IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

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| DALE B. ADAMS | § | |
| | § | |
| v. | § | C.A. NO. MC-12-305 |
| | § | |
| U.S. DEPARTMENT OF JUSTICE, ET AL. | § | |

**MEMORANDUM AND RECOMMENDATION TO DENY PLAINTIFF'S MOTION TO PROCEED *IN FORMA PAUPERIS* AND TO DISMISS PLAINTIFF'S ACTION**

Dale B. Adams, plaintiff, proceeding pro se, has filed this Bivens[1] action against the United States Department of Justice, Attorney General Eric Holder, the Federal Bureau of Investigation, and FBI Director Robert Mueller, III. (D.E. 1-1, at 13-18). Moreover, he is asserting a claim pursuant to the Foreign Intelligence Surveillance Act ("FISA"). Id. at 18-19. Pending is his application to proceed in forma pauperis in this action. (D.E. 1). On July 19, 2012, a hearing was held regarding plaintiff's motion and his claims.

For the reasons stated herein, it is respectfully recommended that plaintiff's motion to proceed in forma pauperis be denied, and that his action be dismissed.

## I. BACKGROUND

Plaintiff alleges that the defendants violated his First, Fourth, Fifth, Eighth, and Fourteenth Amendment rights. He alleges that defendants are illegally using the FISA to monitor his activities.

### A. Plaintiff's Claim.

Plaintiff moved to Corpus Christi, Texas in 2001. (D.E. 1-1, at ¶ 21). During that time

[1] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). A Bivens action is the federal counterpart of § 1983 and "extends the protections afforded by § 1983 to parties injured by federal actors not liable under § 1983." Abate v. Southern Pac. Transp. Co., 993 F.2d 107, 110 n.14 (5th Cir. 1993).

he had broadband internet service from Time Warner Cable. Id. at ¶ 22. At some point, he decided to start a book publishing firm, which he named Majestic Publishers. Id. at ¶ 27.

In 2006, plaintiff wrote and published a book entitled Care Giving Made Easy How to be an Awesome Caregiver. Id. at ¶ 29. In this book, he was critical of the Food and Drug Administration. Based on this criticism, the government began monitoring his activities. He began being placed under surveillance by local police officers. His telephone was wiretapped.

After writing the book, plaintiff began writing articles critical of the federal government that were posted on websites. On August 17, 2006, he posted "Is Our Government to Blame For High Gas Prices?" Id. at ¶ 33. On or about September 14, 2006, he began working on another article, "Homeland Security At Work–Destroying Our U.S. Constitution." Id. at ¶ 34. While writing this article, he claims that his computer was hacked and that the IP address traced back to Herndon. Id. Based on that location, he believes that the FBI was hacking his computer.

Plaintiff further asserts that his computer was being hacked on September 21, 2006, but that when he contacted Roadrunner about the problem, they did nothing. Id. at ¶¶ 53-56. Based on this hacking that he alleges was by defendants, his speech was chilled. Id. at ¶¶ 57, 60. On October 11, 2006, plaintiff wrote and posted "Before You Vote A Word From Thomas Jefferson" on the internet. Id. at ¶ 40. However, on that same day, he also closed down his website because of the government's conduct. Id. at ¶¶ 58-59.

Plaintiff claims that defendants violated his First Amendment rights by wrongfully placing him on the Terrorist Watch List in response to the books and articles that he wrote. Id. at ¶ 61. He further asserts that they "were investigating and harassing [him] for exercising his 1st Amendment rights to political speech." Id. at ¶ 62.

Plaintiff seeks compensatory damages of nine million dollars as well as $1,000 per day for each FISA violation since September 2006. Moreover, he seeks fifty billion dollars in punitive damages. He wants a declaratory judgment that defendants' actions violated the Constitution. He seeks attorneys fees as well as expenses and costs. He wants to be removed from the Terrorist Watch List, and have all evidence acquired since 2006 regarding him being suppressed.

**B. Plaintiff's Application to Proceed In Forma Pauperis.**

A hearing was held regarding plaintiff's pending motion on July 19, 2012. At that hearing, he testified that he has limited monthly income. He is currently unemployed and last worked in June 2009 at Tyson Foods in Arkansas where he earned approximately $400 per week. Currently, he is enrolled at Kaplan University online. In 2011, he received $16,823 in student loans, which he uses for living expenses. He has received comparable loan amounts this year. He is married, but his wife is on disability for which she receives $698 per month.

Plaintiff currently resides in Harrison, Texas in a home owned by his wife. The monthly mortgage payment is $201, which includes taxes and insurance. They have a checking account that is overdrawn. He testified that he did not own any other valuable assets, except for a 1995 Geo Metro that he values at $700.

Plaintiff estimates that he spends about $135 per month for electricity and $70 per month for water. He also spends about $74 per month for telephone and internet service and $50 per month for cellular phone service. He does not have any active credit cards but indicates that they have about $25,000 in outstanding balances on various cards that have been cancelled. They spend about $500 per month on food. He pays $56.51 per month for car insurance and $12 per

month for burial insurance. He testified that he receives $289 per month in food stamps. Moreover, about twice a year, he receives about $110 in energy assistance.

## II. DISCUSSION

### A. Actions Filed In Forma Pauperis Must Satisfy 28 U.S.C. § 1915(e)(2)(B).

Plaintiff filed an application with the Court to proceed in forma pauperis, which would allow him to file his action without paying the filing fees:

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

28 U.S.C. § 1915(a)(1); see also Gay v. Tex. Dep't of Corrs. State Jail Div., 117 F.3d 240, 241 (5th Cir. 1997) (non-prisoner plaintiffs may file actions without paying a filing fee). Even if a person is indigent, however, that person may be limited in proceeding in forma pauperis:

> Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that–
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> * * *
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> (B) the action or appeal–
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> (I) is frivolous or malicious;
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> (ii) fails to state a claim on which relief may be granted; or
>
> (iii) seeks monetary relief against a defendant who is immune from such relief.

28 U.S.C. § 1915(e)(2); see also Siglar v. Hightower, 112 F.3d 191, 193 (stating that a complaint may be dismissed if it lacks an arguable basis in law or fact).

Plaintiff's pro se complaint is to be construed liberally and its well-pleaded allegations accepted as true. Johnson v. Atkins, 999 F.2d 99, 100 (5th Cir. 1993) (per curiam) (citation

omitted). "Even a liberally construed *pro se* civil rights complaint, however, must set forth facts giving rise to a claim on which relief may be granted." Id. (citing Levitt v. Univ. of Tex. at El Paso, 847 F.2d 221, 224 (5th Cir. 1988)). In Siglar, the court explained that "[a] complaint lacks an arguable basis in law if it is based on an indisputably meritless legal theory, such as if the complaint alleges the violation of a legal interest which clearly does not exist." 112 F.3d at 193 (citing Neitzke v. Williams, 490 U.S. 319, 327 (1989)). The Fifth Circuit has also held that "[a] district court may dismiss an in forma pauperis proceeding as frivolous ... whenever it appears that the claim's realistic chance of ultimate success is slight or the claim has no arguable basis in law or fact." Henson-El v. Rogers, 923 F.2d 51, 53 (5th Cir. 1991) (per curiam) (citations omitted); see also Booker v. Koonce, 2 F.3d 114, 116 (5th Cir. 1993) (dismissing an arrestee's in forma pauperis civil rights claims against district attorney and city as facially frivolous).

**B. Plaintiff's Constitutional Claims Are Barred By The Statute Of Limitations.**[2]

The Court must "apply the forum state's statute of limitations" in § 1983 actions. Stanley v. Foster, 464 F.3d 565, 568 (5th Cir. 2006). Similarly, "a Bivens action is controlled by the applicable state statute of limitations." Spotts v. United States, 613 F.3d 559, 573 (5th Cir. 2010). Federal civil rights actions instituted in Texas, such as those brought pursuant to § 1983, are deemed analogous to personal injury claims, and, therefore, the applicable limitations period is the two years fixed by § 16.003(a) of the Texas Civil Practice and Remedies Code. Stanley, 464 F.3d at 568. The Fifth Circuit has applied Texas law to hold "that the statute of limitations period on a Bivens claim is two years." Brown v. Nationsbank Corp., 188 F.3d 579, 590 (5th

[2] During the telephonic hearing, plaintiff acknowledged that his Eighth Amendment claims that defendants conspired to cause the deaths of his father, mother-in-law, and unborn child are based on actions that occurred after he left Corpus Christi. He indicated that they should be dismissed. Accordingly, it is respectfully recommended that plaintiff's oral motion to dismiss his Eighth Amendment claims be granted.

Cir. 1999); accord Spotts, 613 F.3d at 573 (citations omitted); Jones v. Alcoa, 339 F.3d 359, 364 (5th Cir. 2003) (citations omitted).

The Fifth Circuit has explained that the "[a]ccrual of a § 1983 claim is governed by federal law." Piotrowski v. City of Houston, 237 F.3d 567, 576 (5th Cir. 2001). A cause of action accrues when the plaintiff knows, or has reason to know, of the injury which is the basis of the action. Gonzales v. Wyatt, 157 F.3d 1016, 1020 (5th Cir. 1998) (citation omitted). The district court may raise the defense of limitations *sua sponte*, and dismissal is appropriate if it is clear from plaintiff's allegations that the claims asserted are barred by the applicable statute of limitations. Harris v. Hegmann, 198 F.3d 153, 156 (5th Cir. 1999) (per curiam) (citations omitted).

Here, plaintiff alleges constitutional violations that occurred in 2006. Indeed, he testified that he left Corpus Christi by March 2008. Thus, all of his constitutional claims are outside of the two-year statute of limitation for such claims in Texas. Accordingly, it is respectfully recommended that plaintiff's claim that his First, Fourth, Fifth, Eighth, and Fourteenth Amendment rights were violated be dismissed as barred by the statute of limitations.

**C. Plaintiff's Claims Against Defendants Holder And Mueller Are Without Merit.**

Plaintiff alleges that the use of the FISA to monitor his activities is authorized directly by defendants Holder and Mueller.

It is well established that "[p]ersonal involvement is an essential element of a civil rights cause of action." Thompson v. Steele, 709 F.2d 381, 382 (5th Cir. 1983) (1983) (citation omitted); see also Rizzo v. Goode, 423 U.S. 362, 371-72, 377 (1976) (requiring affirmative link between the injury and the defendant's conduct). A plaintiff cannot obtain damages or

injunctive relief from a policy-maker or supervisor solely on a theory of *respondeat superior*. Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009) ("Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*"); Monell v. Department of Social Servs., 436 U.S. 658, 691-95 (1978) (supervisory officials cannot be held vicariously liable under § 1983 for their subordinate's actions). Supervisory officials may be held liable only if they affirmatively participate in acts that cause the constitutional deprivation or if they implement unconstitutional policies that causally result in plaintiff's injury. Thompkins v. Belt, 828 F.2d 298, 303-04 (5th Cir. 1987). Thus, to state a cause of action under § 1983, the plaintiff must allege facts reflecting each defendant's participation in the alleged wrong, "specify[ing] the personal involvement of each defendant." Murphy v. Kellar, 950 F.2d 290, 292 (5th Cir. 1992); see also Iqbal, 556 U.S. at 676 ("a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution").

Here, plaintiff alleges that defendants Holder and Mueller were involved in violating his rights based on their capacities as the Attorney General and the FBI Director. Specifically, he maintains that the surveillance to which he was subjected pursuant to FISA violated his rights and the law. However, he provides no evidence of any involvement by either of these defendants beyond his own statement. Indeed, defendant Holder was not Attorney General until after plaintiff moved from Corpus Christi.

Allegations based on "mere conclusory statements" are insufficient to support a cause of action. Iqbal, 556 U.S. at 678 (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)); accord Floyd v. City of Kenner, La., 351 F. App'x 890, 896 (5th Cir. 2009) (per curiam)

(unpublished) (quoting Iqbal, 556 U.S. at 678). Plaintiff simply believes because that he is being monitored in violation of FISA, defendants Holder and Mueller must be involved because they have to sign off on such surveillance actions. First, he has not demonstrated that his belief that he is being monitored is ground in reality. Second, assuming that he is being monitored, he has not provided any evidence that either defendant Holder or Mueller were in any way personally involved in such monitoring. This is the type of conclusory assertion that the Supreme Court indicated is unacceptable. Accordingly, it is respectfully recommended that plaintiff's claims against defendants Holder and Mueller be dismissed because he fails to demonstrate any personal involvement.

**D. Plaintiff's Claims Based On Violations Of FISA Must Also Be Dismissed.**

Plaintiff alleges violations of 50 U.S.C. § 1809, which is for criminal sanctions of any prohibited actions. Here, plaintiff has filed a civil complaint. (D.E. 1-1, at 18). If he believes that individuals have violated FISA's criminal provisions, then he should provide such information to the appropriate federal prosecutors. Accordingly, it is respectfully recommended that any claims based on violations of 50 U.S.C. § 1809 be dismissed for failure to state a claim.

Regarding plaintiff's claims pursuant to 50 U.S.C. § 1809, he alleges that defendants in conjunction with other local and federal officials have conspired to deprive him of his constitutional rights and to engage in surveillance in violation of FISA. As evidence of the governmental conspiracy, he points to the dismissal of his employment discrimination lawsuit. See Adams v. Tyson Foods, Inc., 433 F. App'x 487, 2011 WL 4731164 (8th Cir. Oct. 7, 2011) (per curiam) (unpublished) ("we conclude that the district court properly granted Tyson Foods summary judgment, because Adams failed to present a trialworthy issue as to whether Tyson's

legitimate, non-discriminatory reason for his termination was a pretext for unlawful discrimination"), cert. denied, 132 S. Ct. 2380, 80 U.S.L.W. 3633 (May 14, 2012) (No. 11-9054). He alleges that the government caused his father's death by preventing him from getting expensive medical treatment that could have cured his cancer in two weeks. Without providing much details, he further alleges that the government failed to prevent the death of his unborn child and his mother-in-law. (D.E. 1-1, at ¶ 65). Of course, as plaintiff acknowledges, the government that is purportedly engaged in this conspiracy provides him with food stamps and student loans that are backed by the federal government. Moreover, his wife receives disability from the Social Security Administration, a federal agency.

Addressing claims based on violations of FISA and the Patriot Act, one court described claims similar to those raised by plaintiff:

> Here, the gravamen of Roum's claims is that defendants have participated in a vast and ongoing conspiracy against him involving numerous federal and local agencies and officers. He alleges that these agencies have employed the use of various chemicals and technologies to regularly conduct experiments and surveillance on him over a period spanning more than ten years.

Roum v. Fenty, 697 F. Supp. 2d 39, 42 (D.D.C. 2010) (citation omitted). In Roum, the plaintiff alleged FISA violations based on his claims "that various federal agencies have tracked him 'through his cell phones, computer radio frequency bar codes via ... G[PS] war satellites and CIA satellites,' and otherwise surveilled and spied on him and tapped his phone for more than ten years" as well as provided his personal information to various police and foreign intelligence agencies. Id. at 43. Based on the unrealistic nature of the allegations, the Court had to dismiss for lack of jurisdiction. Id. at 42-43.

Similarly, in Baszak v. Federal Bureau of Investigations, the plaintiff alleges that he

predicted the September 11, 2001 attacks in 1999 and warned the FBI prior to the attacks. 816 F. Supp. 2d 66, 67 (D.D.C. 2011). Regarding his FISA violations, he claims "that defendants' interception, surveillance, and subsequent use of plaintiff's information, has deprived plaintiff of his privacy, private property, and personal liberties." Id. at 69. Because this claim was "based on conspiracy theories that are 'essentially fictitious,'" the court found that the claim was "patently insubstantial" and dismissed for lack of jurisdiction. Id.

Here, plaintiff's claims are similarly fantastical. He alleges a lengthy campaign of surveillance by the federal government. Moreover, he asserts the government is responsible for the deaths of three family members. All of these claims are conspiracy theories that are patently insubstantial. Consequently, it is respectfully recommended that plaintiff's FISA claim be dismissed for lack of jurisdiction.

## III. RECOMMENDATION

For the foregoing reasons, it is respectfully recommended that plaintiff's motion to proceed in forma pauperis be denied, and that his action be dismissed.

Respectfully submitted this 23rd day of July 2012.

BRIAN L. OWSLEY
UNITED STATES MAGISTRATE JUDGE

NOTICE TO PARTIES

The Clerk will file this Memorandum and Recommendation and transmit a copy to each party or counsel. Within **FOURTEEN (14) DAYS** after being served with a copy of the Memorandum and Recommendation, a party may file with the Clerk and serve on the United States Magistrate Judge and all parties, written objections, pursuant to 28 U.S.C. § 636(b)(1)(C); Rule 72(b) of the Federal Rules of Civil Procedure; and Article IV, General Order No. 2002-13, United States District Court for the Southern District of Texas.

A party's failure to file written objections to the proposed findings, conclusions, and recommendations in a magistrate judge's report and recommendation within FOURTEEN (14) DAYS after being served with a copy shall bar that party, except upon grounds of *plain error*, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. Douglass v. United Servs. Auto. Ass'n, 79 F.3d 1415 (5th Cir. 1996) (en banc).