to the plaintiffs that were reasonably foreseeable.

The defendants' own breach of their own rules, regulations, policies, bylaws and guidelines is evidence of the defendant's negligence.

The defendant NYSDRA has otherwise acted carelessly and with a wanton disregard to the plaintiffs.

As an initial matter, because the complaint states that plaintiff Wilson and the John Doe plaintiffs have not participated in the NYSDRA mediation program, it fails to state a claim of negligence as a matter of law because there are no facts indicating that NYSDRA owed any duty to those plaintiffs. While it may become clear that plaintiff Sweringen cannot produce evidence demonstrating negligence on the part of NYSDRA, or that he was damaged by NYSDRA's negligence, at this stage, plaintiff need only give "fair notice of the basis" for his claims. *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 514 (2002). Thus, the Court cannot say that "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46. Accordingly, defendant's motion to dismiss the fifth action is granted in part and denied in part.

Breach of Fiduciary Duty (Sixth Cause of Action)

Defendants assert that because plaintiffs failed to allege both an identifiable monetary loss and the existence of a fiduciary relationship, the sixth cause of action for breach of fiduciary duty must be dismissed. The elements of a cause of action for knowing participation in a breach of fiduciary duty are (1) breach of a duty owed to plaintiff by a fiduciary; (2) defendant's knowing participation in the breach; and (3) damages. *Diduck v. Kaszuchi & Sons Contractors Inc.*, 974 F.2d 270, 281-82 (2d Cir.1992). Plaintiff Wilson and the John Doe plaintiffs fail to state a claim of breach of fiduciary duty because they have alleged no relationship with NYSDRA and therefore have failed to allege that NYSDRA owes them a duty. Plaintiff Sweringen's allegations against NYSDRA are thin, the Court cannot say, however, at this stage of the litigation, that Sweringen fails to state a claim of breach of fiduciary duty as a matter of law. Accordingly, defendant's motion to dismiss the sixth cause of action is granted in part and denied in part.

Injunctive Relief (First Cause of Action)

***8** In their first cause of action, plaintiffs seek injunctive relief based on NYSDRA's allegedly fraudulent and otherwise illegal conduct. Because there are several viable causes of action in the complaint, however, NYSDRA is not entitled to dismissal of the first cause of action at this time. Accordingly, NYSDRA's motion to dismiss the first cause of action is denied.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that defendant Eliot Spitzer's motion to dismiss the complaint is granted; and it is further

ORDERED that the Clerk of the Court is directed to terminate defendant Eliot Spitzer from this case; and it is further

ORDERED that defendant NYSDRA's motion to dismiss the complaint with respect to the second, and fourth causes of action is granted without prejudice to repleading; and it is further

ORDERED that to the extent plaintiff David Wilson and the John Doe plaintiffs assert negligence (fifth cause of action) and breach of fiduciary

duty (sixth cause of action), defendant NYSDRA's motion to dismiss those claims are granted without prejudice to repleading; and it is further

ORDERED that the negligence (fifth cause of action) and breach of fiduciary duty (sixth cause of action) claims by plaintiff David Wilson and the John Doe plaintiffs are dismissed without prejudice to repleading; and it is further

ORDERED that defendant NYSDRA's motion to dismiss is otherwise denied it its entirety; and it is further

ORDERED that plaintiffs file an amended complaint, if any, on or before October 18, 2006.

IT IS SO ORDERED.

N.D.N.Y.,2006.
Sweringen v. New York State Dispute Resolution Ass'n (NYSDRA)
Slip Copy, 2006 WL 2811825 (N.D.N.Y.)

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

Hamed ABOUSHANAB and Bahiga Mohamed, husband and wife, Tonino Spinucci, Soheir Ramadan, Samir M. El-Gazzar and Afaf A. Shalaby, husband and wife, Vicente Holanday, Gerald S. Royal and Mary E. Royal, husband and wife, Plaintiffs,

v.

Gad JANAY, Marlene Janay, ResQNet.com, Inc., Tradepaq, Inc., CSI Complex Systems, Inc., John and Jane Does 1-10 and XYZ Corporations 1-10, Defendants.

No. 06 Civ. 13472(AKH).

Sept. 26, 2007.

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

ALVIN K. HELLERSTEIN, U.S.D.J.

***1** Plaintiffs' Second Amended Complaint ("SAC") alleges breach of contract and fraud claims arising out of Defendants' transfer of substantially all assets from ResQNet.com, Inc. ("ResQNet"), a company in which Plaintiffs had invested, to Tradepaq, Inc. ("Tradepaq") and CSI Complex Systems, Inc. ("CSI"), companies in which Plaintiffs had no interest. Defendants moved to dismiss the complaint pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure, arguing that Plaintiffs have not pleaded their allegations of fraud with requisite specificity, and that in any event, all of Plaintiffs' allegations are barred by the applicable statute of limitations. For the reasons stated below, Defendants' motion is granted in part and denied in part.

I. *Background*

A. *The Sale of Series A Preferred Stock and Subsequent ResQNet Agreements*

Defendant Gad Janay ("Janay") is the Chief Executive Officer of ResQNet, Tradepaq, and CSI. Together with his wife, defendant Marlene Janay, Janay owns a majority of the common stock of ResQNet. SAC ¶ 20. Janay owns 90% of Tradepaq and 100% of CSI. SAC ¶¶ 20-21. ResQNet develops computer software; Tradepaq and CSI license computer software. SAC ¶¶ 28-30.

During the fall of 1999, ResQNet distributed an Offering Memorandum offering for sale "Series A Preferred Stock." SAC ¶ 36. As set forth in the Offering Memorandum, Plaintiffs purchased "Series A Preferred Stock" pursuant to a Certificate of Designation. SAC ¶ 38. Section 6(f) of the Certificate of Designation provides in part:

[If ResQNet] sells, transfers, exchanges, or otherwise disposes of all or substantially all of its property, assets, or business ... then each holder of the Series A Preferred Stock shall be given a written notice ... and each holder ... shall have the right thereafter to receive, upon conversion of the Series A Preferred Stock ... the number of shares of stock or other securities, property or assets of [ResQNet] ... or cash receivable as a result of such ... sale, transfer, exchange or disposition by a holder ...

SAC ¶ 39. Plaintiffs allege that the Certificate of Designation is a contract between ResQNet and each of them. *See* SAC ¶¶ 95-103.

Soon after the sale of Series A Preferred Stock, Janay began stripping ResQNet of its business by transferring ResQNet's business and clients to Tradepaq and CSI. SAC ¶ 43. On November 17, 1999, ResQNet entered into a Licensing Representation Agreement with Tradepaq. SAC ¶ 45. The Tradepaq Agreement gave Tradepaq the best available terms for licensing ResQNet software regardless of volume of business. SAC ¶ 48. On December 2, 1999, ResQNet entered into a Licensing Rep-

resentation Agreement with CSI. SAC ¶ 46. The CSI Agreement gave CSI a flat 50 percent discount on ResQNet software products. ResQNet also performed custom enhancements to meet CSI requirements at no cost to CSI. In some instances, paying customers waited for modifications to their software while ResQNet engineers performed free modifications for CSI. SAC ¶ 55.

*2 ResQNet, CSI, and Tradepaq engaged in intercompany transactions and allocations of resources. CSI leased the eighth and ninth floors at 33 Maiden Lane in Manhattan. ResQNet subleased the eighth floor from CSI, and Tradepaq subleased a portion of that space of ResQNet. SAC ¶ 60. The entities shared a single accounting department, a common receptionist, office manager, and conference rooms. *Id.* Janay allocated expenses such as insurance among the three companies, and directed that interest-free loans be made among the three companies. SAC ¶¶ 61-62.

On October 28, 2002, Janay met with minority shareholders. He did not mention the agreements or transactions as between ResQNet and Tradepaq and CSI. SAC ¶ 70. Janay assured shareholders that ResQNet would receive 70 percent of his time; that deals with various local governments might be realized; and that ResQNet's existing revenue streams would be sufficient to pay back the minority shareholders' investment. *Id.* Janay met with the ResQNet Board of Directors on December 5, 2002. He did not disclose that he planned to transfer all of ResQNet's assets, and instead represented that he would consider the options the Board proposed to improve ResQNet's financial condition. SAC ¶ 77.

B. *The January 2003 Events*

In January 2003, Janay terminated 34 of ResQNet's employees, rehiring 21 of them at CSI or Tradepaq. SAC ¶ 79. CSI and Tradepaq did not give ResQNet any form of consideration for the transfer of employees. SAC ¶ 80. Janay then transferred "the vast majority" of ResQNet's customer contacts to Tradepaq through the execution of an Assumption and License Agreement dated January 31, 2003. SAC ¶ 82. The Assumption Agreement transferred all of ResQNet's customer contacts to Tradepaq except for its contacts with IBM and a company called Zephyr, SAC ¶ 82, and pursuant to the Agreement, Tradepaq assumed the revenue streams from ResQNet customers, and ResQNet's duties to service those customers. SAC ¶ 83. Thus in 2004, Tradepaq received $673,205.57 in fees from former ResQNet customers, and paid only $78,328.79 of that amount to ResQNet. SAC ¶ 86.

At a meeting with the Board of Directors on January 31, 2003, Janay confirmed that he had terminated all of ResQNet's employees and transferred many of them to Tradepaq and CSI. SAC ¶ 88. Janay also confirmed that he transferred customer contacts to Tradepaq, and by letter to the ResQNet board dated February 27, 2003, accepted responsibility for the transfers. SAC ¶ 89.

C. *Consequent Litigation*

On March 31, 2006, Justice Richard B. Lowe, III, filed a 24-page "Decision After Trial" in the matter of *Harris Venture Partners, L.P. v. Gad Janay,* No. 603560/03 (N.Y.Sup.Ct.2006).*See* SAC ¶ 91; Ex. to First Amended Complaint (document no. 2). Justice Lowe held defendants Gad Janay, Marlene Janay, Charles Griffis, and ResQNet liable for breach of fiduciary duty in the amount of $1.7 million plus interest, and for breach of contract in the amount of $850,000 plus interest, on facts substantially similar to those recited above. Plaintiffs allege that Justice Lowe's written decision served as the first notice they had of Defendants' conduct. SAC ¶ 91. The parties settled after trial, and on August 18, 2006, Justice Lowe vacated his decision. *See* Def. Reply at 8 n. 6.

*3 On November 23, 2006, Plaintiffs filed a complaint in this Court against defendants Gad Janay, Marlene Janay, ResQNet, Tradepaq, and CSI, alleging claims for breach of contract, breach of fidu-

ciary duty, fraud, and other claims. An amended complaint followed on December 18, 2006, and on March 6, 2007, Defendants moved to dismiss pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure. On April 24, 2007, the parties appeared for oral argument on Defendants' motion to dismiss. I granted the motion, dismissing counts two, eight, and ten with prejudice, and dismissing the remaining counts with leave to replead. *See* Summary Order, April 28, 2007.

On May 29, 2007, Plaintiffs filed their Second Amended Complaint, which alleges two causes of action: breach of contract against Gad Janay, Marlene Janay, and ResQNet, and fraud against Gad Janay, Marlene Janay, ResQNet, Tradepaq, and CSI. Defendants moved to dismiss the Second Amended Complaint, renewing their arguments that the fraud count fails to comply with Rules 9(b) and 12(b)(6), Fed.R.Civ.P., and that in any event, all counts are barred by the applicable statute of limitations and should be dismissed pursuant to Rule 12(b)(6), Fed.R.Civ.P. For the reasons stated below, Defendants' motion to dismiss is granted in part and denied in part.

Discussion

I. Choice of Law

A. *Federal Choice of Law Principles*

Where jurisdiction rests upon diversity of citizenship, a federal court sitting in New York must apply the New York choice-of-law rules and statutes of limitations. *Stuart v. American Cyanamid Co .*, 158 F.3d 622, 626 (2d Cir.1998) (citing *Guaranty Trust Co. v. York*, 326 U.S. 99, 108-09 (1945); *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941)).

B. *New York Statute of Limitations*

New York's statute of limitations, in appropriate instances, will apply, or "borrow," the statute of a different state or nation. Under N.Y. C.P.L.R. § 202,[FN1] in a case filed by a non-resident plaintiff, the shorter statute of limitations period, and all applicable tolling provisions, provided by either New York or the state where the cause of action accrued, will be applied. *Cantor Fitzgerald v. Lutnick*, 313 F.3d 704, 710 (2d Cir.2002). Where, as here, the "injury is purely economic, the place of injury usually is where the plaintiff resides and sustains the economic impact of the loss."*Id.* (quoting *Global Fin. Corp. v. Triarc Corp.*, 93 N.Y.2d 525 (N.Y.1999)).

> FN1.N.Y. C.P.L.R. § 202 provides: An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply.

New York's borrowing statute "is in the nature of an exception to the normal New York conflicts rule of applying the law of the jurisdiction with the most significant contacts."*Bianco v. Erkins (In re Gaston & Snow)*, 243 F.3d 599, 608 (2d Cir.2001). Thus "[m]odern choice-of-law decisions are ... inapplicable to the question of statutory construction presented by CPLR 202."*Id.* (quoting *Ledwith v. Sears Roebuck & Co.*, 231 A.D.2d 17, 24 (N.Y.App.Div.1997); *see also Global Fin. Corp. v. Triarc Corp.*, 93 N.Y.2d at 528 ("[T]here is a significant difference between a choice-of-law question, which is a matter of common law, and this Statute of Limitations issue, which is governed by particular terms of the CPLR"). Accordingly, New York applies its own law to decide where, for statute of limitations purposes, the cause of action accrued, and whether plaintiff was a resident of New York. *See e.g., Global Fin. Corp. v. Triarc Corp., supra* (applying New York claims accrual law); *Ledwith*

v. Sears Roebuck & Co., supra (applying New York residency law).

**4 In this case, the question where the cause of action accrued turns on whether Plaintiffs' claim is derivative or direct. If the claim is derivative, it accrues to the corporation, that is, to ResQNet, in the state in which the corporation resides. *See Brinckerhoff v. JAC Holding Corp.*, 263 A.D.2d 352, 353 (N.Y.App.Div.1999) (holding that under N.Y. C.P.L.R. § 202, plaintiffs' derivative claims accrued in "Georgia, since that is where [the corporation] had its principal office and where [the corporation's] alleged monetary damages would be felt"). If the claim is direct, it accrues to each individual plaintiff in the state in which he or she resides.

C. *Law of Plaintiffs' Breach of Contract Claim*

Although New York law provides the rule of decision as to which state's statute of limitations is applicable, Delaware law governs the merits of Plaintiffs' breach of contract claim against ResQNet, for Delaware law regulates the internal affairs between a corporation, incorporated in Delaware, and the holders of securities of that corporation. Plaintiffs allege that "the rights of ResQNet preferred shareholders are set forth in ResQNet's Certificate of Designations," SAC ¶ 96, pursuant to 8 Del. C. § 151. "Section 151... outlines the general corporate power to issue stock and dividends .... " *Waggoner v. Laster*, 581 A.2d 1127, 1133 (Del.1990), and provides that the "certificate of designation ... when effective (8 Del. C. § 103), amends and becomes a part of the certificate of incorporation (8 Del. C. § 151(g))." *Warner Communications, Inc. v. Chris-Craft Industries, Inc.*, 583 A.2d 962, 968 (Del. Ch.1989). Because the Certificate of Designations creates rights and liabilities as between shareholders and the corporation, and because it becomes part of the corporation's governing charter, both as a matter of Delaware law and New York's "internal affairs" doctrine,[FN2] the law of Delaware applies. *See*Restatement 2d of Conflict of Laws, § 302(2) & comment e. ("Uniform treatment of directors, officers and shareholders is an important objective which can only be attained by having the rights and liabilities of those persons with respect to the corporation governed by a single law."); *Lacos Land Co. v. Lone Star Indus.*, 141 B.R. 815, 822 (Bankr.S.D.N.Y.1992) (holding that dispute involving certificate of incorporation should be resolved according to law of the state that issued the certificate).

FN2. The internal affairs doctrine is a conflict of laws principle according to which only one state should have the authority to regulate a corporation's internal affairs-matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders-because otherwise a corporation could be faced with conflicting demands. *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982); Restatement 2d Conflict of Laws § 309. New York recognizes the doctrine and usually, but not automatically, applies the law of the incorporating state to matters concerning the internal affairs of the corporation. *See Greenspun v. Lindley*, 36 N.Y.2d 473 (1975); *Hart v. General Motors Corp.*, 129 A.D.2d 179 (N.Y.App.Div.1987); *In re Topps Co. Inc .*, No. 600715/07, 2007 N.Y. Misc. LEXIS 4463 (N.Y.Sup.Ct.2007); *Sokol v. Ventures Educ. Sys. Corp.*, 809 N.Y.S.2d 484 (N.Y.Sup.Ct.2005); *Seybold v. Groenink*, No. 06 Civ. 772, 2007 U.S. Dist. LEXIS 16994 (S.D.N.Y.2007). The internal affairs doctrine is not, however, "an exception to traditional statute of limitations principles."*Beana v. Woori Bank*, No. 05 Civ. 7018, 2006 U.S. Dist. LEXIS 74549 (S.D.N.Y.2006).

II. Analysis

A. *Count One: Plaintiffs' Breach of Contract Claim*

i. *Individual Defendants as Parties to the Certificate of Designation*

Plaintiffs' breach of contract claim against individual defendants Gad Janay and Marlene Janay does not allege any facts that would permit the finder of fact to conclude that the Janays entered into a contract directly with Plaintiffs, separately and apart from agreements between Plaintiffs and ResQNet, the corporation, of which they all were stockholders. Plaintiffs do not dispute this point, but argue that the individual defendants should be held liable for ResQNet's breach because ResQNet is an alter ego of the Janays. *See* Opp. Mem. at 28.

***5** To sustain an alter-ego theory, the plaintiff must allege facts showing that "the corporation [is] a sham and exist[s] for no other purpose than as a vehicle for fraud." *Wallace v. Wood,* 752 A.2d 1175, 1184 (Del. Ch.1999). Plaintiffs have alleged no such facts. Indeed, they have shown that ResQNet held board meetings attended by directors, including outside directors, employed several dozen individuals, and kept corporate records. *See Mason v. Network of Wilmington, Inc.,* 2005 Del. Ch. LEXIS 99 (Del. Ch.2005) (citing *United States v. Golden Acres, Inc.,* 702 F.Supp. 1097, 1104 (D.Del.1988)). Plaintiffs' alter-ego theory is not a viable claim, and their breach of contract claim against Gad Janay and Marlene Janay is dismissed with prejudice.

ii. *Statute of Limitations under N.Y. C.P.L.R. § 202*

All plaintiffs are non-residents of New York. Thus the applicable statute of limitations for each plaintiff's claim against ResQNet is the shorter of that provided by New York, or the state of the plaintiff's residence. *See Cantor Fitzgerald,* 313 F.3d at 710 (under N.Y. C.P.L.R. § 202, purely economic injury accrues in state where plaintiff resides).

In New York, "an action upon a contractual obligation or liability""must be commenced within six years."N.Y. C.P.L.R. § 213. The cause of action arises and accrues from the act of breach, not from notice or knowledge of the breach. *See e.g., Ely-Cruikshank Co. v. Bank of Montreal,* 81 N.Y.2d 399, 403 (N.Y.1993). Plaintiffs' complaint, filed November 23, 2006, would be timely under New York law for all acts or events occurring on or after November 23, 2000.

Defendants argue that for two plaintiffs, Hamed Aboushanab and Bahiga Mohamed, who reside in Egypt, the applicable statute of limitations is one to three years, and cite to statutes of Egypt, and decisions of this District citing those statutes. *See* Def. Mem. at 11-12 n. 14 (citing Egyptian Civil Code, Law No. 131, art. 698; *Younis v. American Univ. in Cairo,* 30 F.Supp.2d 390, 393 (S.D.N.Y.1998) (dismissing complaint on ground of forum non conveniens); *Zanfardino v. E-Systems, Inc.,* 652 F.Supp. 637, 639 (S.D.N.Y.1987) (stating that Egypt has one-year statute of limitations for breach of employment contract claims). The cases Defendants cite are distinguishable from the case at bar, and Defendants have failed to provide the Court with an English-language translation of the relevant portion of the Egyptian Civil Code, or other proofs. Defendants have not sustained their affirmative defense that Plaintiffs' breach of contract claims are time-barred, and their motion to dismiss Aboushanab's and Mohamed's claims on that ground is denied.

Similarly, Defendants have not argued that the law of the other states in which Plaintiffs reside-Arizona, Georgia, Florida, Illinois, New Jersey, and Washington-provide for a shorter period of limitations than New York. Thus they have not established their affirmative defense that claims accruing to plaintiffs who live in these states are time-barred. *See Hunt v. Enzo Biochem, Inc.,* 471 F.Supp.2d 390, 399 (S.D.N.Y.2006) ("When a defendant attempts to use the statute of limitations as an affirmative defense, the defendant 'bears the burden of establishing by prima facie proof that the limitations period has expired since the plaintiff's claims

accrued' ") (quoting *Overall v. Estate of Klotz*, 52 F.3d 398, 403 (2d Cir.1995)); *see also Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, No. 93 Civ. 6876, 2001 U .S. Dist. LEXIS 5880 (S.D.N.Y.2001) ("[U]nder New York law, the parties' failure to plead and prove applicable foreign law permits the court to proceed on the assumption that the law of the foreign jurisdiction accords with that of New York on the subject."). Defendants' motion to dismiss the breach of contract claim alleged by plaintiffs other than Aboushanab and Mohamed is denied.

B. *Count Two: Plaintiffs' Fraud Claim*

***6** Plaintiffs' allegations of fraud must be dismissed for at least two reasons: for failure to state a claim pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure, and for lack of standing-that is, failure to bring the claim derivatively.[FN3]

> FN3. In addition to these three grounds, Defendants argue that Plaintiffs' fraud claim should be dismissed for failure to plead individual injury, as duplicative of the breach of contract claim, and as time-barred under Delaware law.

i. *Application of Rules 9(b) and 12(b)(6)*

Under Rule 9(b) of the Federal Rules of Civil Procedure, an allegation of fraud must "be stated with particularity." Fed.R.Civ.P. 9(b).Rule 9(b) is special pleading requirement governing all civil actions, including all suits in which subject matter jurisdiction is based on diversity of citizenship and the law of the state in which the district court sits will control the content of the elements of a fraud claim. *Malmsteen v. Berdon, LLP*, 477 F.Supp.2d 655, 664 (S.D.N.Y.2007) (omitting quotations, brackets, and ellipses). Allegations of fraud "must specify (1) those statements the plaintiff thinks were fraudulent, (2) the speaker, (3) where and when they were made, and (4) why plaintiff believes the statements fraudulent." *Koehler v. Bank of Berm. (N.Y.) Ltd.*, 209 F.3d 130, 136 (2d Cir.2000).

The complaint alleges that defendants Gad Janay, Marlene Janay, ResQNet, Tradepaq, and CSI are liable to Plaintiffs for fraud. But Plaintiffs have alleged no facts showing that any defendant other than Gad Janay made statements, or that Plaintiffs relied upon any statement-save those made by Janay. The complaint alleges only that Gad Janay made misrepresentations at a shareholder meeting on October 28, 2002-it does not mention other defendants in connection with that meeting, or any other meeting. Indeed, the complaint states that the "October 2002 Meeting was the last time the shareholders heard from Janay or the Company."SAC ¶ 73. The fraud claim must be dismissed as against every defendant except Gad Janay for failure to identify statements made by such defendants that the plaintiff thinks were fraudulent.

ii. *Direct or Derivative Claim*

For the purposes of determining whether Plaintiffs have standing to bring a direct, rather than an indirect, or derivative, claim against Defendants for fraud, the law of the state of incorporation applies. *Cf. Everett v. Bozic*, No. 05 Civ. 296, 2006 WL 2291083 (S.D.N.Y.2006) (citing *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 108-09 (1991)). Plaintiffs' claim sounding in fraud alleges injury directly to the corporation, ResQNet, and only indirectly to the plaintiffs as shareholders of ResQNet. *See e.g.*, SAC ¶ 107 (alleging that Janay caused ResQNet to enter into an agreement that was "brutally detrimental to ResQNet's business"); SAC ¶ 120 (Plaintiffs have suffered and continue to suffer special injury as a result of this fraud because ResQNet, the company that they had invested in and hold preferred and common share in, has been drained of its assets and is no longer worth anything as an operating entity ."). Plaintiffs' injury, as shareholders, is indirect-Plaintiffs have not "demonstrated that [they] can prevail without showing an injury to the corporation[.]" *Tooley v.*

Donaldson, Lufkin, & Jenrette, Inc., 845 A.2d 1031, 1036 (Del.2004). Because Plaintiffs have failed to allege their claims of fraud derivatively, in the name of the corporation, Count Two of the complaint is dismissed against all defendants.

iii. *Equitable "Unjust Enrichment" Exception to Derivative Claim Requirements*

*7 Plaintiffs argue that even if their fraud claims are derivative in nature, they should be allowed to bring them directly because a derivative recovery would primarily benefit the Janays, as controlling shareholders. *See* Opp. Mem. at 32 (citing *In re Gaylord Container Corp. Shareholders Litig.*, 747 A.2d 71 (Del. Ch.1999); *Fischer v. Fischer*, 1999 WL 1032768 (Del. Ch.1999). In *Agostino v. Hicks*, Chancellor Chandler commented that *Fischer*, *Gaylord*, and like cases created a limited "unjust enrichment exception" to the general rule that a plaintiff alleging injury to the corporation must bring his claim derivatively, in accordance with Delaware's demand and notice procedures. *See* 845 A.2d 1110, 1125 (Del. Ch.2004) (quoting Kurt M. Heyman & Patricia L. Enerio, *The Disappearing Distinction Between Derivative and Direct Actions*, 4 DEL L.REV. 155, 181 (2001)). The Court of Chancery registered its disagreement, however, with the proposition that Plaintiffs advance here-namely, "that exclusion of culpable parties in the class due relief may affect the distinction between derivative and direct claims." *Id.* at 1126 n. 84.Instead, the court stated that "[t]he identity of the culpable parties does not speak to whether the conduct of those parties injured the corporation, rather than its shareholders."*Id.*

It is not clear whether the "unjust enrichment" exception that Chancellor Chandler described, then found inapplicable to the case before the Court of Chancery, survives *Tooley*, in which the Delaware Supreme Court emphasized that the issue whether a stockholder's claim is derivative or direct "turn[s] *solely*" on the criteria it set out. *Tooley*, 845 A.2d at 1033 (emphasis in original).*Tooley* did not discuss whether an exception to its "sole" criteria might exist where a plaintiff alleges that the corporate recovery would benefit and unjustly enrich wrongdoing directors. But the Delaware Supreme Court approved of Chancellor Chandler's decision in *Agostino*, agreeing that "the focus should be on the person or entity to whom the relevant duty is owed."*Id.* at 1036 n. 9 (citing *Agostino, supra*). In light of these developments, a detailed examination of Plaintiffs' claimed "unjust enrichment" exception to the rules of derivative lawsuits is not required. I note that, in contrast with the corporation in *Fischer*, ResQNet continues to operate and earn revenue and that, in contrast with the shareholders in *Gaylord*, Plaintiffs in this case have not alleged a diminution in voting power. Plaintiffs have not stated a direct claim for fraud, and their allegation of fraud must be dismissed.

Conclusion

For the foregoing reasons, Defendants' motion to dismiss the Second Amended Complaint pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure is GRANTED in part and DENIED in part. Defendants' motion to dismiss Count One, alleging breach of contract, is GRANTED as to defendants Gad Janay and Marlene Janay, and DENIED as to defendant ResQNet. Defendants' motion to dismiss Count Two, alleging fraud, is GRANTED.

**8 The parties shall appear for a status conference on October 12, 2007 at 9:20am.

SO ORDERED.

S.D.N.Y.,2007.
Aboushanab v. Janay
Slip Copy, 2007 WL 2789511 (S.D.N.Y.)

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Only the Westlaw citation is currently available.
United States District Court,N.D. New York.
Juan TEJADA, Plaintiff,
v.
Mr. MANCE, Superintendent, Marcy C.F.; Souza, Correctional Officer, Marcy C.F.; and Zurawski, Correctional Officer, Marcy C.F., Defendants.
No. 9:07-CV-0830.

Sept. 22, 2008.

Juan Tejada, Beacon, NY, pro se.
Hon. Andrew M. Cuomo, Attorney General for the State of New York, Roger W. Kinsey, Esq., of Counsel, New York, NY, for Defendants.

ORDER

NORMAN A. MORDUE, Chief Judge.
***1** The above matter comes to me following a Report-Recommendation by Magistrate Judge George H. Lowe, duly filed on the 12th day of September 2008. Following ten days from the service thereof, the Clerk has sent me the file, including any and all objections filed by the parties herein.

Such Report-Recommendation, which was mailed to plaintiff's last known residence, was returned to the Court as undeliverable to plaintiff at such address. *See*Dkt. No. 18.

Additionally, plaintiff was previously advised by the Court that plaintiff was required to promptly notify the Clerk's Office of any change in his address, and that failure to keep such office apprised of his current address would result in the dismissal of the instant action. *See*Dkt. No. 6, at page 3.

After careful review of all of the papers herein, including the Magistrate Judge's Report-Recommendation, and no objections submitted thereto, it is

ORDERED, that:

1. The Report-Recommendation is hereby adopted in its entirety.

2. The defendants' motion to dismiss for failure to state a claim (Dkt. No. 12) is granted, and plaintiff's complaint is dismissed in its entirety.

3. The Clerk of the Court shall serve a copy of this Order upon all parties and the Magistrate Judge assigned to this case.

IT IS SO ORDERED.

REPORT-RECOMMENDATION

GEORGE H. LOWE, United States Magistrate Judge.
This *pro se* prisoner civil rights action, commenced pursuant to 42 U.S.C. § 1983, has been referred to me by the Honorable Norman A. Mordue, Chief United States District Judge, for Report and Recommendation with regard to any dispositive motions filed, pursuant to 28 U.S.C. § 636(b) and Local Rule 72.3(c). Generally, in his Complaint, Juan Tejada ("Plaintiff") alleges that three employees of the New York State Department of Correctional Services ("DOCS") violated his rights under the First, Eighth and Fourteenth Amendments when they denied Plaintiff (and other inmates) an opportunity to exercise outdoors for one hour per day on approximately four days between the period of May 5, 2007, and July 15, 2007, at Marcy Correctional Facility ("Marcy C.F."). (*See generally*Dkt. No. 1 [Plf.'s Compl.].) Currently pending before the Court is Defendants' motion to dismiss for failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6). (Dkt. No. 12.)For the reasons set forth below, I recommend that Defendants' motion be granted.

I. BACKGROUND

A. Summary of Plaintiff's Complaint

Construed with the special leniency normally afforded to the pleadings of *pro se* civil rights litigants, Plaintiff's Complaint and the attachments thereto (which are incorporated by reference into the Complaint) allege as follows:

1. On May 5, 2007, DOCS Correctional Officer Souza ("Defendant Souza") and Correctional Officer Zurawski ("Defendant Zurawski") wrongfully deprived Plaintiff, and other inmates in the Marcy C.F. Special Housing Unit ("S.H.U."), of the one hour of outdoor exercise that they were permitted by DOCS Directive 4933; FN1

FN1. (Dkt. No. 1, ¶ 6 [Plf.'s Compl.]; Dkt. No. 1, at 7 [Ex. A to Plf.'s Compl., attaching letter from Plaintiff dated May 5, 2007].)

*2 2. In addition, at unidentified times before May 10, 2007, Defendants Souza and Zurawski wrongfully deprived Plaintiff, and other inmates in the Marcy C.F. S.H.U., of unspecified "supplies" and their radios; FN2

FN2. (Dkt. No. 1, ¶ 6 [Plf.'s Compl.]; Dkt. No. 1, at 20-21 [Ex. B to Plf.'s Compl., attaching two versions of letter from Plaintiff dated May 10, 2007].)

3. On May 23, 2007, Defendants Souza and Zurawski wrongfully deprived Plaintiff, and other inmates in the Marcy C.F. S.H.U., of the one hour of outdoor exercise that they were permitted by DOCS Directive 4933; FN3

FN3. (Dkt. No. 1, ¶ 6 [Plf.'s Compl.]; Dkt. No. 1, at 26 [Ex. B to Plf.'s Compl., attaching letter from Plaintiff dated May 23, 2007].)

4. That same day, two unidentified inmates were "bitten [sic] ... for standing up [to] this abuse [of the inmates' right to one hour of outdoor exercise per day];" FN4

FN4. (Dkt. No. 1, ¶ 6 [Plf.'s Compl.].)

5. Also on that day, Plaintiff brought the deprivation of outdoor exercise to the attention of Superintendent Mance ("Defendant Mance"), who subsequently did nothing; FN5

FN5. (Dkt. No. 1, ¶ 6 [Plf.'s Compl.]; Dkt. No. 1, at 26 [Ex. B to Plf.'s Compl., attaching letter from Plaintiff dated May 23, 2007]; Dkt. No. 1, at 14-19 [Ex. B to Plf.'s Compl., attaching three different versions of letter from Plaintiff dated June 24, 2007].)

6. At unidentified times before May 26, 2007, Correctional Officers at Marcy C.F. were, in some way, "being racist towards the Spanish [inmates in the Marcy C.F. S.H.U.]"; FN6

FN6. (Dkt. No. 1, at 23 [Ex. B to Plf.'s Compl., attaching letter from Plaintiff dated May 26, 2007].)

7. On July 5, 2007, Defendant Souza threatened to file a false misbehavior report against Plaintiff and his cellmate (who spoke only Spanish); FN7

FN7. (Dkt. No. 1, at 32-35 [Ex. B to Plf.'s Compl., attaching letter from Plaintiff dated July 5, 2007].)

8. On July 9, 2007, Defendant Zurawaski deprived Plaintiff of the one hour of outdoor exercise that he was permitted by DOCS Directive 4933, in retaliation against him for having filed a grievance against Defendant Zurawaski; FN8 and

FN8. (Dkt. No. 1, ¶ 6 [Plf.'s Compl.]; Dkt. No. 1, at 30 [Ex. B to Plf.'s Compl., attaching letter from Plaintiff dated July 9, 2007].)

9. On July 15, 2007, Defendants Souza and Zurawski wrongfully deprived Plaintiff, and other inmates in the Marcy C.F. S.H.U., of the one hour of outdoor exercise that they were permitted by DOCS

Directive 4933.[FN9]

FN9. (Dkt. No. 1, ¶ 6 [Plf.'s Compl.]; Dkt. No. 1, at 31 [Ex. B to Plf.'s Compl., attaching letter from Plaintiff dated July 15, 2007].)

As a result of these deprivations, Plaintiff requests both injunctive and monetary relief.[FN10]

FN10. (Dkt. No. 1, ¶¶ 7, 9 [Plf.'s Compl.].)

Based on these factual allegations, I liberally construe Plaintiff's Complaint and its attachments as asserting the following four legal claims against Defendants: (1) a claim of inadequate prison conditions and/or harassment under the Eighth Amendment; (2) a procedural due process claim under the Fourteenth Amendment; (3) an equal protection claim under the Fourteenth Amendment; and (4) a retaliation claim (against Defendant Souza) under the First Amendment.[FN11]

FN11. Due to the special solicitude normally afforded to the pleadings of *pro se* civil rights litigants, when a district court is determining what legal claims a *pro se* civil litigant has raised, "the court's imagination should be limited only by [the plaintiff's] factual allegations, not by the legal claims set out in his pleadings." *Phillips v. Girdich,* 408 F.3d 124, 130 (2d Cir.2005) [citations omitted].

B. Summary of Grounds in Support of Defendants' Motion to Dismiss

Generally, Defendants' motion to dismiss is premised on the following seven grounds: (1) Plaintiff's Complaint fails to allege facts plausibly suggesting a deprivation that was sufficiently serious to constitute a violation of the Eighth Amendment; (2) Plaintiff's Complaint fails to allege facts plausibly suggesting the personal involvement of Defendant Mance (a supervisor) in the constitutional violations alleged; (4) Plaintiff's Complaint fails to state a procedural due process claim under the Fourteenth Amendment because a violation of DOCS Directive 4933 does not constitute a violation of the Fourteenth Amendment; (5) Plaintiff lacks standing to assert any claims on behalf of other inmates; (6) the Eleventh Amendment bars Plaintiff's claims against Defendants in their official capacities; and (7) based on Plaintiff's factual allegations, Defendants are protected from liability as a matter of law by the doctrine of qualified immunity. (Dkt. No. 12, Part 2, 1-9 [Defs.' Memo. of Law].)

II. LEGAL STANDARD GOVERNING MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM

***3** Under Fed.R.Civ.P. 12(b)(6), a defendant may move to dismiss a complaint for "failure to state a claim upon which relief can be granted."Fed.R.Civ.P. 12(b)(6). It has long been understood that a defendant may base such a motion on either or both of two grounds: (1) a challenge to the "sufficiency of the pleading" under Fed.R.Civ.P. 8(a)(2);[FN12] or (2) a challenge to the legal cognizability of the claim.[FN13]

FN12. *See* 5C Wright & Miller, *Federal Practice and Procedure* § 1363 at 112 (3d ed. 2004) ("A motion to dismiss for failure to state a claim for relief under Rule 12(b)(6) goes to the sufficiency of the pleading under Rule 8(a)(2).") [citations omitted]; *Princeton Indus., Inc. v. Rem,* 39 B.R. 140, 143 (Bankr.S.D.N.Y.1984) ("The motion under F.R.Civ.P. 12(b)(6) tests the formal legal sufficiency of the complaint as to whether the plaintiff has conformed to F.R.Civ.P. 8(a)(2) which calls for a 'short and plain statement' that the pleader is entitled to relief."); *Bush v. Masiello,* 55 F.R.D. 72, 74 (S.D.N.Y.1972) ("This motion under Fed.R.Civ.P. 12(b)(6) tests the formal legal sufficiency of the complaint, determining whether the complaint has conformed to Fed.R.Civ.P.

8(a)(2) which calls for a 'short and plain statement that the pleader is entitled to relief.' ").

FN13.*See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002) ("These allegations give respondent fair notice of what petitioner's claims are and the grounds upon which they rest.... In addition, they state claims upon which relief could be granted under Title VII and the ADEA."); *Wynder v. McMahon*, 360 F.3d 73, 80 (2d Cir.2004) ("There is a critical distinction between the notice requirements of Rule 8(a) and the requirement, under Rule 12(b)(6), that a plaintiff state a claim upon which relief can be granted."); *Phelps v. Kapnolas*, 308 F.3d 180, 187 (2d Cir.2002) ("Of course, none of this is to say that a court should hesitate to dismiss a complaint when the plaintiff's allegation ... fails as a matter of law.") [citation omitted]; *Kittay v. Kornstein*, 230 F.3d 531, 541 (2d Cir.2000) (distinguishing between a failure to meet Rule 12 [b][6]'s requirement of stating a cognizable claim and Rule 8[a]'s requirement of disclosing sufficient information to put defendant on fair notice); *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 379 F.Supp.2d 348, 370 (S.D.N.Y.2005) ("Although Rule 8 does not require plaintiffs to plead a theory of causation, it does not protect a legally insufficient claim [under Rule 12(b)(6)]."") [citation omitted]; *Util. Metal Research & Generac Power Sys.*, 02-CV-6205, 2004 U.S. Dist. LEXIS 23314, at *4-5 (E.D.N.Y. Nov. 18, 2004) (distinguishing between the legal sufficiency of the cause of action under Rule 12[b][6] and the sufficiency of the complaint under Rule 8[a]); *accord, Straker v. Metro Trans. Auth.*, 331 F.Supp.2d 91, 101-102 (E.D.N.Y.2004); *Tangorre v. Mako's, Inc.*, 01-CV-4430, 2002 U.S. Dist. LEXIS 1658, at *6-7 (S.D.N.Y. Jan. 30, 2002) (identifying two sorts of arguments made on a Rule 12[b][6] motion-one aimed at the sufficiency of the pleadings under Rule 8 [a], and the other aimed at the legal sufficiency of the claims).

Rule 8(a)(2) requires that a pleading contain "a short and plain statement of the claim *showing* that the pleader is entitled to relief."Fed.R.Civ.P. 8(a)(2) [emphasis added]. By requiring this "showing," Fed.R.Civ.P. 8(a)(2) requires that the pleading contain a short and plain statement that "give[s] the defendant *fair notice* of what the plaintiff's claim is and the grounds upon which it rests."[FN14]The main purpose of this rule is to "facilitate a proper decision on the merits."[FN15] A complaint that fails to comply with this rule "presents far too heavy a burden in terms of defendants' duty to shape a comprehensive defense and provides no meaningful basis for the Court to assess the sufficiency of [plaintiff's] claims."[FN16]

FN14. *Dura Pharm., Inc. v. Broudo*, 125 S.Ct. 1627, 1634 (2005) (holding that the complaint failed to meet this test) [citation omitted; emphasis added]; *see also Swierkiewicz*, 534 U.S. at 512 [citation omitted]; *Leathernman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993) [citation omitted].

FN15. *Swierkiewicz*, 534 U.S. at 514 (quoting *Conley*, 355 U.S. at 48);*see also Simmons v. Abruzzo*, 49 F.3d 83, 86 (2d Cir.1995) ("Fair notice is that which will enable the adverse party to answer and prepare for trial, allow the application of res judicata, and identify the nature of the case so it may be assigned the proper form of trial.") [citation omitted]; *Salahuddin v. Cuomo*, 861 F .2d 40, 42 (2d Cir.1988) ("[T]he principle function of pleadings under the Federal Rules is to give the adverse party fair notice of the claim asserted so as

to enable him to answer and prepare for trial.") [citations omitted].

FN16. *Gonzales v. Wing,* 167 F.R.D. 352, 355 (N.D.N.Y.1996) (McAvoy, J.), *aff'd,* 113 F.3d 1229 (2d Cir.1997) (unpublished table opinion); *accord, Hudson v. Artuz,* 95-CV-4768, 1998 WL 832708, at *2 (S.D.N.Y. Nov. 30, 1998), *Flores v. Bessereau,* 98-CV-0293, 1998 WL 315087, at *1 (N.D.N.Y. June 8, 1998) (Pooler, J .). Consistent with the Second Circuit's application of § 0.23 of the Rules of the U.S. Court of Appeals for the Second Circuit, I cite this unpublished table opinion, not as precedential authority, but merely to show the case's subsequent history. *See, e.g., Photopaint Technol., LLC v. Smartlens Corp.,* 335 F.3d 152, 156 (2d Cir.2003) (citing, for similar purpose, unpublished table opinion of *Gronager v. Gilmore Sec. & Co.,* 104 F.3d 355 [2d Cir.1996]).

The Supreme Court has long characterized this pleading requirement under Fed.R.Civ.P. 8(a)(2) as "simplified" and "liberal," and has repeatedly rejected judicially established pleading requirements that exceed this liberal requirement.[FN17] However, it is well established that even this liberal notice pleading standard "has its limits."[FN18] As a result, several Supreme Court and Second Circuit decisions exist, holding that a pleading has failed to meet this liberal notice pleading standard.[FN19]

FN17.*See, e.g., Swierkiewicz,* 534 U.S. at 513-514 (noting that "Rule 8(a)(2)'s simplified pleading standard applies to all civil actions, with limited exceptions [including] averments of fraud or mistake.").

FN18. 2 *Moore's Federal Practice* § 12.34[1][b] at 12-61 (3d ed.2003).

FN19.*See, e.g., Bell Atlantic Corp. v. Twombly,* 127 S.Ct. 1955, 1964-1974 (2007) (pleading did not meet Rule 8[a][2]'s liberal requirement); *accord, Dura Pharm.,* 125 S.Ct. at 1634-1635, *Christopher v. Harbury,* 536 U.S. 403, 416-422 (2002), *Freedom Holdings, Inc. v. Spitzer,* 357 F.3d 205, 234-235 (2d Cir.2004), *Gmurzynska v. Hutton,* 355 F.3d 206, 208-209 (2d Cir.2004). Several unpublished decisions exist from the Second Circuit affirming the Rule 8(a)(2) dismissal of a complaint after *Swierkiewicz. See, e.g., Salvador v. Adirondack Park Agency of the State of N.Y.,* No. 01-7539, 2002 WL 741835, at *5 (2d Cir. Apr. 26, 2002) (affirming pre-*Swierkiewicz* decision from Northern District of New York interpreting Rule 8[a][2]). Although these decisions are not themselves precedential authority, *see*Rules of the U.S. Court of Appeals for the Second Circuit, § 0.23, they appear to acknowledge the continued precedential effect, after *Swierkiewicz,* of certain cases from within the Second Circuit interpreting Rule 8(a)(2).*See Khan v. Ashcroft,* 352 F.3d 521, 525 (2d Cir.2003) (relying on summary affirmances because "they clearly acknowledge the continued precedential effect" of *Domond v. INS,* 244 F.3d 81 [2d Cir.2001], after that case was "implicitly overruled by the Supreme Court" in *INS v. St. Cyr,* 533 U.S. 289 [2001]).

Most notably, in the recent decision of *Bell Atlantic Corporation v. Twombly,* the Supreme Court, in reversing an appellate decision holding that a complaint had stated an actionable antitrust claim under 15 U.S.C. § 1, "retire[d]" the famous statement by the Court in *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957), that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 127 S.Ct. 1955, 1968-69 (2007).[FN20] Rather

than turning on the *conceivability* of an actionable claim, the Court clarified, the Fed.R.Civ.P. 8 "fair notice" standard turns on the *plausibility* of an actionable claim. *Id.* at 1965-74.

> FN20. The Court in *Twombly* further explained: "The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been adequately stated, it may be supported by showing any set of facts consistent with the allegations in the complaint....*Conley,* then, described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival." *Twombly,* 127 S.Ct. at 1969.

More specifically, the Court reasoned that, by requiring that a pleading "show [ ] that the pleader is entitled to relief,"Fed.R.Civ.P. 8(a)(2) requires that the pleading give the defendant "fair notice" of (1) the nature of the claim and (2) the "grounds" on which the claim rests. *Id.* at 1965, n. 3 [citation omitted]. While this does not mean that a pleading need "set out in detail the facts upon which [the claim is based]," it does mean that the pleading must contain at least "some factual allegation[s]." *Id.*[citations omitted]. More specifically, the "[f]actual allegations must be enough to raise a right to relief above the speculative level [to a plausible level]," assuming (of course) that all the allegations in the complaint are true. *Id.* at 1965 [citations omitted]. What this means, on a practical level, is that there must be "plausible grounds to infer [actionable conduct]," or, in other words, "enough fact to raise a reasonable expectation that discovery will reveal evidence of [actionable conduct]."*Id.*

**4 As have other Circuits, the Second Circuit has repeatedly recognized that the clarified plausibility standard that was articulated by the Supreme Court in *Twombly* governs *all* claims, not merely antitrust claims brought under 15 U.S.C. § 1 (as were the claims in *Twombly*).[FN21] The Second Circuit has also recognized that this *plausibility* standard governs claims brought even by *pro se* litigants (although the plausibility of those claims is be assessed generously, in light of the special solicitude normally afforded *pro se* litigants).[FN22]

> FN21.*See, e.g., Ruotolo v. City of New York,* 514 F.3d 184, 188 (2d Cir.2008) (in civil rights action, stating that "To survive a motion to dismiss, a complaint must plead 'enough facts to state a claim up relief that is plausible on its face.'") [citation omitted]; *Goldstein v. Pataki,* 07-CV-2537, 2008 U.S.App. LEXIS 2241, at *14 (2d Cir. Feb. 1, 2008) (in civil rights action, stating that *"Twombly* requires ... that the complaint's '[f]actual allegations be enough to raise a right to relief above the speculative level ...." ') [internal citation omitted]; *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.,* 493 F.3d 87, 98, n. 2 (2d Cir.2007) ("We have declined to read Twombly's flexible 'plausibility standard' as relating only to antitrust cases.") [citation omitted]; *Iqbal v. Hasty,* 490 F.3d 143, 157-58 (2d Cir.2007) (in prisoner civil rights action, stating, "[W]e believe the [Supreme] Court [in *Bell Atlantic Corp. v. Twombly*] is ... requiring a flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible.* ") [emphasis in original].
>
> FN22.*See, e.g., Jacobs v. Mostow,* 281 F. App'x 85, 87 (2d Cir. March 27, 2008) (in pro se action, stating, "To survive a motion to dismiss, a complaint must plead 'enough facts to state a claim up relief that is plausible on its face.'") [citation omitted] (summary order, cited in accordance with Local Rule 32.1[c][1]); *Boykin v. KeyCorp.,* 521 F.3d 202, 215-16 (2d Cir.2008) (finding that borrower's *pro se* complaint

> sufficiently presented a *"plausible* claim of disparate treatment," under Fair Housing Act, to give lenders fair notice of her discrimination claim based on lenders' denial of her home equity loan application) [emphasis added].

It should be emphasized that Fed.R.Civ.P. 8's plausibly standard, explained in *Twombly,* was in no way retracted or diminished by the Supreme Court's decision (two weeks later) in *Erickson v. Pardus,* in which the Court stated, "Specific facts are not necessary" to successfully state a claim under Fed.R.Civ.P. 8(a)(2). *Erickson v. Pardus,* 127 S.Ct. 2197, 2200 (2007) [citation omitted]. That statement was merely an abbreviation of the often-repeated point of law-first offered in *Conley* and repeated in *Twombly*-that a pleading need not "set out in detail the facts upon which [the claim is based]" in order to successfully state a claim. *Twombly,* 127 S.Ct. 1965, n. 3 (citing *Conley v. Gibson,* 355 U.S. 41, 47 [1957]). That statement in no way meant that all pleadings may achieve the requirement of giving a defendant "fair notice" of the nature of the claim and the "grounds" on which the claim rests without ever having to allege any facts whatsoever.FN23There must still be enough facts alleged to raise a right to relief above the speculative level to a plausible level, so that the defendant may know what the claims are and the grounds on which they rest (in order to shape a defense).

> FN23. For example, in *Erickson,* a district court had dismissed a *pro se* prisoner's civil rights complaint because, although the complaint was otherwise factually specific as to how the prisoner's hepatis C medication had been wrongfully terminated by prison officials for a period of approximately 18 months, the complaint (according to the district court) failed to allege facts plausibly suggesting that the termination caused the prisoner "substantial harm." 127 S.Ct. at 2199. The Supreme Court vacated and remanded the case because (1) under Fed.R.Civ.P. 8 and *Twombly,* all that is required is a "a short and plain statement of the claim" sufficient to "give the defendant fair notice" of the claim and "the grounds upon which it rests," and (2) the plaintiff had alleged that the termination of his hepatitis C medication for 18 months was "endangering [his] life" and that he was "still in need of treatment for [the] disease." *Id.* at 2200.While *Erickson* does not elaborate much further on its rationale, a careful reading of the decision (and the dissent by Justice Thomas) reveals a point that is perhaps so obvious that it did not need mentioning in the short decision: a claim of deliberate indifference to a serious medical need under the Eighth Amendment involves two elements, i.e., the existence of a sufficiently serious medical need possessed by the plaintiff, and the existence of a deliberately indifferent mental state possessed by prison officials with regard to that sufficiently serious medical need. The *Erickson* decision had to do with only the first element, not the second element. *Id.* at 2199-2200.In particular, the decision was merely recognizing that an allegation by a plaintiff that, during the relevant time period, he suffered from hepatis C is, in and of itself, a factual allegation plausibly suggesting that he possessed a sufficiently serious medical need; the plaintiff need not *also* allege that he suffered an independent and "substantial injury" as a result of the termination of his hepatis C medication. *Id.* This point of law is hardly a novel one. For example, numerous decisions, from district courts within the Second Circuit alone, have found that suffering from hepatitis C constitutes having a serious medical need for purposes of the Eighth Amendment. *See, e .g., Rose v. Alvees,* 01-CV-0648, 2004 WL 2026481, at *6 (W.D.N.Y. Sept. 9, 2004); *Verley v. Goord,* 02-CV-1182, 2004 WL 526740, at

*10 n. 11 (S.D.N.Y. Jan. 23, 2004); *Johnson v. Wright,* 234 F.Supp.2d 352, 360 (S.D.N.Y.2002); *McKenna v. Wright,* 01-CV-6571, 2002 WL 338375, at *6 (S.D.N.Y. March 4, 2002); *Carbonell v. Goord,* 99-CV-3208, 2000 WL 760751, at *9 (S.D.N.Y. June 13, 2000).

Having said all of that, it should also be emphasized that, "[i]n reviewing a complaint for dismissal under Fed.R.Civ.P. 12(b)(6), the court must accept the material facts alleged in the complaint as true and construe all reasonable inferences in the plaintiff's favor."[FN24] "This standard is applied with even greater force where the plaintiff alleges civil rights violations or where the complaint is submitted *pro se.*"[FN25] In other words, as stated above in Part I.A. of this Report-Recommendation, while all pleadings are to be construed liberally under Fed.R.Civ.P. 8(e), *pro se* civil rights pleadings are to be construed with an *extra* degree of liberality.[FN26]

FN24. *Hernandez v. Coughlin,* 18 F.3d 133, 136 (2d Cir.1994) (affirming grant of motion to dismiss) [citation omitted]; *Sheppard v. Beerman,* 18 F.3d 147, 150 (2d Cir.1994).

FN25. *Hernandez,* 18 F.3d at 136 [citation omitted]; *Deravin v. Kerik,* 335 F.3d 195, 200 (2d Cir.2003) [citations omitted]; *Vital v. Interfaith Med. Ctr.,* 168 F.3d 615, 619 (2d Cir.1999) [citation omitted].

FN26. *See, supra,* note 1 of this Report-Recommendation.

For example, the mandate to read the papers of *pro se* litigants generously makes it appropriate to consider a plaintiff's papers in opposition to a defendant's motion to dismiss as effectively amending the allegations of the plaintiff's complaint, to the extent that those factual assertions are consistent with the allegations of the plaintiff's complaint.[FN27] Moreover, "courts must construe *pro se* pleadings broadly, and interpret them to raise the strongest arguments that they suggest."FN28Furthermore, when addressing a *pro se* complaint, *generally* a district court "should not dismiss 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."FN29Of course, an opportunity to amend is not required where "the problem with [plaintiff's] causes of action is substantive" such that "[b]etter pleading will not cure it."[FN30]

FN27. "Generally, a court may not look outside the pleadings when reviewing a Rule 12(b)(6) motion to dismiss. However, the mandate to read the papers of *pro se* litigants generously makes it appropriate to consider plaintiff's additional materials, such as his opposition memorandum." *Gadson v. Goord,* 96-CV-7544, 1997 WL 714878, at *1, n. 2 (S.D.N.Y. Nov. 17, 1997) (citing, *inter alia, Gil v. Mooney,* 824 F.2d 192, 195 [2d Cir.1987] [considering plaintiff's response affidavit on motion to dismiss]). Stated another way, "in cases where a pro se plaintiff is faced with a motion to dismiss, it is appropriate for the court to consider materials outside the complaint to the extent they 'are consistent with the allegations in the complaint.' " *Donhauser v. Goord,* 314 F.Supp.2d 119, 212 (N.D.N.Y.2004) (considering factual allegations contained in plaintiff's opposition papers) [citations omitted], *vacated in part on other grounds,* 317 F.Supp.2d 160 (N.D.N.Y.2004). This authority is premised, not only on case law, but on Rule 15 of the Federal Rules of Civil Procedure, which permits a plaintiff, as a matter of right, to amend his complaint once at any time before the service of a responsive pleading-which a motion to dismiss is not. *See Washington v. James,* 782 F.2d 1134, 1138-39 (2d Cir.1986) (considering sub-

sequent affidavit as amending *pro se* complaint, on motion to dismiss) [citations omitted].

FN28. *Cruz v. Gomez,* 202 F.3d 593, 597 (2d Cir.2000) (finding that plaintiff's conclusory allegations of a due process violation were insufficient) [internal quotation and citation omitted].

FN29. *Cuoco v. Moritsugu,* 222 F.3d 99, 112 (2d Cir.2000) [internal quotation and citation omitted]; *see also*Fed.R.Civ.P. 15(a) (leave to amend "shall be freely given when justice so requires").

FN30. *Cuoco,* 222 F.3d at 112 (finding that repleading would be futile) [citation omitted]; *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.") (affirming, in part, dismissal of claim with prejudice) [citation omitted].

***5** However, while this special leniency may somewhat loosen the procedural rules governing the form of pleadings (as the Second Circuit very recently observed),[FN31] it does not completely relieve a *pro se* plaintiff of the duty to satisfy the pleading standards set forth in Fed.R.Civ.P. 8, 10 and 12.[FN32] Rather, as both the Supreme Court and Second Circuit have repeatedly recognized, the requirements set forth in Fed.R.Civ.P. 8, 10 and 12 are procedural rules that even *pro se* civil rights plaintiffs must follow.[FN33] Stated more plainly, when a plaintiff is proceeding *pro se,* "all normal rules of pleading are not absolutely suspended."FN34

FN31. *Sealed Plaintiff v. Sealed Defendant # 1,* No. 06-1590, 2008 WL 3294864, at *5 (2d Cir. Aug. 12, 2008) ("[The obligation to construe the pleadings of *pro se* litigants liberally] entails, at the very least, a permissive application of the rules governing the form of pleadings.") [internal quotation marks and citation omitted]; *see also Traguth v. Zuck,* 710 F.2d 90, 95 (2d Cir.1983) ("[R]easonable allowances to protect *pro se* litigants from inadvertent forfeiture of important rights because of their lack of legal training ... should not be impaired by harsh application of technical rules.") [citation omitted].

FN32. *See Prezzi v. Schelter,* 469 F.2d 691, 692 (2d Cir.1972) (extra liberal pleading standard set forth in *Haines v. Kerner,* 404 U.S. 519 [1972], did not save *pro se* complaint from dismissal for failing to comply with Fed.R.Civ.P. 8]); *accord, Shoemaker v. State of Cal.,* 101 F.3d 108 (2d Cir.1996) (citing *Prezzi v. Schelter,* 469 F.2d 691) [unpublished disposition cited only to acknowledge the continued precedential effect of *Prezzi v. Schelter,* 469 F.2d 691, within the Second Circuit]; *accord, Praseuth v. Werbe,* 99 F.3d 402 (2d Cir.1995).

FN33. *See McNeil v. U.S.,* 508 U.S. 106, 113 (1993) ("While we have insisted that the pleadings prepared by prisoners who do not have access to counsel be liberally construed ... we have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel."); *Faretta v. California,* 422 U.S. 806, 834, n. 46 (1975) ("The right of self-representation is not a license ... not to comply with relevant rules of procedural and substantive law."); *Triestman v. Fed. Bureau of Prisons,* 470 F.3d 471, 477 (2d Cir.2006) (*pro se* status "does not exempt a party from compliance with relevant rules of procedural and substantive law") [citation omitted]; *Traguth v. Zuck,* 710

F.2d 90, 95 (2d Cir.1983) (*pro se* status "does not exempt a party from compliance with relevant rules of procedural and substantive law") [citation omitted]; *cf. Phillips v. Girdich,* 408 F.3d 124, 128, 130 (2d Cir.2005) (acknowledging that *pro se* plaintiff's complaint could be dismissed for failing to comply with Rules 8 and 10 if his mistakes either "undermine the purpose of notice pleading [ ]or prejudice the adverse party").

FN34. *Stinson v. Sheriff's Dep't of Sullivan Cty.*, 499 F.Supp. 259, 262 & n. 9 (S.D.N.Y.1980); *accord, Standley v. Dennison,* 05-CV-1033, 2007 WL 2406909, at *6, n. 27 (N.D.N.Y. Aug. 21, 2007) (Sharpe, J., adopting report-recommendation of Lowe, M.J.); *Muniz v. Goord,* 04-CV-0479, 2007 WL 2027912, at *2 (N.D.Y.Y. July 11, 2007) (McAvoy, J., adopting report-recommendation of Lowe, M.J.); *DiProjetto v. Morris Protective Serv.*, 489 F.Supp.2d 305, 307 (W.D.N.Y.2007); *Cosby v. City of White Plains,* 04-CV-5829, 2007 WL 853203, at *3 (S.D.N.Y. Feb. 9, 2007); *Lopez v. Wright,* 05-CV-1568, 2007 WL 388919, at *3, n. 11 (N.D.N.Y. Jan. 31, 2007) (Mordue, C.J., adopting report-recommendation of Lowe, M.J.); *Richards v. Goord,* 04-CV-1433, 2007 WL 201109, at *5 (N.D.N.Y. Jan. 23, 2007) (Kahn, J., adopting report-recommendation of Lowe, M.J.); *Ariola v. Onondaga County Sheriff's Dept.,* 04-CV-1262, 2007 WL 119453, at *2, n. 13 (N.D.N.Y. Jan. 10, 2007) (Hurd, J., adopting report-recommendation of Lowe, M.J.); *Collins v. Fed. Bur. of Prisons,* 05-CV-0904, 2007 WL 37404, at *4 (N.D.N.Y. Jan. 4, 2007) (Kahn, J., adopting report-recommendation of Lowe, M.J.).

III. ANALYSIS

A. First Basis for Dismissal: Facial Merit of Defendants' Unopposed Motion

"Where a properly filed motion is unopposed and the Court determines that the moving party has met its burden to demonstrate entitlement to the relief requested therein, the non-moving party's failure to file or serve any papers as required by this Rule shall be deemed as consent to the granting or denial of the motion, as the case may be, unless good cause be shown."N.D.N.Y. L.R. 7.1(b)(3).

Here, Defendants' motion to dismiss is properly filed, Plaintiff has failed to oppose it (despite being warned of the possible consequences of that failure), FN35 and Plaintiff has failed to show good cause why his failure to oppose Defendants' motion should not be deemed as consent to the granting of the motion. Therefore, I must determine whether Defendants have met their burden to "demonstrate entitlement to dismissal" under Rule 12(b)(6). FN36

FN35. (Dkt. No. 12, Part 1 [Defs.' Notice of Motion].)

FN36.*See also*Fed.R.Civ.P. 7(b)(1) (requiring motions to, *inter alia,*"state with particularity the grounds therefor").

An inquiry into whether a movant has met its "burden to demonstrate entitlement" to dismissal under Local Rule 7.1(b)(3) is a more limited endeavor than a review of a contested motion to dismiss. Specifically, under such an analysis, the movant's burden has appropriately been characterized as "modest." FN37 This is because, as a practical matter, the burden requires only that the movant present an argument that is "facially meritorious." FN38

FN37.*See, e.g., Ciaprazi v. Goord,* 02-CV-0915, 2005 WL 3531464, at *8 (N.D.N.Y. Dec. 22, 2005) (Sharpe, J.; Peebles, M.J.) (characterizing defendants' threshold burden on a motion for summary judgment as "modest") [citing *Celotex*

Corp. v. Catrett, 477 U.S. 317, 323-324 (1986)]; *accord, Saunders v. Ricks,* 03-CV-0598, 2006 WL 3051792, at *9 & n. 60 (N.D.N.Y. Oct. 18, 2006) (Hurd, J., adopting Report-Recommendation of Lowe, M.J.), *Smith v. Woods,* 03-CV-0480, 2006 WL 1133247, at *17 & n. 109 (N.D.N.Y. Apr. 24, 2006) (Hurd, J., adopting Report-Recommendation of Lowe, M.J.); *see also Race Safe Sys. v. Indy Racing League,* 251 F.Supp.2d 1106, 1109-1110 (N.D.N.Y.2003) (Munson, J.) (reviewing merely whether record contradicted defendant's arguments, and whether record supported plaintiff's claims, in deciding unopposed motion to dismiss, under Local Rule 7.1[b][3]); *Wilmer v. Torian,* 96-CV-1269, 1997 U.S. Dist. LEXIS 16345, at *2 (N.D.N.Y. Aug. 29, 1997) (Hurd, M.J.) (applying prior version of Rule 7.1[b][3], but recommending dismissal because of plaintiff's failure to respond to motion to dismiss *and* the reasons set forth in defendants' motion papers), *adopted by*1997 U.S. Dist. LEXIS 16340, at *2 (N .D.N.Y. Oct. 14, 1997) (Pooler, J.); *accord, Carter v. Superintendent Montello,* 95-CV-989, 1996 U.S. Dist. LEXIS 15072, at *3 (N.D.N.Y. Aug. 27, 1996) (Hurd, M.J.), *adopted by* 983 F.Supp. 595 (N.D.N.Y.1996) (Pooler, J.).

FN38.*See, e.g., Hernandez v. Nash,* 00-CV-1564, 2003 U.S. Dist. LEXIS 16258, at *7-8 (N.D.N.Y. Sept. 10, 2003) (Sharpe, M.J.) (before a motion to dismiss may be granted under Local Rule 7.1[b][3], "the court must review the motion to determine whether it is *facially meritorious"*) [emphasis added; citations omitted]; *accord, Topliff v. Wal-Mart Stores East LP,* 04-CV-0297, 2007 U.S. Dist. LEXIS 20533, at *28 & n. 43 (N.D.N.Y. March 22, 2007) (Lowe, M .J.); *Hynes v. Kirkpatrick,* 05-CV-0380, 2007 U.S. Dist. LEXIS 24356, at *5-6 & n. 2 (N.D.N.Y. March 21, 2007) (Lowe, M.J.); *Sledge v. Kooi,* 04-CV-1311, 2007 U.S. Dist. LEXIS 26583, at *28-29 & n. 40 (N.D.N.Y. Feb. 12, 2007) (Lowe, M.J.), *adopted by*2007 U.S. Dist. LEXIS 22458 (N.D.N.Y. March 28, 2007) (McAvoy, J.); *Kele v. Pelkey,* 03-CV-0170, 2006 U.S. Dist. LEXIS 95065, at *5 & n. 2 (N.D.N.Y. Dec. 19, 2006) (Lowe, M.J.), *adopted by*2007 U.S. Dist. LEXIS 4336 (N.D.N.Y. Jan. 22, 2007) (Kahn, J.).

Here, I find that Defendants have met their lightened burden on their unopposed motion given Defendants' cogent, and legally supported, legal arguments set forth in their memoranda of law. (Dkt. No. 12, Part 2, 1-9 [Defs.' Memo. of Law].) I note that this Court has, on numerous occasions, granted motions to dismiss based on a similar facial analysis of a defendant's legal arguments (and a plaintiff's claims).[FN39]

FN39.*See, e.g., Wilmer v. Torian,* 96-CV-1269, 1997 U.S. Dist. LEXIS 16345, at *2 (N.D.N.Y. Aug. 29, 1997) (Hurd, M.J.) (applying prior version of Local Rule 7.1[b][3], but recommending dismissal because of plaintiff's failure to respond to motion to dismiss *and* the reasons set forth in defendants' motion papers), *adopted by* 96-CV-1269, 1997 U.S. Dist. LEXIS 16340, at *2 (N.D.N .Y. Oct. 14, 1997) (Pooler, J.); *accord, Carter v. Superintendent Montello,* 95-CV-0989, 1996 U.S. Dist. LEXIS 15072, at *3 (N.D.N.Y. Aug. 27, 1996) (Hurd, M.J.), *adopted by* 983 F.Supp. 595 (N.D.N.Y.1996) (Pooler, J.); *Munoz v. Coombe,* 95-CV-1191, 1996 U.S. Dist. LEXIS 15107, at *3 (N.D.N.Y. Aug. 21, 1996) (Hurd, M.J.), *adopted by* 95-CV-1191, 1996 U.S. Dist. LEXIS 15108, at *2 (N.D.N .Y. Oct. 11, 1996) (Pooler, J.) (rejecting plaintiff's objections, explaining that "Local Rule 7.1(b) permits

the court to grant an unopposed motion"); *Owens v. Long,* 95-CV-0604, 1996 U.S. Dist. LEXIS 6520, at *2 (N.D.N.Y. March 11, 1996) (Hurd, M.J.), *adopted by* 95-CV-0604, 1996 U.S. Dist. LEXIS 4807 (N.D.N.Y. Apr. 10, 1996) (Pooler, J.).

Even if I were to subject Defendants' legal arguments to the detailed scrutiny that would be appropriate on a *conteste* d motion to dismiss, I would be persuaded by those legal arguments. For the sake of brevity, I will not repeat in detail all of Defendants arguments but only make two points.

First, I agree with Defendants that, even when construed with the utmost of special leniency, Plaintiff's Complaint and its attachments fail to allege facts plausibly suggesting a deprivation that was sufficiently serious to constitute a violation of the Eighth Amendment. Generally, to prevail on a claim of inadequate prison conditions, a plaintiff must show two things: (1) that the conditions of his confinement resulted in deprivation that was *sufficiently serious;* and (2) that the defendant acted with *deliberate indifference* to the plaintiff's health or safety. *Farmer v. Brennan,* 511 U.S. 825, 834 (1994); *Davidson v. Murray,* 371 F.Supp.2d 361, 370 (W.D.N.Y.2005). The denial of one hour of outdoor exercise (and radios and "supplies") on four days during a seventy-one (71) day period of time is not a deprivation that is sufficiently serious for purposes of the Eighth Amendment.[FN40]

FN40. *Arce v. Walker,* 907 F.Supp. 658, 662-63 (W.D.N.Y.1995) (holding, *inter alia,* that denying inmate one hour of daily exercise outside his cell, as required by state regulation, for 18 out of 19 days did not violate inmate's Eighth Amendment rights, as a matter of law), *affirmed in pertinent part,* 139 F.3d 329, 337-38 (2d Cir.1998); *Ochoa v. Connell,* 05-CV-1068, 2007 WL 3049889, at *12 (N.D.N.Y. Oct. 18, 2007) (Sharpe, J.) (holding that denial of exercise on 11 out of 33 days did not violate Eighth Amendment) [citations omitted]; *Ford v. Phillips,* 05-CV-6646, 2007 WL 946703, at *9 (S.D.N.Y. March 27, 2007) (holding that denial of exercise on 5 days did not violate Eighth Amendment); *Gibson v. City of New York,* 96-CV-3409, 1998 WL 146688, at *3 (S.D.N.Y. Mar. 25, 1998) (holding that denying inmate exercise for 8 days in a 60 day period did not violate Eighth Amendment) [citations omitted]; *Davidson v. Coughlin,* 968 F.Supp. 121, 131 (S.D.N.Y.1997) (holding that denying inmate exercise for 14 days did not violate Eighth Amendment) [citations omitted]; *see also May v. Baldwin,* 109 F.3d 557, 565 (9th Cir.1997) (deprivation of outdoor exercise for 21 days while in Disciplinary Segregation Unit did not demonstrate a serious deprivation under the Eighth Amendment); *Green v. Ferrell,* 801 F.2d 765, 771-72 (5th Cir.1986) (holding that Eighth Amendment was not violated by policy denying inmates out-of-cell exercise for first 15 days of punitive confinement).

***6** Second, I agree with Defendants that, even when construed with the utmost of special leniency, Plaintiff's Complaint fails to state a due process claim under the Fourteenth Amendment because a violation of DOCS Directive 4933 does not constitute a violation of the Fourteenth Amendment. Section 1983 provides, in pertinent part, "Every person who ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by *the Constitution and laws,* shall be liable to the party injured ...." 42 U.S.C. § 1983 [emphasis added]. The term "the Constitution and laws" refers to the United States Constitution and *federal* laws.[FN41] A violation of a state law or regulation, *in and of itself,* does not give rise to liability under 42 U.S.C. § 1983.[FN42] Furthermore, the violation of a DOCS Directive, alone, is not even a violation of New York State law or regulation.[FN43] This is because a

DOCS Directive is "merely a system the [DOCS] Commissioner has established to assist him in exercising his discretion," which he retains, despite any violation of that Directive. FN44

FN41. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970) ("The terms of § 1983 make plain two elements that are necessary for recovery. First, the plaintiff must prove that the defendant has deprived him of a right secured by the 'Constitution and laws' *of the United States.*") (emphasis added); *Patterson v. Coughlin*, 761 F.2d 886, 890 (2d Cir.1985) ("Recovery under 42 U.S.C. § 1983... is premised upon a showing, first, that the defendant has denied the plaintiff a constitutional or *federal* statutory right ....") (citation omitted; emphasis added); *Fluent v. Salamanca Indian Lease Auth.*, 847 F.Supp. 1046, 1056 (W.D.N.Y.1994) ("The initial inquiry in a § 1983 action is whether the Plaintiff has been deprived of a right 'secured by the Constitution and laws'*of the United States.*") [emphasis added].

FN42. *See Doe v. Conn. Dept. of Child & Youth Servs.*, 911 F.2d 868, 869 (2d Cir.1990) ("[A] violation of state law neither gives [plaintiff] a § 1983 claim nor deprives defendants of the defense of qualified immunity to a proper § 1983 claim."); *Patterson*, 761 F.2d at 891 ("[A] state employee's failure to conform to state law does not in itself violate the Constitution and is not alone actionable under § 1983....") (citation omitted); *Murray v. Michael*, 03-CV-1434, 2005 WL 2204985, at *10 (N.D.N.Y. Sept. 7, 2005) (DiBianco, M.J.) ("[A]ny violations of state regulations governing the procedures for disciplinary hearings ... do not rise to the level of constitutional violations.") (citation omitted); *Rivera v. Wohlrab*, 232 F.Supp.2d 117, 123 (S.D.N.Y.2002) ("[V]iolations of state law procedural requirements do not alone constitute a deprivation of due process since '[f]ederal constitutional standards rather than state law define the requirements of procedural due process.'") (citing *Russell v. Coughlin*, 910 F.2d 75, 78 n. 1 [2d Cir.1990]).

FN43. *See Rivera v. Wohlrab*, 232 F.Supp.2d 117, 123 (S.D.N.Y.2002) (citation omitted); *Lopez v. Reynolds*, 998 F.Supp. 252, 259 (W.D.N.Y.1997).

FN44. *See Farinaro v. Coughlin*, 642 F.Supp. 276, 280 (S.D.N.Y.1986).

Finally, a few words are necessary about Plaintiff's Fourteenth Amendment equal protection claim and his First Amendment retaliation claim. Even though Defendants do not specifically address these claims in their motion, the Court is not precluded from analyzing these claims because, in a *pro se* prisoner civil rights case, a district court may (and, indeed, has a duty to) *sua sponte* address whether the pleading in such a case has successfully stated a claim upon which relief may be granted. FN45

FN45. The authority to conduct this *sua sponte* analysis is derived from two sources: (1) 28 U.S.C. § 1915(e)(2)(B)(ii), which provides that "the court shall dismiss [a] case [brought by a prisoner proceeding *in forma pauperis*] at any time if the court determines that ... the action ... is frivolous or malicious[,] ... fails to state a claim on which relief may be granted[,] ... or ... seeks monetary relief against a defendant who is immune from such relief"; and (2) 28 U.S.C. § 1915A(b), which provides that, "[o]n review, the court shall ... dismiss the [prisoner's] complaint, or any portion of the complaint, if the complaint ... is frivolous, malicious, or fails to state a claim upon which relief may be granted ...."

With regard to Plaintiff's Fourteenth equal protection claim (i.e ., his claim that Defendants Souza and Zurawski discriminated against inmates based on their Hispanic national origin), to prove a violation of the Equal Protection Clause, a plaintiff must demonstrate that he was intentionally treated differently from others similarly situated as a result of intentional or purposeful discrimination directed at an identifiable or suspect class.[FN46] Here, Plaintiff has not alleged facts plausibly suggesting that the deprivations that allegedly occurred on May 5, May 23, July 9, and July 15, 2007, were caused by some sort of racial animus on the part of Defendants. *See, supra,* Part I.A. of this Report-Recommendation.[FN47] Rather, the only allegations of racial animus that Plaintiff offers are vague as to how, when and by whom the discrimination was committed. *Id.* More importantly, Plaintiff's allegations are devoid of any indication as to *why* he believed the offending officers were acting with racial animus, rendering his allegation of discrimination wholly conclusory. *Id.* Similarly, Plaintiff's allegation that Defendant Souza threatened to file a false misbehavior report against him and his cellmate (who spoke only Spanish) fails to allege any facts plausibly suggesting that Defendant Souza made that threat because of racial animus (or even that he carried out the threat).*Id.*

FN46. *Travis v. N.Y. State Div. of Parole,* 96-CV-0759, 1998 U.S. Dist. LEXIS 23417, at *11 (N.D.N.Y. Aug. 26, 1998) (Sharpe, M.J.), *adopted,* 96-CV-0759, Decision and Order (N.D.N.Y. filed Nov. 2, 1998) (McAvoy, C.J.).

FN47. Indeed, to the contrary, he has alleged the deprivation that occurred on July 7, 2007, occurred because he had filed a grievance against Defendant Souza. *See, supra,* Part I.A. of this Report-Recommendation.

***7** With regard to Plaintiff's First Amendment retaliation claim (i.e ., his claim against Defendant Zurawaski for depriving him of the one hour of outdoor exercise that he was permitted on July 9, 2007, by DOCS Directive 4933, in retaliation against him for having filed a grievance against Defendant Zurawaski), to prevail on a First Amendment claim under 42 U.S.C. § 1983, a plaintiff must prove by the preponderance of the evidence that: (1) the speech or conduct at issue was "protected"; (2) the defendants took "adverse action" against the plaintiff-namely, action that would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights; and (3) there was a causal connection between the protected speech and the adverse action-in other words, that the protected conduct was a "substantial or motivating factor" in the defendants' decision to take action against the plaintiff.[FN48] Here, Plaintiff has alleged facts plausibly suggesting that he engaged in protected activity and that Defendant Zurawaski took action against him because of that activity. *See, supra,* Part I .A. of this Report-Recommendation. However, he has failed to allege facts plausibly suggesting that the action taken by Defendant Zurawaski-denying him one hour of outdoor exercise while he was confined in the S.H.U.-was sufficiently adverse for purposes of the First Amendment. *Id.* It is noteworthy that Plaintiff has alleged that, following this denial (on July 9, 2007), he continued to engage in the protected activity of filing complaints about Defendant Zurawaski.[FN49] Under the circumstances alleged, I find that depriving Plaintiff one hour of exercise was *de minimis* adverse action, in that it was insufficient to "deter a similarly situated prisoner of ordinary firmness from exercising his constitutional rights."*Davis v. Goord,* 320 F.3d 246, 353 (2d Cir.2003) [internal quotation marks and citation omitted].[FN50]

FN48. *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle,* 429 U . S. 274, 287 (1977); *Gill,* 389 F.3d at 380 (citing *Dawes v. Walker,* 239 F.3d 489, 492 [2d. Cir.2001]).

FN49. (Dkt. No. 1, at 30-31 [Ex. B to Plf.'s Compl., attaching letters of complaint from

Plaintiff dated July 9 and 15, 2007].)

FN50.*Lunney v. Brureton,* 04-CV-2438, 2007 U.S. Dist. LEXIS 38660, at *65-66 (S.D.N.Y. May 25, 2007) ("Case law suggests that the isolated or sporadic denial of privileges [such as recreation] do not suffice to state a claim of actionable retaliation.") [citations omitted]; *cf. Snyder v. McGinnis,* 03-CV-0902, 2004 WL 1949472, at *11 (W.D.N.Y. Sept. 2, 2004) (deprivation of one meal on two occasions was *de minimis,* and did not state a claim for retaliation); *Bartley v. Collins,* 95-CV-10161, 2006 U.S. Dist. LEXIS 28285, at *21 (S.D.N.Y. May 12, 2006) ("Bates' misbehavior report against plaintiff and Collins's first report, which both resulted in plaintiff's temporary loss of various privileges such as permission to visit the commissary, likewise do not constitute adverse action because they were *de minimis:* they do not constitute penalties that would deter a similarly situated prisoner of ordinary firmness from exercising his constitutional rights.") [citations omitted].

For these reasons, I recommend that the Court grant Defendants' motion and dismiss Plaintiff's Complaint in its entirety.

B. Alternative Basis for Dismissal: Fed.R.Civ.P. 41

Rule 41 of the Federal Rules of Civil Procedure provides, "If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it."Fed.R.Civ.P. 41(b). Even though Fed.R.Civ.P. 41(b) speaks only of a dismissal *on a motion by a defendant,* courts have recognized that the rule does nothing to abrogate a district court's inherent power to dismiss a plaintiff's complaint, *sua sponte,* for failure to prosecute.[FN51] Moreover, the term "these rules" in Fed.R.Civ.P. 41(b) is construed to mean not only the Federal Rules of Civil Procedure, but also the local rules of practice for a district court (since Fed.R.Civ.P. 83[a][1] expressly authorizes district courts to adopt local rules of practice).[FN52] As a result, Fed.R.Civ.P. 41(b) may be fairly characterized as providing for two independent grounds for dismissal on motion or on the Court's own initiative: (1) a failure to prosecute the action, and (2) a failure to comply with the procedural rules, or any Order, of the Court.*Id.*

FN51. *Saylor v. Bastedo,* 623 F.2d 230, 238-239 (2d Cir.1980) (recognizing that, under the language of Rule 41[b], a district court retains the inherent power to dismiss a plaintiff's complaint, *sua sponte,* for failure to prosecute) [citations omitted]; *see also* N.D.N.Y. L.R. 41.2(a) ("Whenever it appears that the plaintiff has failed to prosecute an action or proceeding diligently, the assigned judge shall order it dismissed.").

FN52.*See, e.g., Tylicki v. Ryan,* 244 F.R.D. 146, 147 (N.D.N.Y.2006) (Kahn, J.) (dismissing complaint pursuant to Fed.R.Civ.P. 41[b] for failing to comply with, *inter alia,* the district court's Local Rule 10.1[b][2]); *In re Interbank Funding Corp.,* 310 B.R. 238, 254 (Bankr.S.D.N.Y.2004) (dismissing complaint pursuant to Fed.R.Civ.P. 41 [b] for failing to comply with, *inter alia,* the district court's local rules); *see also Abdullah v. Acands, Inc.,* 30 F.3d 264, 269-70 (1st Cir.1994) (affirming district court dismissal pursuant to Fed.R.Civ.P. 41[b] for failing to comply with, *inter alia,* the district court's local rule governing joinder); *Kilgo v. Ricks,* 983 F.2d 189, 192 (11th Cir.1993) ("A district court has authority under Federal Rule of Civil Procedure 41(b) to dismiss actions for failure to comply with local rules."); *Hewitt v. Romeo-Rim, Inc.,* 05-CV-40236, 2006 U.S. Dist.

LEXIS 90803, at *2 (E.D.Mich. Nov. 14, 2006) (dismissing complaint pursuant to Fed.R.Civ.P. 41[b] for failing to comply with, *inter alia,* the district court's local rule requiring response to motion); *Chillis v. U.S. Postal Off.,* 01-CV-0913, 2001 U.S. Dist. LEXIS 18133, at *3 (N.D.Tex. Nov. 5, 2001) (dismissing complaint pursuant to Fed.R.Civ.P. 41[b] for failing to comply with the district court's Local Rule 83.13); *Shough v. Coyle,* 00-CV-0237, 2000 U.S. Dist. LEXIS 21796, at *4 (D.Colo. Aug. 10, 2000) dismissing complaint pursuant to Fed.R.Civ.P. 41[b] for failing to comply with the district court's Local Rule 5.1[L]).

***8** With regard to the second ground for dismissal (a failure to comply with an Order of the Court), the legal standard governing such a dismissal is very similar to the legal standard governing a dismissal for failure to prosecute."Dismissal pursuant to Fed. R. Civ.P. 41(b) for failure to comply with an order of the court is a matter committed to the discretion of the district court."[FN53]The correctness of a Rule 41(b) dismissal for failure to comply with an order of the court is determined in light of five factors:

FN53. *Alvarez v. Simmons Market Research Bureau, Inc.,* 839 F.2d 930, 932 (2d Cir.1988) [citations omitted].

(1) the duration of the plaintiff's failure to comply with the court order, whether plaintiff was on notice that failure to comply would result in dismissal, (3) whether the defendants are likely to be prejudiced by further delay in the proceedings, (4) a balancing of the court's interest in managing its docket with the plaintiff's interest in receiving a fair chance to be heard, and (5) whether the judge has adequately considered a sanction less drastic than dismissal.[FN54]

FN54. *Lucas v. Miles,* 84 F.3d 532, 535 (2d Cir.1996) [citations omitted].

Here, on September 17, 2007, the Court ordered Plaintiff, *inter alia,* to keep the Clerk's Office apprised of his current address. (Dkt. No. 6, at 3 [Order filed Sept. 17, 2007].) Specifically, the Court advised Plaintiff that he is ***"required to promptly notify the Clerk's Office and all parties or their counsel of any change in [his] address; his failure to do same will result in the dismissal of this action."*** (*Id.*) As of that date, Plaintiff's address of record had been Marcy C.F. (Dkt. No. 1, ¶ 2 [Plf.'s Compl.].) On November 10, 2007, Plaintiff notified the Court of his change in address to Fishkill C.F. (Dkt. No. 14.)However, on November 24, 2007, Plaintiff was released from the custody of the Department of Correctional Services. (*Id.*)*See also*N.Y. S. D.O.C.S. Inmate Locator System Report Regarding Plaintiff http:// nysdocslookup.docs.state.ny.us/GCA00P00/WIQ3/WINQ130 (last visited Sept. 11, 2008). Since his release, Plaintiff has not notified the Court of his change of address.

I have weighed the five factors listed above, and I have concluded that they weigh decidedly in favor of dismissal.[FN55]With regard to the first factor, I find that the duration of Plaintiff's failure to provide his current address has been nearly *nine and a half months.*With regard to the second factor, I find that Plaintiff has received adequate notice that the sort of delay that he has caused in this action (due to his failure to provide his current address) would result in dismissal.[FN56]With regard to the third factor, I find that Defendants are likely to be prejudiced by a further delay.[FN57] With regard to the fourth factor, I have taken care to strike an appropriate balance between alleviating Court calendar congestion and protecting a party's right to due process and a fair chance to be heard, and I find that the need to alleviate congestion on the Court's docket outweighs Plaintiff's right to receive a further chance to be heard in this matter.[FN58] With regard to the fifth factors, I have considered all less-drastic sanctions and rejected them under the circumstances .[FN59]

FN55.*See, e.g., Robinson v. Middaugh,*

95-CV-0836, 1997 U.S. Dist. LEXIS 13929, at *2-3 (N.D.N.Y. Sept. 11, 1997) (Pooler, J.) (dismissing action under Fed.R.Civ.P. 41[b] where plaintiff failed to inform the Clerk of his change of address despite having been previously ordered by Court to keep the Clerk advised of such a change).

FN56. This notice was provided by the Court's Order of September 17, 2007. (Dkt. No. 6, at 3 [Order filed Sept. 17, 2007].) It was provided also by the Local Rules of Practice for this Court, which the Clerk's Office has provided to all correctional facilities in New York State, and which contains similar notifications. N.D.N.Y. L.R. 10.1(b)(2), 41.2(a), (b). Clearly, Plaintiff received this notice, since in his Notice of Change of Address, filed on November 15, 2007, he promised the Court that "as soon [as][I] know the address [of the] shelter or program [I'm] going to I will write the [C]ourt with the address."(Dkt. No. 14.)

FN57. For example, further delay by Plaintiff may very well result in the fading of memories, the discarding of relevant documents, and the retirement or transfer of witnesses. *See Geordiadis v. First Boston Corp.*, 167 F.R.D. 24, 25 (S.D.N.Y.1996) ("The passage of time always threatens difficulty as memories fade. Given the age of this case, that problem probably is severe already. The additional delay that plaintiff has caused here can only make matters worse.").

FN58. I note that it is cases like this one that delay the resolution of other cases, and that contribute to the Second Circuit's dubious distinction as having (among the twelve circuits, including the D.C. Circuit) the longest median time to disposition for prisoner civil rights cases, between 2000 and 2005 (9.8 months, as compared to a national average of 5.7 months).

FN59. For example, I am persuaded that issuing an Order chastising Plaintiff for his conduct would be futile, given the fact that such an Order will almost certainly never reach Plaintiff, due to his failure to provide a current address. I am also persuaded that simply waiting another month or so for Plaintiff to contact the Court would also be futile, given the fact that he has failed to contact the Court for nearly ten months now.

***9** For these reasons, I recommend that, in the alternative, the Court *sua sponte* dismiss Plaintiff's Complaint with prejudice for failure to diligently prosecute this action.

ACCORDINGLY, it is

RECOMMENDED that Defendants' motion to dismiss for failure to state a claim (Dkt. No. 12) be ***GRANTED,*** and that Plaintiff's Complaint be ***DISMISSED*** in its entirety.

ANY OBJECTIONS to this Report-Recommendation must be filed with the Clerk of this Court within TEN (10) WORKING DAYS, PLUS THREE (3) CALENDAR DAYS from the date of this Report-Recommendation (unless the third calendar day is a legal holiday, in which case add a fourth calendar day).*See* 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 72(b); N.D.N.Y. L.R. 72.1(c); Fed.R.Civ.P. 6(a)(2), (d).

BE ADVISED that the District Court, on *de novo* review, will ordinarily refuse to consider arguments, case law and/or evidentiary material that could have been, but were not, presented to the Magistrate Judge in the first instance. FN60

FN60. *See, e.g., Paddington Partners v. Bouchard,* 34 F.3d 1132, 1137-38 (2d Cir.1994) ("In objecting to a magistrate's report before the district court, a party has no right to present further testimony when

it offers no justification for not offering the testimony at the hearing before the magistrate.") [internal quotation marks and citations omitted]; *Pan Am. World Airways, Inc. v. Int'l Bhd. of Teamsters,* 894 F.2d 36, 40 n. 3 (2d Cir.1990) (district court did not abuse its discretion in denying plaintiff's request to present additional testimony where plaintiff "offered no justification for not offering the testimony at the hearing before the magistrate"); *Alexander v. Evans,* 88-CV-5309, 1993 WL 427409, at *18 n. 8 (S.D.N.Y. Sept. 30, 1993) (declining to consider affidavit of expert witness that was not before magistrate) [citation omitted]; *see also Murr v. U.S.,* 200 F.3d 895, 902, n. 1 (6th Cir.2000) ("Petitioner's failure to raise this claim before the magistrate constitutes waiver."); *Marshall v. Chater,* 75 F.3d 1421, 1426 (10th Cir.1996) ("Issues raised for the first time in objections to the magistrate judge's recommendations are deemed waived.") [citations omitted]; *Cupit v.. Whitley,* 28 F.3d 532, 535 (5th Cir.1994) ("By waiting until after the magistrate judge had issued its findings and recommendations [to raise its procedural default argument] ... Respondent has waived procedural default ... objection [ ].") [citations omitted]; *Greenhow v. Sec'y of Health & Human Servs.,* 863 F.2d 633, 638-39 (9th Cir.1988) ("[A]llowing parties to litigate fully their case before the magistrate and, if unsuccessful, to change their strategy and present a different theory to the district court would frustrate the purpose of the Magistrates Act."), *overruled on other grounds by U.S. v. Hardesty,* 977 F.2d 1347 (9th Cir.1992); *Patterson-Leitch Co. Inc. v. Mass. Mun. Wholesale Elec. Co.,* 840 F.2d 985, 990-91 (1st Cir.1988) ("[A]n unsuccessful party is not entitled as of right to de novo review by the judge of an argument never seasonably raised before the magistrate.") [citation omitted].

BE ALSO ADVISED that the failure to file timely objections to this Report-Recommendation will PRECLUDE LATER APPELLATE REVIEW of any Order of judgment that will be entered. *Roldan v. Racette,* 984 F.2d 85, 89 (2d Cir.1993) (citing *Small v. Sec'y of H.H.S.,* 892 F.2d 15 [2d Cir.1989]).

N.D.N.Y.,2008.
Tejada v. Mance
Slip Copy, 2008 WL 4384460 (N.D.N.Y.)

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Only the Westlaw citation is currently available.

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

Harold P. SCHROER, Plaintiff,

v.

EMIL NORSIC & SON, INC., and Capital One Financial Corporation, Defendants.

No. 07-CV-1564 (JFB)(AKT).

Dec. 5, 2007.

Harold P. Schroer, Southampton, NY, pro se.

Michael D. Tryon, Esq., Tryon & Pascale, P.C., Garden City, NY, for Defendants.

MEMORANDUM AND ORDER

JOSEPH F. BIANCO, District Judge.

***1** *Pro se* plaintiff Harold P. Schroer ("plaintiff") brought this action against contractor Emil Norsic and Son, Inc. ("Norsic") and Capital One Financial Corporation ("Capital One") in connection with a dispute regarding a $543.75 charge to plaintiff's Mastercard after plaintiff hired Norsic to clean the septic tank at his home. By Stipulation, filed August 7, 2007, the case against Capital One was dismissed with prejudice.

With respect to the remaining defendant, Norsic, plaintiff attempts to assert federal claims under the "U.S. Consumer Protection Act," the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* ("FDCPA"), and the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* ("FCPA"). Plaintiff also seeks to bring state claims for fraud, breach of contract, defamation, and unfair and deceptive business practices.

Norsic moves to dismiss plaintiff's federal claims in the Amended Complaint (the "complaint") for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Norsic also seeks to have the Court, if the federal claims are dismissed, decline to exercise subject matter jurisdiction over the remaining state claims. For the reasons set forth below, Norsic's motion to dismiss the federal claims is granted. Specifically, given the facts in the complaint, there is no plausible claim that can be brought under federal law with respect to the charge submitted by Norsic to Capital One in connection with work at plaintiff's home. The Court declines to retain jurisdiction over plaintiff's remaining state law claims, and dismisses such claims without prejudice.

I. BACKGROUND

A. Facts

The facts are drawn from the complaint and taken as true for the purposes of this motion.

Plaintiff's complaint seeks compensatory damages against Norsic for a breach of contract in the amount of $419.00.[FN1] Plaintiff also seeks the following: (1) compensatory damages in an unspecified amount for defamation; (2) punitive damages in an unspecified amount; and (3) a permanent injunction by which the Court would order that Norsic follow certain procedures in performing septic tank work and charging customers.

> FN1. The complaint appears to calculate damages at $419.00 by combining the alleged overpayment for the cleaning of plaintiff's septic tank in the amount of $225.64, $75.00 in damages to refill some dirt that was excavated, and $78.66 as a separate overcharge for claiming to remove sewage in excess of what was actually removed from the tank, although the sum of these figures is actually $379.30. (Compl. at 2.)

With respect to the core dispute regarding Norsic's work on the septic tank, although plaintiff acknow-

ledges in the complaint that he authorized a charge to his Capital One credit card for work Norsic was to perform on his septic tank (based on a estimate of $250), he alleges (1) that Norsic overcharged him for the work done and thereby obtained payment on his card for $543, (2) that Capital One relied on the misrepresentations of Norsic regarding the amount owed, and (3) that this resulted in "defamation" of his credit.

B. Procedural History

Plaintiff filed the complaint on April 17, 2007. By letter dated May 7, 2007, plaintiff requested leave to amend his complaint. On May 8, 2007, the Court granted leave to amend pursuant to Rule 15 of the Federal Rules of Civil Procedure. On May 30, 2007, the Amended Complaint was filed. On July 27, 2007, Norsic filed its motion to dismiss. On August 7, 2007, a stipulation of dismissal with prejudice was filed as to Capital One. On September 25, 2007, plaintiff filed his opposition to the motion. On October 30, 2007, at plaintiff's request, oral argument was held. In a letter dated November 1, 2007, plaintiff submitted a letter supplementing his previous submission. All of plaintiff's submissions have been considered by the Court.

II. STANDARD FOR MOTION TO DISMISS

***2** In reviewing a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the court must accept the factual allegations set forth in the complaint as true, and draw all reasonable inferences in favor of the plaintiff. *See Cleveland v. Caplaw Enter.*, 448 F.3d 518, 521 (2d Cir.2006); *Nechis v. Oxford Health Plans, Inc.*, 421 F.3d 96, 100 (2d Cir.2005). The plaintiff must satisfy "a flexible 'plausibility standard.' " *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir.2007). "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atl. Corp. v. Twombly*, ---U.S. ----, ----, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (May 21, 2007). The Court, therefore, does not require "heightened fact pleading of specifics, but only enough facts to state a claim for relief that is plausible on its face." *Id.* Moreover, as the plaintiff is appearing *pro se*, the Court shall " 'construe [his complaint] broadly, and interpret [it] to raise the strongest arguments that [it] suggests.' " *Weixel v. Bd. of Educ. of the City of N.Y.*, 287 F.3d 138, 145-46 (2d Cir.2002) (quoting *Cruz v. Gomez*, 202 F.3d 593, 597 (2d Cir.2000)). In connection with a motion to dismiss under Rule 12(b)(6), the Court may only consider "facts stated in the complaint or documents attached to the complaint as exhibits or incorporated by reference." Nechis, 421 F.3d at 100;*accord Kramer v. Time Warner Inc.*, 937 F.2d 767, 773 (2d Cir.1991).

III. DISCUSSION

Norsic moves to dismiss the federal claims for failing to state a cause of action given the allegations in the complaint, which Norsic argues establish that no federal claim exists against it as a matter of law. Norsic further argues that the Court should decline to exercise supplemental jurisdiction over the state claims. As set forth below, the Court finds that all of plaintiff's purported federal claims fail as a matter of law, and declines to exercise pendent jurisdiction over the remaining state claims.

A. Federal Claims

Plaintiff argues that federal claims exist against Norsic under the "U.S. Consumer Protection Act," the FDCPA, and the FCRA.

The FDCPA prohibits a "debt collector" from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt."15 U.S.C. § 1692e. A "debt collector" is defined as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due

or asserted to be owed or due another."15 U.S.C. § 1692a(6). Based upon this definition, the Second Circuit has explained:

> As a general matter, creditors are not subject to the FDCPA. However, a creditor becomes subject to the FDCPA if the creditor "in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts."15 U.S.C. § 1692a(6). A creditor uses a name other than its own when it uses a name that implies that a third party is involved in collecting its debts, "pretends to be someone else" or "uses a pseudonym or alias." *Villarreal v. Snow,* [No. 95 C 2484,] 1996 WL 473386, at *3 (N.D.Ill. Aug.19, 1996).

3** *Maguire v. Citicorp Retail Servs., Inc.,* 147 F.3d 232, 235 (2d Cir.1998); ***see also *Kropelnicki v. Siegel,* 290 F.3d 118, 127 (2d Cir.2002) ("The FDCPA establishes certain rights for consumers whose debts are placed in the hands of professional debt collectors for collection, and requires that such debt collectors advise the consumers whose debts they seek to collect of specified rights.").

The purpose of the FCRA is "to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit ... in a manner which is fair and equitable to the consumer with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information."15 U.S.C. § 1681b. Thus, "[t]he FCRA places distinct obligations on three types of entities: consumer reporting agencies, users of consumer reports, and furnishers of information to consumer reporting agencies." *Redhead v. Winston & Winston, P. C.,* No. 01 Civ. 11475(DLC), 2002 WL 31106934, at *3 (S.D.N.Y. Sept.20, 2002) (citations omitted).

In the instant case, based upon the allegations in the complaint, it is abundantly clear that there can be no cause of action under either of these statutes (or any other federal law) against Norsic for the acts alleged in the complaint. Plaintiff concedes in his complaint that, after being given an estimate that the services by Norsic would be approximately $250, he gave them his Capital One credit card to bill him, and Norsic received payment. Norsic's only activity in the complaint with respect to plaintiff's credit card was to charge plaintiff for $543 for work performed, which plaintiff disputes was unjustified given the estimate and the actual work done. According to the complaint, Norsic did not act as a creditor extending credit to plaintiff, never sought to collect any debt on its own behalf or through a collection agency, never furnished any information to any credit reporting agency, never used any consumer report information of the plaintiff, and never took any action at all as it relates to plaintiff's credit standing. Instead, the complaint alleges that Capital One reported him to collection agencies when he disputed the credit card bill. Plaintiff seeks to hold Norsic responsible for these issues with his credit because, if Norsic did not require him to pay for the services (which he alleges were unjustified), he would not have had the credit problems with Capital One. However, there is no federal claim under the FDCPA or the FCRA for such a theory of liability given the factual circumstances described in the complaint. To hold otherwise would allow anyone who believed they were overcharged on a credit card by a contractor or any other type of service provider to refuse to pay the credit card company, and then seek to sue the contractor for any ensuing credit problems caused by the consumer's refusal to pay the credit card company. There is no language in the FDCPA, the FCRA, or any other federal statute that provides for a federal cause of action against the service provider in such a situation.[FN2]

> FN2. In the complaint, plaintiff also alleges jurisdiction under the "U.S. Consumer Protection Act" without any citation. The Court is unaware of a federal statute under that particular name and, thus, it is unclear to the Court the precise statute that plaintiff is attempting to in-

voke. To the extent plaintiff is referencing the federal Telephone Consumer Protection Act, 47 U.S.C. § 227, *et. seq.*, or the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 18 U.S.C. § 158(d), neither of those statutes provide any cause of action under the facts as alleged in this case and have no applicability. As noted above, the Court has considered whether the allegations in the complaint could potentially provide a cause of action under any federal statute and finds that no such claim exists as a matter of law on this complaint. Finally, to the extent that plaintiff is referring to the New York Consumer Protection Act, N.Y. General Business Law §§ 349 and 350, as set forth *infra,* the Court declines to exercise supplemental jurisdiction over such claims and, therefore, plaintiff can attempt to pursue any such claim in state court.

***4** At oral argument and again in a supplemental submission, plaintiff argues that the Supreme Court's decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985), provides a federal cause of action and, thus, a basis for federal jurisdiction over this case. However, plaintiff's reliance on the *Dun & Bradstreet* case is misplaced. That case involved a defamation action by a construction contractor against a credit reporting agency that allegedly issued a false credit report to a contractor's creditors. 472 U.S. at 751. Moreover, no federal statute was implicated; rather, it was a state defamation claim brought in Vermont state court. *Id.* at 752.The Supreme Court was addressing whether the First Amendment provided certain protections from such a state defamation claim. *Id.* at 753.Thus, the *Dun & Bradstreet* case provides no support for plaintiff in his attempt to demonstrate that a *federal* claim exists based upon the alleged facts in this case.

In short, having carefully examined the complaint, the Court finds that the purported federal claims must fail as a matter of law because plaintiff cannot state a cause of action. Furthermore, because the Court finds, for the reasons discussed *supra,* that any amendment of plaintiff's complaint would be futile (given the facts already contained in the complaint), the claim is dismissed without leave to replead the claim. *See Dluhos v. Floating and Abandoned Vessel, Known as N.Y.*, 162 F.3d 63, 69 (2d Cir.1998) (finding that a *pro se* litigant may be denied leave to amend where such an amendment would be futile).

B. State Law Claims [FN3]

FN3. Because plaintiff is a New York resident and Norsic is incorporated under New York law, and because less than $75,000 in damages is being sought, there is no diversity jurisdiction pursuant to 28 U.S.C. § 1332 for the state law claims.

In addition to the federal claims, plaintiff asserts several state law claims, including fraud, breach of contract, defamation, and unfair and deceptive business practices. "In the interest of comity, the Second Circuit instructs that 'absent exceptional circumstances,' where federal claims can be disposed of pursuant to Rule 12(b)(6) or summary judgment grounds, courts should 'abstain from exercising pendent jurisdiction.' " *Birch v. Pioneer Credit Recover, Inc.*, No. 06-CV-6497 (MAT), 2007 U.S. Dist. LEXIS 41834, at *15, 2007 WL 1703914 (W.D.N.Y. June 8, 2007) (quoting *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 52 (2d Cir.1986)). Therefore, in the instant case, the Court, in its discretion, "decline[s] to exercise supplemental jurisdiction over [plaintiffs'] state law claims [because] it has dismissed all claims over which it has original jurisdiction." *Kolari v. N.Y. Presbyterian Hosp.*, 455 F.3d 118, 121-22 (2d Cir.2006) (quoting 28 U.S.C. § 1367(c)(3)) (internal quotation marks omitted) ("If the federal law claims are dismissed before trial ... the state claims should be dis-

missed as well."); *Karmel v. Liz Claiborne, Inc.*, No. 99-CV-3608 (WK), 2002 U.S. Dist. LEXIS 12842, at *10-* 11, 2002 WL 1561126 (S.D.N.Y. July 15, 2002) ("Where a court is reluctant to exercise supplemental jurisdiction because of one of the reasons put forth by § 1367(c), or when the interests of judicial economy, convenience, comity and fairness to litigants are not violated by refusing to entertain matters of state law, it should decline supplemental jurisdiction and allow the plaintiff to decide whether or not to pursue the matter in state court."). Moreover, the Second Circuit has recognized that the dismissal of remaining state claims after the dismissal of federal claims is particularly appropriate where as here, the resolution of the state law claims entails resolving additional issues of fact. *N.Y. Mercantile Exch., Inc. v. Intercontinental Exch., Inc.*, 497 F.3d 109, 119 (2d Cir.2007). Accordingly, pursuant to 42 U.S.C. § 1367(c)(3), the Court declines to retain jurisdiction over the remaining state claims, and dismisses such claims, without prejudice.

C. Leave to Replead

***5** Although plaintiff has not requested leave to amend or replead his Amended Complaint again, the Court has considered whether plaintiff should be given an opportunity to replead. The Second Circuit has emphasized that

> A *pro se* complaint is to be read liberally. Certainly the court should not dismiss 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.

Cuoco v. Moritsugu, 222 F.3d 99, 112 (2d Cir.2000) (quotations and citations omitted). However, even under this liberal standard, this Court finds that any attempt to amend the pleading in this case would be futile.[FN4] As discussed *supra*, it is clear from the complaint that Norsic's only role was to submit a credit card charge in connection with work done on plaintiff's home. Plaintiff again conceded this point at oral argument and in his supplemental submission to the Court, but seeks to create a claim for alleged conduct for which no federal cause of action exists-namely, that seeking payment from the credit card company "was the basis for Capital One's defaming my integrity."(Plaintiff's November 1, 2007 Letter to the Court, at 1.) Thus, the Court has concluded that, given the concessions in the Amended Complaint, no amendments can cure these pleading deficiencies and any attempt to replead would be futile. *See Cuoco*, 222 F.3d at 112 ("The problem with [plaintiff's] cause[ ] of action is substantive; better pleading will not cure it. Repleading would thus be futile. Such a futile request to replead should be denied."); *see also Hayden v. County of Nassau*, 180 F.3d 42, 54 (2d Cir.1999) (holding that if a plaintiff cannot demonstrate he is able to amend his complaint "in a manner which would survive dismissal, opportunity to replead is rightfully denied").

> FN4. In reaching this determination, the Court has reviewed all of the plaintiff's submissions, including the bills, letters, and other documents that he attached to his opposition, all of which confirm the futility of any amendment as to the proposed federal claims.

IV. CONCLUSION

For the reasons stated, defendant's motion to dismiss the federal claims is GRANTED in its entirety. The Court declines to retain jurisdiction over plaintiff's remaining state law claims, and dismisses such claims without prejudice to plaintiff attempting to pursue such claims in state court. The Clerk of the Court shall enter judgment accordingly and close this case.

SO ORDERED.

E.D.N.Y.,2007.
Schroer v. Emil Norsic & Son, Inc.
Slip Copy, 2007 WL 4299180 (E.D.N.Y.)

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