

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

RALPH J. CATALDO,)
)
 Plaintiff)
)
 v.)
)
 UNITED STATES DEPARTMENT OF)
 JUSTICE, et al.,)
)
 Defendants)

Docket No. 99-264-B-C

**MEMORANDUM DECISION ON PLAINTIFF’S MOTION TO CHANGE VENUE
AND RECOMMENDED DECISION ON ORDER TO SHOW CAUSE AND RESPONSE
THERETO; MOTION OF DEFENDANTS STATE OF MAINE, OFFICE OF THE ATTORNEY
GENERAL, OFFICE OF THE PENOBSCOT COUNTY DISTRICT ATTORNEY, AND
MORRISON TO DISMISS; MOTION OF DEFENDANT CNA INSURANCE COMPANY
TO DISMISS; AND MOTION OF DEFENDANT MONAGHAN, LEAHY,
HOCHADEL & LIBBY TO DISMISS**

The plaintiff has filed a 61-page *pro se* complaint with 208 numbered paragraphs and 39 causes of action naming the following defendants: United States Department of Justice, Federal Bureau of Investigation, United States Marshals Service, Office of the United States Attorney (Bangor, Maine), United States Bureau of Prisons, United States Probation and Parole, Penobscot County Sheriff’s Department, District Attorney’s Office (Bangor, Maine), William Palmer, James Munch, Massachusetts Department of Industrial Accidents, Daniel Trusz, Bettylynn Trusz, Michael Morrison, CNA Insurance Company, Office of the Attorney General (State of Maine), Maine State Police, and Monaghan, Leahy, Hochadel & Libby. Complaint (Docket No. 1) at 1-3. The complaint

also names the following individuals as defendants, apparently in their alleged capacity as agents for some of the defendants listed above: James Sangillo, Robert Hoke, Amy Sturgeon, Elizabeth Woodcock, Marjorie Earl, Dr. Siguardson, Dr. Kucharski, Edward Reynolds, Glen Ross, Eric Lundgren, Peter Stone, R. Christopher Almy, Michael Roberts, Leonard Jackson, William Fisher and Ivy Frignoca. *Id.* The complaint alleges violations of the due process and equal protection clauses of the United States Constitution, conspiracy under various state and federal statutes, violation of other federal statutes, violation of the First, Fourth, Fifth and Sixth Amendments, and a state-law tort claim.

I. Change of Venue

Approximately five weeks after filing his complaint, the plaintiff filed a motion for change of venue, contending that the judges of this court have demonstrated prejudice against him in prior proceedings, that he has filed complaints against them with the Judiciary Committee of the United States Senate, and that the presence of a resident of Massachusetts among the defendants means that “the suit can be transfered [sic] on those grounds alone.” Motion for Change of Venue (Docket No. 2) at 1. Since the plaintiff chose to bring this action in the District of Maine, this motion is curious at best. The plaintiff does not specify the district to which he seeks to transfer this case, although he notes that denial of the motion “will not prevent the plaintiff from filing in another venue anyway.” *Id.* at [10].

A federal court may grant a motion for change of venue made by fewer than all parties and transfer a civil action to any other district where it might have been brought “[f]or the convenience of parties and witnesses, in the interest of justice.” 28 U.S.C. § 1404(a). The purpose of this statute, allowing transfer of an action to a jurisdiction other than that district chosen by the plaintiff when

the action was filed, is to prevent the waste of time, energy and money, and to protect litigants, witnesses and the public against unnecessary inconvenience and expense. *Central Sports Army Club v. Arena Assocs., Inc.*, 952 F. Supp. 181, 189 (S.D.N.Y. 1997). None of these purposes would be served by transferring this action out of the District of Maine, perhaps to the District of Massachusetts. Six of the eighteen named defendants are not residents of Maine;¹ only two are residents of Massachusetts. Many of the events alleged in the complaint as the basis for the plaintiff's claims took place in Maine. Expense and inconvenience for most of the defendants can only be increased by a change of venue. The plaintiff's allegations of bias are without foundation.

The plaintiff has not established that the interests of justice require the transfer of this action from the jurisdiction he chose when filing it to another unidentified jurisdiction. *See generally Cianbro Corp. v. Curran-Lavoie, Inc.*, 814 F.2d 7, 11 (1st Cir. 1987). The motion for a change of venue should be denied.

II. Motion to Dismiss by State Defendants

Defendants the state of Maine, the office of the attorney general for the state of Maine, the office of the Penobscot County District Attorney, and Morrison,² a state game warden (collectively, the "state defendants"), move to dismiss all claims against them³ pursuant to Fed.R.Civ.P. 12(b)(1)

¹ The residences of the individuals named as "agents" are not stated in the complaint.

² The plaintiff makes clear in his response to this motion that Morrison is sued in his official capacity only. Plaintiff, Ralph J. Cataldo's, Response to the "State Defendants" Motion to Dismiss, etc. ("Plaintiff's Response") (Docket No. 10) at 8.

³ To the extent that the complaint may be construed to allege claims for damages against the individuals named as "agents" of any of the state defendants, those claims are made against those individuals only in their official capacities, and such claims are barred by the state's sovereign immunity. *Ford Motor Co. v. Department of the Treasury*, 323 U.S. 459, 464 (1945); *Culebras* (continued...)

and 12(b)(6). Motion to Dismiss (“Motion”) (Docket No. 6) at 1.⁴

When a defendant moves to dismiss pursuant to Rule 12(b)(1), the plaintiff has the burden of demonstrating that the court has jurisdiction. *Lundquist v. Precision Valley Aviation, Inc.*, 946 F.2d 8, 10 (1st Cir. 1991); *Lord v. Casco Bay Weekly, Inc.*, 789 F. Supp. 32, 33 (D. Me. 1992). The court does not draw inferences favorable to the pleader. *Hodgdon v. United States*, 919 F. Supp. 37, 38 (D. Me. 1996). For the purposes of a motion to dismiss under Rule 12(b)(1) only, the moving party may use affidavits and other matter to support the motion. The plaintiff may establish the actual existence of subject matter jurisdiction through extra-pleading material. 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1350 at 213 (2d ed. 1990); see *Hawes v. Club Ecuestre el Comandante*, 598 F.2d 698, 699 (1st Cir. 1979) (question of jurisdiction decided on basis of answers to interrogatories, deposition statements and an affidavit).

The motion to dismiss also invokes Fed. R. Civ. P. 12(b)(6), asserting that the complaint fails to state a claim upon which relief may be granted. “When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in [his] favor.” *Pihl v. Massachusetts Dep’t of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). The defendant is entitled to dismissal for failure to state a claim only if “it

³(...continued)

Enters. Corp. v. Rivera Rios, 813 F.2d 506, 516 (1st Cir. 1987). Specifically, this discussion refers to R. Christopher Almy (Causes of Action 2, 4, 11-13, 19, 21, 25); Edward Reynolds, Glen Ross, Eric Lundgren and Peter Stone (Causes of Action 3, 9, 21); Michael Roberts (Causes of Action 11-13, 19, 21, 25, 27, 30-31); Glen Ross and Eric Lundgren (Causes of Action 11-13, 19, 25); and Glen Ross (Cause of Action 36). Complaint at 51-60.

⁴ The plaintiff has filed a document entitled “OBJECTION: Plaintiff Ralph Cataldo’s Objection to the State Defendants Memorandum in Reply to Plaintiff Cataldo’s Response to the State Defendants Motion to Dismiss.” Docket No. 13. The plaintiff did not seek leave of court to file this sur-reply memorandum and therefore it will not be considered.

appears to a certainty that the plaintiff would be unable to recover under any set of facts.” *Roma Constr. Co. v. aRusso*, 96 F.3d 566, 569 (1st Cir. 1996); *see also Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993).

The state defendants first contend that the plaintiff’s claims against them are barred by the doctrine of sovereign immunity. Motion at 4-5. The plaintiff responds that the Eleventh Amendment does not bar suits by a resident of a state against that state. Plaintiff’s Response at 7. The plaintiff’s view of the doctrine of sovereign immunity is incorrect. Since *Hans v. Louisiana*, 134 U.S. 1 (1890), the Supreme Court has repeatedly held that a state may not be sued in federal court by one of its own citizens without its consent. *E.g., California v. Deep Sea Research, Inc.*, 523 U.S. 491, 501-02 (1998). Sovereign immunity derives from the Constitution, not merely from the language of the Eleventh Amendment. *Alden v. Maine*, 119 S.Ct. 2240, 2253-54 (1999). The plaintiff does not identify any of his claims against any of the state defendants as ones for which the state has waived its immunity. Accordingly, to the extent that the complaint seeks monetary relief against any of the state defendants, such claims should be dismissed. To the extent that the complaint seeks injunctive relief against the state of Maine or any state agency, the claims should also be dismissed on this basis. *Strahan v. Cox*, 127 F.3d 155, 166 (1st Cir. 1997). Only claims that might be construed to seek injunctive relief against individual defendants in their official capacities survive the sovereign immunity bar. *Id.*

The following causes of action alleged in the complaint could be construed to seek such relief: 1, 14 (R. Christopher Almy); 11-13, 19, 25, 26 (R. Christopher Almy, Michael Roberts, Glen Ross, Eric Lundgren); 20 (R. Christopher Almy, Michael Roberts); 21 (R. Christopher Almy, Michael Roberts, Edward Reynolds, Glen Ross, Peter Stone, Eric Lundgren). As to those causes of

action alleged against individuals in the district attorney's office (Almy and Roberts), the defendants contend that the claims are barred by prosecutorial immunity. Motion at 6-7. The plaintiff responds that the alleged actions are subject only to qualified immunity rather than absolute immunity because they fall within the district attorney's administrative and investigatory functions rather than his judicial function and that qualified immunity cannot be applied before a factual determination is made. Plaintiff's Response at 2-3, 9-10.⁵

The plaintiff is wrong on both points. His allegations against the district attorney's office, although not always clear, appear to involve the performance of more than a ministerial function. *E.g.*, the district attorney's office had contact with defendant CNA or "authorities in Massachusetts" resulting in "altering" of a decision of the defendant Massachusetts Department of Industrial Accidents, Complaint ¶¶ 3-4; the district attorney "purposefully abuses process" by seeking indictment of the plaintiff "for the goal of extorting a plea bargain," *id.* ¶ 67; the district attorney's office "extorted" the plaintiff's property by "forc[ing him] under threat of jail time" to turn over a shotgun to defendant Daniel Trusz to settle a claim that the plaintiff had damaged Trusz's vehicle, *id.* ¶ 98; Almy and Roberts pursued prosecution against the plaintiff despite having possession of an envelope that proved he was not guilty of the charge (an envelope also alleged to have remained in the possession of Daniel Trusz), *id.* ¶¶ 131-35; the district attorney forwarded to defendant CNA Insurance the "concocted" record of this charge, including a "false psychiatric report" prepared by

⁵ The plaintiff also argues here, and throughout his submissions concerning the pending motions, that he does not bring his constitutional claims pursuant to 42 U.S.C. § 1983 but only directly under the amendments to the Constitution that he cites. Private parties have no direct cause of action against states and state government officials under constitutional amendments; section 1983 provides the only means of asserting such claims. *Hearth, Inc. v. Department of Pub. Welfare*, 617 F.2d 381, 382-83 (5th Cir. 1980); *Henderson v. Corrections Corp. of Am.*, 918 F. Supp. 204, 208-09 (E.D.Tenn. 1996).

the defendant federal Bureau of Prisons, *id.* ¶¶ 141-44; the district attorney also filed this report in a probation revocation proceeding, *id.* ¶ 146; Roberts made unspecified “false ascertions [sic]” to counsel appointed to represent the plaintiff, forcing the plaintiff to move twice for appointment of new counsel, *id.* ¶¶ 156-59; and Roberts made unspecified “false ascertions [sic]” to unidentified persons that allegedly interfered with the plaintiff’s ability either to pursue an appeal from a 1995 state-court conviction or to obtain compensation from an unspecified source, *id.* ¶¶ 165-66.⁶ Accordingly, to the extent that these allegations are sufficiently clear so as to possibly provide the basis for a claim, absolute prosecutorial immunity applies. *Reid v. State of New Hampshire*, 56 F.3d 332, 337 (1st Cir. 1995).

Even if that were not the case, qualified immunity is often raised and determined by motions to dismiss, before any factual inquiry has taken place. *E.g., Guzmán-Rivera v. Rivera-Cruz*, 98 F.3d 664, 667 (1st Cir. 1996). The complaint’s failure to allege the violation of a clearly established constitutional right in each of the counts against Almy and Roberts⁷ entitles them to dismissal on the

⁶ Some of these allegations were raised by the plaintiff against Roberts in a previous action in this court which was dismissed on the ground of prosecutorial immunity. *Cataldo v. Roberts*, Docket No. 96-49-B, Endorsement dated May 29, 1996 on Defendants Roberts and Morrison’s Motion to Dismiss (Docket No. 11). Such allegations could not provide the basis for relief in this action in any event. *Diversified Foods, Inc. v. First Nat’l Bank of Boston*, 985 F.2d 27, 30 (1st Cir. 1993).

⁷ In order to avoid dismissal on the ground of qualified immunity, a complaint must include more than a conclusory allegation that a particular constitutional amendment was violated. When a qualified immunity defense is raised by motion under Fed. R. Civ. P. 12(b)(6), a heightened pleading standard applies, requiring the complaint to contain “specific, nonconclusory allegations of fact sufficient to allow the district court to determine that those facts, if proved, demonstrate that the actions taken were not objectively reasonable in the light of clearly established law.” *Dill v. City of Edmond*, 155 F.3d 1193, 1204 (10th Cir. 1998) (citation omitted). A plaintiff “cannot prevail with mere conclusory statements evidencing only a personal belief that the defendants were motivated by an impermissible animus.” *Burns-Toole v. Byrne*, 11 F.3d 1270, 1274 (5th Cir. 1994); *see also* (continued...)

ground of qualified immunity as well. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

Cause of action 27, which incorporates by reference paragraph 148 of the complaint, may be construed to allege the tort of slander and defamation against the district attorney's office and Roberts. If that is the case, the claim should be dismissed because the complaint fails to allege that the plaintiff has filed a notice of claim as required by 14 M.R.S.A. § 8107 as a jurisdictional prerequisite to recovery on tort claims against such defendants. *Springer v. Seaman*, 658 F. Supp. 1502, 1511 (D. Me. 1987).

Cause of action 1, asserted against the district attorney's office, Almy and the sheriff's office, Complaint at 31, also alleges violation of 5 M.R.S.A. § 4684, which provides:

For the purposes of this chapter and Title 17, section 2931, rights secured by the Constitution of the United States and the laws of the United States and by the Constitution of Maine and the laws of the State include rights that would be protected from interference by governmental actors regardless of whether the specific interference complained of is performed or attempted by private parties.

Neither cause of action 1 nor paragraphs 1 and 2 of the complaint, which are alleged to provide the basis for the cause of action, Complaint at 31, refers to any act by private parties; they refer to individuals sued here in their official capacities, the district attorney, the district attorney's office and the sheriff's department. Accordingly, the cited statute appears to be inapplicable to the plaintiff's claims. If in fact the plaintiff intends by this reference to assert a claim under the Maine Civil Rights Act, 5 M.R.S.A. §§ 4681-85, the same immunities discussed above in connection with the plaintiff's federal constitutional claims apply. *Comfort v. Town of Pittsfield*, 924 F. Supp. 1219, 1235-36 (D.

⁷(...continued)

Sweaney v. Ada County, 119 F.3d 1385, 1389 (9th Cir. 1997). Despite its length, the complaint in this case includes nothing more than conclusory assertions of constitutional violations.

Me. 1996).

The complaint also invokes Article 1, § 4 of the Maine Constitution. Cause of Action 27, Complaint at 45. That section provides:

Every citizen may freely speak, write and publish sentiments on any subject, being responsible for the abuse of this liberty; no laws shall be passed regulating or restraining the freedom of the press; and in prosecutions for any publication respecting the official conduct of people in public capacity, or the qualifications of those who are candidates for the suffrages of the people, or where the matter published is proper for public information, the truth thereof may be given in evidence, and in all indictments for libels, the jury, after having received the direction of the court, shall have a right to determine, at their discretion, the law and the fact.

The plaintiff apparently cites this section in support of his claim for defamation. Complaint at 45. This state constitutional provision does not support a private cause of action. *Andrews v. Department of Env'l Protection*, 716 A.2d 212, 220 (Me. 1998). Accordingly, any claim based on this provision should be dismissed.

The complaint also invokes 42 U.S.C. § 1985. Cause of action 38, Complaint at 50. The state defendants seek dismissal of any claims under section 1985 on the ground that the complaint fails to allege “any race or class-based discriminatory animus.” Motion at 5 n.2. The plaintiff argues that he need not make any such allegation because section 1985 protects him as an individual, but, in the alternative, that he “has made several references to class based discrimination Cause of Action 39[sic].” Plaintiff’s Response at 8. The plaintiff’s view of section 1985 is incorrect. A plaintiff seeking to recover under that statute must allege racial or class-based “invidiously discriminatory animus” behind the alleged conspirators’ action. *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971); *Andrade v. Jamestown Housing Auth.*, 82 F.3d 1179, 1192 (1st Cir. 1996).

While cause of action 39 and the factual allegations to which it refers are separate in the plaintiff's complaint from cause of action 38, which is the only claim that invokes section 1985, the court need not rely on that deficiency in pleading in order to determine that any claim under section 1985 should be dismissed.⁸ The factual allegations in cause of action 39 can be interpreted to allege discrimination against mental patients.⁹ My research has located no reported case law in which a court has recognized mental patients as the class upon which a section 1985 claim may be based. Mental illness and retardation have been so recognized. *E.g.*, *Newberry v. East Texas State Univ.*, 161 F.3d 276, 280-81 (5th Cir. 1998) (mental illness); *Lake v. Arnold*, 112 F.3d 682, 686 (3d Cir. 1997) (mental retardation; recognizing split of authority on question whether the handicapped are entitled to protection of section 1985). The distinction is important, because mental illness is not usually a condition which the individual can control, but the circumstance of being a mental patient is ordinarily subject to the individual's control. The necessary class-based discriminatory animus to state a claim under section 1985 must be founded on a status or condition that is beyond the control of the members of the class. *Wright v. City of Reno*, 533 F. Supp. 58, 65 (D. Nev. 1981); *see also Aulson v. Blanchard*, 83 F.3d 1, 5 (1st Cir. 1996) ("at the very least a class must be more than just a group of persons who bear the brunt of the same allegedly tortious behavior").

⁸ However, cause of action 39 is asserted only against the sheriff's department, and that particularity of the pleading cannot be overlooked to extend the claim asserted in cause of action 38 under section 1985 to any other defendants. Under these circumstances, the section 1985 claim can be considered only as having been asserted against the sheriff's department.

⁹ The allegations of the complaint at paragraph 84 raise a serious question whether the plaintiff has alleged that he himself is a member of the class he identifies: "plaintiff is not a current menatpatient [sic]; . . . Plaintiff has never sought treatment for a mental illness and has never signed an informed consent form allowing said treatment: plaintiff has never committed himself voluntarily to any psychiatric facility: has never been committed by family or friends: has never been committed by Court Order [.]"

Even if the plaintiff's complaint could reasonably be construed to limit the class upon which his allegations of discrimination are based to individuals who have been involuntarily committed for treatment of mental illness, however, the complaint still fails to state a claim on which relief may be granted under section 1985 because it fails to allege that the sheriff's department discriminated against the plaintiff because he was a mental patient. *Aulson*, 83 F.3d at 4 (complaint must allege facts showing that defendants conspired against plaintiff because of his membership in the class and that the criteria defining the class are invidious); *Cronin v. Town of Amesbury*, 895 F. Supp. 375, 392 (D. Mass. 1995), *aff'd* 81 F.3d 257 (1st Cir. 1996); *Love v. Bolinger*, 927 F. Supp. 1131, 1140 (S.D.Ind. 1996). Accordingly, any claims raised against the state defendants under section 1985 should be dismissed.

Finally, as to defendants Roberts and Warren, all of the claims raised against them in the instant complaint arise out of the same facts that provided the basis for claims made against them by the plaintiff in *Cataldo v. Roberts*, Docket No. 96-49-B-C. Compare Complaint, ¶¶ 1, 8, 32-41, 83-87, 156-59 & 165-68, with Amended Complaint (Docket No. 6) in Docket No. 96-49-B-C, Event Nos. 9, 1, 2, 10, 8 & 11. Contrary to the plaintiff's vehement argument, Plaintiff's Response at 11, the facts that he makes different charges against these defendants in this proceeding and that he has added additional defendants who were not present in the first case do not make the doctrine of *res judicata* inapplicable to his current claims against these two defendants. He has made no attempt to show that the charges made in this case against Roberts and Warren could not have been brought at the time of the first proceeding. When the parties seeking to invoke *res judicata* and the opposing party are the same and the matters presented in the second litigation could have been presented in the first action, *res judicata* bars the litigation of those claims. *Mitsubishi Motors Corp. v. Soler*

Chrysler-Plymouth, Inc., 814 F.2d 844, 846 (1st Cir. 1987). A plaintiff cannot escape the application of the doctrine by adding new defendants to his second complaint. The doctrine does not apply to the claims against the new defendants in the second action, but the defendants who are the same are entitled to the dismissal of all claims asserted against them in the second action that were or could have been brought in the first action. Accordingly, Warren and Roberts are also entitled to dismissal of the claims against them on the basis of *res judicata*.

III. Defendant CNA's Motion to Dismiss

Defendant CNA Insurance Company ("CNA") moves pursuant to Fed. R. Civ. P. 12(b)(5) to dismiss the claims asserted against it. Defendant CNA Insurance Company's Motion to Dismiss Pursuant to Rule 12(b)(5) F.R.Civ.P., etc. ("CNA Motion") (Docket No. 19) at 1. That subsection of Rule 12 deals with insufficient service of process. Specifically, CNA contends that the plaintiff has failed to serve it properly pursuant to Fed. R. Civ. P. 4(d) or (h) within the 120-day time limit of Rule 4(m). The complaint was filed in this court on November 12, 1999. Docket. The 120-day limit accordingly expired on March 11, 2000.

Rule 4(h) provides several ways in which a complaint and summons may be served on a corporation: through waiver of service (Rule 4(d)(2)), in the manner prescribed for an individual in Rule 4(e)(1) (pursuant to the law of the state in which the district court is located or in which service is effected), or by delivering a copy of the summons and complaint to an officer of the corporation or an agent authorized to accept the service of process upon the corporation. The plaintiff sent copies of the complaint and summons to CNA by certified mail on March 7, 2000. Exh. 7 to Plaintiff, Ralph Cataldo's Answer to the Courts Show Cause Order of March 16, 2000 ("Show Cause Response") (Docket No. 21). CNA contends that this mailing failed to comply with any of the three

options for service of process under Rule 4.

The plaintiff responds that he “completed Service of Process per F.R.Civ.P. Rule 4(c),” that Rule 4(h)(1) authorizes service by mail, and that CNA has waived any defect in service by appearing in this action. Plaintiff Cataldo’s Response to Motion to Dismiss as Filed by the Defendant CNA Insurance Co. (Docket No. 24) at 1-2. Rule 4(c) does not itself prescribe a *method* of service. It must be read in conjunction with other subparts of Rule 4 that do. Because CNA is a corporation, Rule 4(h) governs service upon it. Rule 4(h)(1) authorizes service by mail only upon the defendant *in addition to* service upon an agent, when that agent is authorized to receive service by statute and the same statute requires service in addition upon the corporate defendant. The plaintiff here refers to no such statute and no service upon an agent authorized by statute to accept service on behalf of CNA. An appearance by a defendant to contest the sufficiency of service of process upon it does not waive the Rule 12(b)(5) defense. *See Howard v. Klynveld Peat Marwick Goerdeler*, 977 F. Supp. 654, 658-59 (S.D.N.Y. 1997). Indeed, to hold otherwise would mean that a potential defendant could never contest the sufficiency of the service of process upon it.

The plaintiff’s attempted service by mail on CNA is not effective. “Except where a waiver has been obtained, the Federal Rules of Civil Procedure do not provide for service of original process by mail, including certified mail.” *Staudte v. Abrahams*, 172 F.R.D. 155, 156 (E.D.Pa. 1997). There is no evidence that the mailed documents even included the notice and request for waiver of summons that must be provided when service by mail is attempted. Rule 4(d)(2). In any event, service by mail is ineffective if an executed waiver is not returned by the potential defendant. *See Media Duplication Servs., Ltd. v. HDG Software, Inc.*, 928 F.2d 1228, 1233-34 (1st Cir. 1991). Neither Maine, the state in which this court is located, nor Massachusetts, the state in which service

would be effected, allow service by mail without some form of notice and acknowledgment to be returned, so the requirements of Rule 4(e)(1) have not been met. Me. R. Civ. P. 4(c) & (d)(9); Mass. R. Civ. P. 4(c) & (d)(2) & *Lennon v. McClory*, 3 F.Supp.2d 1461, 1463 (D.D.C. 1998). Finally, “delivering” to an officer or authorized agent as that word is used in Rule 4(h)(1) means service in hand; it cannot mean merely service by mail. *See Weaver v. State of New York*, 7 F.Supp.2d 234, 236 (W.D.N.Y. 1998) (merely mailing a summons and complaint not proper service; personal delivery to defendant required if notice and request for waiver not included in mailing). Such an interpretation would render Rule 4(d) and some of the language in Rule 4(h) superfluous.

The plaintiff has failed to effect proper service upon CNA within the time allowed and CNA is accordingly entitled to dismissal of all claims asserted against it in the complaint.

IV. Defendant Law Firm’s Motion to Dismiss

Defendant Monaghan, Leahy, Hochadel & Libby (“the law firm”) has moved to dismiss all claims against it pursuant to Rule 12(b)(5). Defendant Monaghan, Leahy, Hochadel & Libby’s Motion to Dismiss or Motion for Summary Judgment, etc. (“Law Firm Motion”) (Docket No. 22) at 1, 3. The law firm presents its motion on this basis on behalf of defendants Fisher and Frignoca as well. *Id.* at 1 n.1 & 5 nn. 3 & 4. Because the plaintiff has failed to effect proper service on the law firm, it is not necessary to reach its alternative motion for summary judgment.

The plaintiff again contends that he effected proper service by mailing the complaint to the law firm on March 8, 2000. Plaintiff Cataldo’s Response and Opposing Motion to Deny Defendant Monaghan, Leahy, Hochadel & Libby Motion(s) for Dismissal and/or Summary Judgment (Docket No. 25) at 1 and Exh. 5 to Show Cause Response. For the reasons stated above in the discussion of CNA’s motion to dismiss, such service is not sufficient, and the law firm is entitled to dismissal of

all claims against it.¹⁰

The plaintiff has not responded to the motion with respect to Fisher and Frignoca, and the court's file on this case contains no evidence of service on either of them. To the extent that the complaint seeks relief against either individual, therefore, they are entitled to dismissal as well.

V. Order to Show Cause

On March 16, 2000 the plaintiff was ordered to show cause why service on the following named defendants had not been made within 120 days after the filing of the complaint and advised that, in the absence of a showing of good cause, the complaint would be dismissed as to these defendants: Ivy Frignoca, William Fisher, Monaghan Leahy, CNA Insurance Company, Bettylynn Trusz, Daniel Trusz, Industrial Accidents, James Munch, William Palmer, Michael Roberts, Peter Stone, Eric Lundgren, Glen Ross, Edward Reynolds, Penobscot Sheriff's Department, Marjorie Earl, U.S. Probation Office, Dr. Kucharski, Dr. Sigurdson, Bureau of Prisons, Elizabeth Woodcock, U.S. Attorney General, Amy Sturgeon, Robert Hoke, U. S. Marshal Service, James Sangillo, Federal Bureau of Investigation, and the U. S. Department of Justice. Order to Show Cause (Docket No. 16). The plaintiff responded to this order on March 27, 2000. Docket No. 21.

The plaintiff relies on his mailing of "suit" to the following defendants: Massachusetts Department of Industrial Accidents; James Munch; Monaghan, Leahy, Hochadel & Libby; William Palmer; CNA Insurance Company. Show Cause Response at 2. The plaintiff offers no evidence that he included in these mailings the notice and request for waiver that is required by Fed. R. Civ. P. 4(d), or that he received signed waivers from the recipients of his mailing. For the reasons discussed above, therefore, service on these defendants was insufficient. The plaintiff having failed to show

¹⁰ Fed. R. Civ. P. 4(h)(1) applies to the law firm whether it is a corporation or a partnership.

good cause for his failure to effect service, the complaint should be dismissed as to these named defendants.

With respect to Bettylynn Trusz and Daniel Trusz, the plaintiff states that he “is under court order to avoid any contact and this court has refused to appoint process server.” Show Cause Response at 2. The plaintiff refers to his Motion for Appointment of Process Server Pursuant to Fed. R. Civ. P. Rule 4 and Incorporated Motion for Issuance of Warrant Pursuant to Title 42 U.S.C.A. § 1987 (Docket No. 3), which was denied by this court on February 1, 2000 (Docket No. 4). Neither of these facts prevented the plaintiff from serving these individuals in accordance with Fed. R. Civ. P. 4(c)(2), which allows service by any person not a party who is at least 18 years of age. Accordingly, the complaint should be dismissed as to these two named defendants.

The plaintiff has not responded to the order to show cause with respect to named defendants Ivy Frignoca and William Fisher, and dismissal accordingly is warranted as to them as well.

This court has already ruled that the plaintiff has failed to make a showing of legally sufficient service of process on the Penobscot County Sheriff’s Department. Endorsement, Motion for Default Under Rule 55(a) of the Federal Rules of Civil Procedure and for Judgment under Rule 55(b)(1) of the Federal Rules of Civil Procedure (Docket No. 15), at 5. The plaintiff offers no evidence of any further attempt to serve this defendant in his response to the order to show cause, and dismissal is therefore in order as to this defendant. With respect to the individuals whom the plaintiff lists in the complaint as “agents” of the Sheriff’s Department, Edward Reynolds, Glen Ross, Eric Lundgren and Peter Stone, Complaint at 2, the plaintiff contends that service on the department is sufficient. Show Cause Response at 3. However, to the extent that the complaint may be construed to seek relief against any of these individuals, as opposed to the department, *see* Complaint

at 52, 53, 56, 58, and 59,¹¹ it is necessary that the individuals be served individually. To the extent that Reynolds, Ross, Lundgren and Stone are or ought to have been named as defendants, therefore, the complaint should be dismissed as to them. *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999) (“In the absence of service of process (or waiver of service by the defendant), a court ordinarily may not exercise power over a party the complaint names as defendant.”).

The plaintiff next contends that his service on the Maine attorney general is sufficient to accomplish service on Michael Roberts, who is listed in the complaint as an “agent” of the Penobscot County District Attorney’s Office.¹² Complaint at 2. Again, to the extent that the complaint seeks to recover from Roberts or to name him as a defendant, it is necessary that he be served directly. In addition, service on the attorney general, an officer of the state, cannot in any event be considered service on the district attorney, an officer of Penobscot County. The complaint should be dismissed as to Roberts.

With respect to the federal defendants, the plaintiff contends that service on the United States Department of Justice is sufficient service on all. Show Cause Response at 4-5. Again, to the extent that the complaint may be construed to seek relief against any individuals named as “agents” of any agency of the federal government, including injunctive relief, they must be served individually. *See* Fed. R. Civ. P. 4(i)(2). The plaintiff has made no showing that the following individuals were

¹¹ This possibility is heightened by the fact that the complaint names different “agents” of the sheriff’s department in connection with the relief sought on different causes of action. *Compare, e.g.,* Cause of Action 3, Complaint at 52, *with* Cause of Action 36, Complaint at 59.

¹² The plaintiff does not argue that Roberts, to whom he refers throughout his complaint as an “agent” of the district attorney’s office, is not a defendant in this action, as he does for the individuals listed as “agents” of the sheriff’s department.

served, and dismissal of the complaint as to them is in order: Marjorie Earl, Dr. Kucharski, Dr. Siguardson, Elizabeth Woodcock, Amy Sturgeon, Robert Hoke, and James Sangillo.¹³

Next, the United States probation office is an agency of the federal courts, 18 U.S.C. § 3602, a separate branch of the federal government from the executive branch of which the Department of Justice is a part, and service on the Department of Justice could therefore never conceivably be construed as effective service on the probation office or any probation officer. The plaintiff has made no showing of any attempt to serve the probation office and accordingly the complaint must be dismissed as to that agency.

With respect to the attorney general of the United States and the Department of Justice, it appears that the plaintiff has made effective service. Fed. R. Civ. P. 4(i)(1); Exh. 1 to Show Cause Response. However, with respect to the Bureau of Prisons, Marshal Service, and FBI, all agencies of the federal government within the administrative structure of the Department of Justice, service on the Department of Justice alone is not sufficient. The plaintiff has not made a showing of service in accordance with Rule 4(i)(2), which requires that a copy of the summons and complaint also be sent by registered or certified mail to the agency itself. *See, e.g., Peters v. Agents for Int'l Monetary Fund*, 918 F. Supp. 309, 311 (C.D.Cal. 1995). The complaint should be dismissed as to the Bureau of Prisons, the Marshal Service and the FBI.

¹³ Fed. R. Civ. P. 4(i)(3) might ordinarily be read to require the court to allow the plaintiff more time in which to serve the individual defendants, if he in fact seeks relief from them in their official capacities, but five months have passed since the plaintiff filed the complaint in this action and almost two months since the order to show cause was issued. Under these circumstances, the court need not wait any longer for the plaintiff to comply with the clear requirement of the rule. *Tuke v. United States*, 76 F.3d 155, 158 (7th Cir. 1996).

VI. Plaintiff's Motion for Partial Summary Judgment

The plaintiff has incorporated in his response to the state defendants' motion to dismiss a motion for summary judgment on causes of action 27 and 38. Plaintiff's Response at 14-16. The plaintiff has also filed a document entitled Notification of Default by the State Defendants on Motion(s) for Summary Judgment (Docket No. 20). That "notification" erroneously states that the state defendants were granted additional time to respond to the motion for summary judgment and that the time allowed has expired, entitling the plaintiff to summary judgment on those claims. In fact, this court on March 8, 2000 granted the State Defendants' Motion for Enlargement of Time in Which to Respond to Plaintiff's Motion for Summary Judgment, etc. (Docket No. 12), which specifically requested an enlargement of time in which to respond until "10 business days after such time as the Court has ruled on State Defendants' Motion to Dismiss, if such response is still required at that time," *id.* at 2. That time has not yet arrived and, if the court adopts my recommendation that the state defendants' motion to dismiss be granted, no such response will be required, because the motion for summary judgment will be moot as to those defendants.

If my recommendation on the order to show cause is adopted by the court, the United States Department of Justice and the office of the United States Attorney for the District of Maine will remain as defendants in this action. Causes of action 27 and 38 are directed against one or both of these defendants. The plaintiff is hereby notified that his motion for summary judgment on those causes of action fails to comply with this court's Local Rule 56¹⁴ and may be stricken for that reason.

¹⁴ Local Rule 56 requires, *inter alia*, the filing of a "separate, short, and concise statement of material facts, set forth in numbered paragraphs, as to which the moving party contends there is no genuine issue of material fact to be tried. Each fact asserted in the statement shall be supported by a record citation as required by subsection (e) of this rule." Local Rule 56(b). Local Rule 56(e) (continued...)

VII. Conclusion

For the foregoing reasons, I recommend that the motion to dismiss filed by the State of Maine, Maine State Police, Office of the Maine Attorney General, Office of the Penobscot County District Attorney, and Michael Morrison be **GRANTED**, except to the extent that the complaint may reasonably be construed to seek injunctive relief against individual defendants in their official capacity, other than Almy and Roberts; that the motions to dismiss filed by CNA Insurance Company; Monaghan, Leahy, Hochadel & Libby; William Fisher; and Ivy Frignoca be **GRANTED**; and that the complaint be **DISMISSED** against the following defendants for failure to effect service, in accordance with the court's order to show cause dated March 16, 2000: Ivy Frignoca, William Fisher, Monaghan, Leahy, Hochadel & Libby, CNA Insurance Company, Bettylynn Trusz, Daniel Trusz, Massachusetts Department of Industrial Accidents, James Munch, William Palmer, Michael Roberts, Peter Stone, Eric Lundgren, Glen Ross, Edward Reynolds, Penobscot County Sheriff's Department, Marjorie Earl, United States Probation Office, Dr. Kucharski, Dr. Siguardson, United States Bureau of Prisons, Elizabeth Woodcock, Amy Sturgeon, Robert Hoke, United States Marshal Service, James Sangillo, and the Federal Bureau of Investigation. The plaintiff's motion for change of venue is **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or

¹⁴(...continued)

provides, in pertinent part: "An assertion of fact set forth in a statement of material facts shall be followed by a citation to the specific page or paragraph of identified record material supporting the assertion. . . . The court shall have no independent duty to search or consider any part of the record not specifically referenced in the parties' separate statements of facts."

proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 15th day of May, 2000.

*David M. Cohen
United States Magistrate Judge*

CATALDO v. JUSTICE, US DEPT, et al Filed: 11/12/99 Assigned to: JUDGE GENE CARTER
Jury demand: Plaintiff Demand: \$0,000 Nature of Suit: 440 Lead Docket: None Jurisdiction: US
Defendant Dkt# in other court: None Cause: 28:1331 Fed. Question: Civil Rights Violation RALPH
J CATALDO RALPH J CATALDO plaintiff [COR LD NTC] 71 Puddleduck Road Corinth, ME
04427 285-3488 v. JUSTICE, US DEPT defendant FBI defendant JAMES SANGILLO, As agent
for FBI defendant U S MARSHAL SERVICE defendant ROBERT HOKE, As agent of the U S
Marshal Service defendant AMY STURGEON, As agent of the U S Marshal Service defendant
ATTORNEY GENERAL, US defendant Docket as of May 17, 2000 7:32 am Page 1 Proceedings
include all events. 1:99cv264 CATALDO v. JUSTICE, US DEPT, et al PORTLD STNDRD
ELIZABETH WOODCOCK, As agent for the U S Attorney Office defendant BUREAU OF
PRISONS, US defendant SIQUARDSON, DR, As agent for the U S Bureau of Prisons defendant
KUCHARSKI, DR, As agent for the U S Bureau of Prisons defendant U S PROBATION AND
PAROLE defendant MARJORIE EARLE, As agent for U S Probation and Parole defendant
PENOBSCOT COUNTY SHERIFF'S DEPARTMENT defendant EDWARD REYNOLDS, As
agent for Penobscot County Sheriffs Dept defendant GLEN ROSS, As agent for Penobscot County
Sheriffs Dept defendant ERIC LUNDGREN, As agent for Penobscot County Sheriffs Dept defendant
PETER STONE, As agent for Penobscot County Sheriffs Dept defendant Docket as of May 17, 2000
7:32 am Page 2 Proceedings include all events. 1:99cv264 CATALDO v. JUSTICE, US DEPT, et
al PORTLD STNDRD DISTRICT ATTORNEYS OFFICE CHRISTOPHER JERNIGAN, ESQ.
defendant [COR LD NTC] DEPARTMENT OF ATTORNEY GENERAL 6 STATE HOUSE
STATION AUGUSTA, ME 04333-0006 R CHRISTOPHER ALMY, As agent CHRISTOPHER
JERNIGAN, ESQ. for the District Attorneys (See above) Office [COR LD NTC] defendant
MICHAEL ROBERTS, As agent for CHRISTOPHER JERNIGAN, ESQ. the District Attorneys
Office (See above) defendant [COR LD NTC] WILLIAM PALMER, ESQ defendant JAMES
MUNCH, ESQ defendant MASSACHUSETTS DEPT OF INDUSTRIAL ACCIDENTS defendant
DANIEL TRUSZ defendant BETTYLYNN TRUSZ defendant MICHAEL MORRISON
CHRISTOPHER JERNIGAN, ESQ. defendant (See above) [COR LD NTC] CNA INSURANCE

CO GLENN H. ROBINSON defendant 774-2500 [COR LD NTC] THOMPSON & BOWIE 3
CANAL PLAZA P.O. BOX 4630 PORTLAND, ME 04112 774-2500 Docket as of May 17, 2000
7:32 am Page 3