

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 18-10551-E

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SAMUEL RIVERA ROSADO,

Plaintiff-Appellant,

versus

LUCID ENERGY, INC.,

Defendant-Appellee.

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Appeal from the United States District Court  
for the Southern District of Florida

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Before MARTIN, JORDAN and BRANCH, Circuit Judges.

BY THE COURT:

Samuel Rivera Rosado, a Florida prisoner, filed a pro se complaint against Lucid Energy, Inc. ("LEI"), seeking \$250 million in damages for alleged copyright infringement. Specifically, Mr. Rosado alleged he had copyrighted technical drawings of a pipeline that LEI later used to build its own pipeline. He claimed LEI's unauthorized use of his drawings infringed his copyright.

A Magistrate Judge issued a report and recommendation ("R&R"), advising the District Court to sua sponte dismiss Mr. Rosado's complaint. Upon review of

court records, the Magistrate Judge observed Mr. Rosado had previously filed a nearly identical lawsuit, Rosado v. Roman, No. 1:16-cv-21100-JAL (S.D. Fla. 2016), against LEI's chief executive officer, an LEI project director, and others. The Magistrate Judge noted that the previous suit was transferred to the District of Oregon because the alleged events giving rise to Mr. Rosado's claims occurred in Oregon. The Oregon District Court ultimately dismissed Mr. Rosado's suit with prejudice because, among other things, it failed to state a claim against any defendant. The Oregon District Court found that, even liberally construed, Mr. Rosado's complaint failed to state a copyright infringement claim because "[a] copyright confers on its owner an exclusive right to reproduce the original work—not the exclusive right to manufacture." Thus, accepting as true Mr. Rosado's claim that defendants directly referenced his copyrighted drawings when building LEI's pipeline, Rosado would not be entitled to relief.

The Magistrate Judge in the instant copyright-infringement action observed it was filed two months after the dismissal of Mr. Rosado's earlier suit. The Magistrate Judge recommended dismissing Mr. Rosado's complaint because it: (1) failed to state a claim for the reasons set out in the Oregon District Court's order; (2) was frivolous; and (3) was unauthorized, as the Oregon District Court had dismissed Rosado's earlier suit with prejudice. The District Court adopted the R&R and dismissed Mr. Rosado's complaint with prejudice. The District Court

later denied Mr. Rosado's request for leave to proceed in forma pauperis ("LTP") on appeal. Mr. Rosado now seeks LTP from this Court.

**DISCUSSION:**

Because Mr. Rosado has moved for leave to proceed in forma pauperis on appeal, his appeal is subject to a frivolity determination. See 28 U.S.C.

§ 1915(e)(2)(B). Pursuant to § 1915(e)(2)(B), a District Court shall dismiss an action, if the action is frivolous or malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief against a defendant who is immune from suit. Id. "[A]n action is frivolous if it is without arguable merit either in law or fact." Napier v. Preslicka, 314 F.3d 528, 531 (11th Cir. 2002) (quotation marks omitted). In making this determination, courts liberally construe pro se pleadings. Hughes v. Lott, 350 F.3d 1157, 1160 (11th Cir. 2003).

This Court "review[s] de novo a District Court's sua sponte dismissal for failure to state a claim, pursuant to § 1915(e)(2), using the same standards that govern Federal Rule of Civil Procedure 12(b)(6) dismissals." Farese v. Scherer, 342 F.3d 1223, 1230 (11th Cir. 2003). To prevent dismissal under Rule 12(b)(6), the plaintiff must allege sufficient facts to state a claim for relief that is "plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974 (2007). "[A] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant

is liable for the misconduct alleged.” Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009).

With those standards in mind, this Court must assess whether Mr. Rosado’s claim is frivolous. A copyright owner has the exclusive right to reproduce a copyrighted work. 17 U.S.C. § 106. Anyone who violates this exclusive right infringes on the owner’s copyright. Id. § 501(a). To establish copyright infringement, “two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361, 111 S. Ct. 1282, 1296 (1991).

The scope of copyright protection is limited, however, in that it does not “extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” 17 U.S.C. § 102(b). Unlike a patent, which protects the duplication of an invention, “a copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea—not the idea itself.” Mazer v. Stein, 347 U.S. 201, 217, 74 S. Ct. 460, 470 (1954).

Here, the District Court did not err by dismissing Mr. Rosado’s copyright-infringement complaint. His complaint failed to state a claim of copyright infringement because, even accepting as true that Mr. Rosado had a valid copyright

and his technical drawings had been used to create a pipeline without his permission, he would not be entitled to relief. Id. To properly seek relief for LEI's alleged reliance on his technical drawings, Mr. Rosado needed to assert that he had a valid patent that protected his drawings. He did not do so. Accordingly, the District Court did not err by determining the suit was frivolous because Mr. Rosado's complaint did not allege a facially valid claim for relief. See Napier, 314 F.3d at 531. Moreover, Mr. Rosado's suit was also unauthorized because his prior suit asserting the same claim was dismissed with prejudice by the Oregon District Court. Thus, because any appeal of this suit would be frivolous, Mr. Rosado's motion is DENIED and his appeal is DISMISSED.

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION**

Case No. 17-23623-CIV-GRAHAM

SAMUEL RIVERA ROSADO,

Plaintiff,

vs.

LUCID ENERGY, INC.,

Defendant.

---

**ORDER**

**THIS CAUSE** came before the Court upon Plaintiff's Motion for Extension of Time [D.E. 10], filed December 12, 2017.

**THE COURT** having considered the motion, the pertinent portions of the record and being otherwise fully advised in the premises it is,

**ORDERED AND ADJUDGED** that the Motion is **GRANTED**. Plaintiff shall have up to and including January 11, 2018 in which to file his objection to the Magistrate's Report and Recommendation.

**DONE AND ORDERED** in Chambers at Miami, Florida, this 15th day of December, 2017.

s/Donald L. Graham

DONALD L. GRAHAM

UNITED STATES DISTRICT JUDGE

Copies to  
Samuel Rivera Rosado  
Reg # 180695  
South Florida Reception Center-South Unit  
Inmate Mail/Parcels  
13910 NW 41<sup>st</sup> Street  
Doral, FL 33178

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-23623-CIV-GRAHAM/MCALILEY

SAMUEL RIVERA ROSADO,

Plaintiff,

v.

LUCID ENERGY, INC.,

Defendant.

---

**REPORT AND RECOMMENDATION OF DISMISSAL**

Plaintiff, Samuel Rivera Rosado, has filed a *pro se* Complaint against Defendant Lucid Energy, Inc. ("LEI") seeking \$250 million in damages for alleged copyright infringement.<sup>1</sup> [DE 1]. Along with his Complaint, Plaintiff filed an Application to Proceed in District Court Without Prepayment of Fees or Costs. [DE 4]. The Honorable Donald L. Graham referred that motion to me. [DE 6].

Proceedings *in forma pauperis* are governed by 28 U.S.C. § 1915. Subsection (e)(2) of that statute provides that "the court shall dismiss the case at any time if the court determines that...the action or appeal is (i) frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2). For the reasons explained

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<sup>1</sup> Plaintiff is currently a prisoner in the South Florida Reception Center.

below, I recommend that the Court dismiss the Complaint with prejudice because it fails to state a claim upon which relief may be granted and is frivolous.

**I. Discussion**

Plaintiff's Complaint largely repeats allegations that Plaintiff made in an earlier lawsuit, which another federal district court recently dismissed with prejudice. Notably, Plaintiff did not advise this Court of that lawsuit. The Court learned of it through its own search of the PACER website. *See* <https://pcl.uscourts.gov>.

**A. *Rosado I***

Plaintiff's earlier lawsuit is styled *Rosado v. Roman, et al.*, case number 16-21100-Lenard/White, and Plaintiff filed it with this Court.<sup>2</sup> In that lawsuit, Plaintiff alleged that various defendants, including Lucid Commercial Micro-Hydro Energy System Company, and certain of its executives (collectively, the "Lucid Defendants") infringed his copyrighted technical drawings of the "New Super Power Square Pipeline" and "The New Super Power Square Pipeline That Produce Electricity From Fresh Or Seawater." [*Rosado I*, DE 1 at pp. 3, 8]. Plaintiff alleged that Lucid Commercial Micro-Hydro Energy System Company manufactured a pipeline that is the subject of Plaintiff's copyrighted drawings, and that by doing so, infringed Plaintiff's copyright. [*Rosado I*, DE 1 at pp. 8-9].

Magistrate Judge Patrick A. White issued a report recommending that the case be transferred to the District Court, District of Oregon because the alleged events giving rise

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<sup>2</sup> Docket entries in Plaintiff's previous lawsuit are cited herein as "*Rosado I* DE \_\_\_\_."



to Plaintiff's claims occurred in the City of Portland, Oregon. [*Rosado I* DE 5]. The Honorable Joan A. Lenard adopted Judge White's recommendation and transferred Plaintiff's case to the United States District Court for the District of Oregon, where it was assigned case number 16-cv-00784-SI. [*Rosado I* DE 6-7].<sup>3</sup>

Following transfer, the United States Marshals Service (on behalf of Plaintiff) attempted to serve the Lucid Defendants at the office of LEI, the defendant here. LEI filed a motion to dismiss in which it challenged, among other things, the adequacy of service of process. [*Rosado I*, DE 21]. LEI asserted that it has never been named, done business as, or owned any subsidiaries with the name Lucid Commercial Micro-Hydro Energy System Company (the entity to which the summons was issued). [*Rosado I*, DE 21 at p. 9]. The non-Lucid Defendants similarly filed motions to dismiss raising a host of arguments, including that Plaintiff failed to state a claim upon which relief can be granted. [*Rosado I*, DE 32].

On August 11, 2017, the District Court in Oregon issued its Order granting the motions to dismiss. *Rosado v. Roman*, Case No. 16-cv-784-SI, 2017 WL 3473177 (D. Or. Aug. 11, 2017). The Court agreed that LEI had not been properly named or served in that lawsuit, and that service of process was insufficient on Lucid Commercial Micro-Hydro Energy System Company and the individual Lucid Defendants. *Id.* at \*3-4.

The Court then addressed the adequacy of the allegations and found that Plaintiff failed to state a claim for copyright infringement -- against any defendant. The Court

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<sup>3</sup> The pleadings and orders filed in the Oregon District Court are publically available, and I take judicial notice of them. F. R. Ev. 201

carefully analyzed Plaintiff's claims and the applicable law. As noted, at its essence, Plaintiff complained that the Lucid Defendants had manufactured a pipeline that was depicted in the technical drawings Plaintiff alleged he had copyrighted. The Court found that even if this were true, it would not amount to copyright infringement. The Court reasoned that:

A copyright confers on its owner an exclusive right to reproduce the original work – not the exclusive right to manufacture. It is a patent that gives its owner a far broader right: “the right to exclude others from making, using, offering for sale, or selling the invention.” 35 U.S.C. § 154. Rosado, however, has not patented his pipeline or the process by which one can make energy from water.

*Id.* at \*6. Given this, the Court found that Plaintiff's allegations could not state a claim that LEI infringed on any protected interest of Rosado. *Id.* It dismissed Plaintiff's complaint *with prejudice*, stating that “[b]ecause Rosado's complaint is based on copyright protection that cannot serve as a basis for the relief he seeks, the Court finds that an amendment would be futile,” *Id.* at \*7.

#### **B. Rosado II**

Two months after the Oregon District Court dismissed his case with prejudice, Plaintiff filed the Complaint against LEI now before the Court. [DE 1]. I have carefully reviewed the complaints in both lawsuits, and their allegations are substantially identical. The cause of action is the same, copyright infringement. [*Rosado I*, DE 1 at p. 10]; [DE 1 at ¶¶ 39, 40]. The same copyrights are allegedly infringed, the “New Super Power Square Pipeline” and the “The New Super Power Square Pipeline That Produce Electricity From

Fresh Or Seawater.” [*Rosado I*, DE 1 at pp. 3, 8-9 ]; [DE 1 at ¶¶ 3-7]. The alleged infringement is the same, namely that LEI built a pipeline from Plaintiff’s copyrighted technical drawings. [*Rosado I*, DE 1 at p. 9]; [DE 1 at ¶¶ 6, 8, 16, 21, 28-33, 38, 46].

As the Oregon District Court clearly explained, the manufacture of a product depicted in copyrighted technical drawings does not constitute copyright infringement. *Rosado I*, 2017 WL 3473177 at \*5-6 ; see also, *Niemi v. NHK Spring Co., Ltd.*, Case no. 3:06CV11117, 2007 WL 2460348 at \*2-3 (N.D. Ohio Aug. 27, 2007); *Forest River, Inc. v. Heartland Recreational Vehicles, LLC*, 753 F. Supp. 2d 753, 759-760 (N.D. Ind. 2010); *Russell v. Trimfit, Inc.*, 428 F. Supp. 91 (E.D. Penn. 1977).

I find the reasoning of the *Rosado I* court persuasive and adopt it here. Accordingly, I conclude that Plaintiff fails to state a claim upon which relief can be granted. I also conclude, as did the Oregon District Court, that amendment would be futile because Plaintiff’s allegations cannot give rise to a cause of action for copyright infringement.

The Court should also dismiss Plaintiff’s Complaint for another reason: it is frivolous. A frivolous complaint is one that “lacks an arguable basis either in law or in fact.” *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). This describes Plaintiff’s Complaint as it raises the same allegations that the Oregon District Court determined cannot serve as a basis for copyright infringement. The Complaint is also unauthorized because the Oregon District Court dismissed Plaintiff’s copyright infringement claim with prejudice.

## II. Recommendation

For the foregoing reasons, I respectfully **RECOMMEND** that the Court **DISMISS** the Complaint [DE 1], with prejudice and **DENY** Plaintiff's Application to Proceed in District Court Without Prepayment of Fees or Costs [DE 4].<sup>4</sup>

## III. Objections

**No later than fourteen days** from the date of this Report and Recommendation the parties may file any written objections to this Report and Recommendation with the Honorable Donald L. Graham, who is obligated to make a *de novo* review of only those factual findings and legal conclusions that are the subject of objections. Only those objected-to factual findings and legal conclusions may be reviewed on appeal. See *Thomas v. Arn*, 474 U.S. 140 (1985), *Henley v. Johnson*, 885 F.2d 790, 794 (11th Cir. 1989), 28 U.S.C. § 636(b)(1), 11th Cir. R. 3-1 (2016).

RESPECTFULLY RECOMMENDED in chambers at Miami, Florida, this 22nd day of November, 2017.

  
CHRIS McALILEY  
UNITED STATES MAGISTRATE JUDGE

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<sup>4</sup> It is proper to dismiss an *in forma pauperis* complaint before process is issued. See *Neitzke*, 490 U.S. at 325 ("Dismissals on th[e] grounds [of frivolousness or maliciousness] are often made *sua sponte* prior to issuance of process so as to spare prospective defendants the inconvenience and expense of answering such complaints."); see also *Scavella v. Help at Home, Inc.*, Case No. 2:17-cv-11-WKW, 2017 WL 2485380 at \*1 (M.D. Ala. June 8, 2017) (dismissing *in forma pauperis* complaint prior to service of process because it failed to state a claim on which relief can be granted).

Copies to:  
The Honorable Donald L. Graham

Samuel Rivera Rosado  
Inmate #180695  
South Florida Reception Center-South Unit  
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13910 NW 41st Street  
Doral, FL 33178

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

Case No. 17-23623-CIV-GRAHAM/MCALILEY

**CLOSED  
CIVIL  
CASE**

SAMUEL RIVERA ROSADO,

Plaintiff,

v.

LUCID ENERGY, INC.,

Defendant.

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ORDER

THIS CAUSE came before the Court originally on pro se Plaintiff, Samuel Rivera Rosado's Complaint [D.E. 1] and Application to Proceed *in forma pauperis*. [D.E. 4]. The matter is now before the Court on the Magistrate Judge's Report and Recommendation. [D.E. 7].

THIS MATTER was initiated when Petitioner filed a motion to vacate his sentence [D.E. 1]. The matter was assigned to the Honorable United States Magistrate Judge Chris McAliley. [D.E. 5]. Magistrate Judge McAliley issued a report recommending that Plaintiff's Complaint be dismissed with prejudice because it fails to state a claim upon which relief may be granted and is frivolous. [D.E. 7].

In his timely filed objections to the Magistrate Judge's report, Plaintiff in essence restates the same claims that were

considered and rejected by the Magistrate Judge. Also, Plaintiff generally asserts that his complaint is not frivolous. [D.E. 12]. In the addendum to his objections, Plaintiff confusingly argues that his complaint is not frivolous because his claim has never been addressed on the merits by the courts. [D.E. 13]. However, upon review, the Court finds Plaintiff's objections [D.E. 12] and addendum to his objections [D.E. 13] without merit.

THE COURT has conducted a de novo review of the file and is otherwise fully advised in the premises. Accordingly, it is

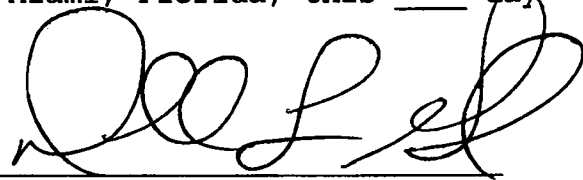
ORDERED AND ADJUDGED that United States Magistrate Judge McAliley's Report is hereby RATIFIED, AFFIRMED and APPROVED in its entirety [D.E. 7]. It is further

ORDERED AND ADJUDGED that Plaintiff's Application to Proceed in forma pauperis [D.E. 4] is DENIED. It is further

ORDERED AND ADJUDGED that Plaintiff's Complaint is DISMISSED with prejudice. It is further

ORDERED AND ADJUDGED that this case is CLOSED and all pending Motions are DENIED as Moot.

DONE AND ORDERED in Chambers at Miami, Florida, this 26<sup>th</sup> day of January, 2018.

  
DONALD L. GRAHAM  
UNITED STATES DISTRICT JUDGE

cc: All counsel of record  
Samuel Rivera Rosado, pro se

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

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Proceedings *in forma pauperis* are governed by 28 U.S.C. § 1915. Subsection (e)(2) of that statute provides that "the court shall dismiss the case at any time if the court determines that...the action or appeal is (i) frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2). For the reasons explained

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**I. Discussion**

Plaintiff's Complaint largely repeats allegations that Plaintiff made in an earlier lawsuit, which another federal district court recently dismissed with prejudice. Notably, Plaintiff did not advise this Court of that lawsuit. The Court learned of it through its own search of the PACER website. *See* <https://pcl.uscourts.gov>.

**A. *Rosado I***

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Following transfer, the United States Marshals Service (on behalf of Plaintiff) attempted to serve the Lucid Defendants at the office of LEI, the defendant here. LEI filed a motion to dismiss in which it challenged, among other things, the adequacy of service of process. [*Rosado I*, DE 21]. LEI asserted that it has never been named, done business as, or owned any subsidiaries with the name Lucid Commercial Micro-Hydro Energy System Company (the entity to which the summons was issued). [*Rosado I*, DE 21 at p. 9]. The non-Lucid Defendants similarly filed motions to dismiss raising a host of arguments, including that Plaintiff failed to state a claim upon which relief can be granted. [*Rosado I*, DE 32].

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The Court then addressed the adequacy of the allegations and found that Plaintiff failed to state a claim for copyright infringement -- against any defendant. The Court

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carefully analyzed Plaintiff's claims and the applicable law. As noted, at its essence, Plaintiff complained that the Lucid Defendants had manufactured a pipeline that was depicted in the technical drawings Plaintiff alleged he had copyrighted. The Court found that even if this were true, it would not amount to copyright infringement. The Court reasoned that:

A copyright confers on its owner an exclusive right to reproduce the original work – not the exclusive right to manufacture. It is a patent that gives its owner a far broader right: “the right to exclude others from making, using, offering for sale, or selling the invention.” 35 U.S.C. § 154. Rosado, however, has not patented his pipeline or the process by which one can make energy from water.

*Id.* at \*6. Given this, the Court found that Plaintiff's allegations could not state a claim that LEI infringed on any protected interest of Rosado. *Id.* It dismissed Plaintiff's complaint *with prejudice*, stating that “[b]ecause Rosado's complaint is based on copyright protection that cannot serve as a basis for the relief he seeks, the Court finds that an amendment would be futile.” *Id.* at \*7.

#### **B. Rosado II**

Two months after the Oregon District Court dismissed his case with prejudice, Plaintiff filed the Complaint against LEI now before the Court. [DE 1]. I have carefully reviewed the complaints in both lawsuits, and their allegations are substantially identical. The cause of action is the same, copyright infringement. [*Rosado I*, DE 1 at p. 10]; [DE 1 at ¶¶ 39, 40]. The same copyrights are allegedly infringed, the “New Super Power Square Pipeline” and the “The New Super Power Square Pipeline That Produce Electricity From

Fresh Or Seawater.” [*Rosado I*, DE 1 at pp. 3, 8-9 ]; [DE 1 at ¶¶ 3-7]. The alleged infringement is the same, namely that LEI built a pipeline from Plaintiff’s copyrighted technical drawings. [*Rosado I*, DE 1 at p. 9]; [DE 1 at ¶¶ 6, 8, 16, 21, 28-33, 38, 46].

As the Oregon District Court clearly explained, the manufacture of a product depicted in copyrighted technical drawings does not constitute copyright infringement. *Rosado I*, 2017 WL 3473177 at \*5-6 ; see also, *Niemi v. NHK Spring Co., Ltd.*, Case no. 3:06CV11117, 2007 WL 2460348 at \*2-3 (N.D. Ohio Aug. 27, 2007); *Forest River, Inc. v. Heartland Recreational Vehicles, LLC*, 753 F. Supp. 2d 753, 759-760 (N.D. Ind. 2010); *Russell v. Trimfit, Inc.*, 428 F. Supp. 91 (E.D. Penn. 1977).

I find the reasoning of the *Rosado I* court persuasive and adopt it here. Accordingly, I conclude that Plaintiff fails to state a claim upon which relief can be granted. I also conclude, as did the Oregon District Court, that amendment would be futile because Plaintiff’s allegations cannot give rise to a cause of action for copyright infringement.

The Court should also dismiss Plaintiff’s Complaint for another reason: it is frivolous. A frivolous complaint is one that “lacks an arguable basis either in law or in fact.” *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). This describes Plaintiff’s Complaint as it raises the same allegations that the Oregon District Court determined cannot serve as a basis for copyright infringement. The Complaint is also unauthorized because the Oregon District Court dismissed Plaintiff’s copyright infringement claim with prejudice.

## II. Recommendation

For the foregoing reasons, I respectfully **RECOMMEND** that the Court **DISMISS** the Complaint [DE 1], with prejudice and **DENY** Plaintiff's Application to Proceed in District Court Without Prepayment of Fees or Costs [DE 4].<sup>4</sup>

## III. Objections

**No later than fourteen days** from the date of this Report and Recommendation the parties may file any written objections to this Report and Recommendation with the Honorable Donald L. Graham, who is obligated to make a *de novo* review of only those factual findings and legal conclusions that are the subject of objections. Only those objected-to factual findings and legal conclusions may be reviewed on appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985), *Henley v. Johnson*, 885 F.2d 790, 794 (11th Cir. 1989), 28 U.S.C. § 636(b)(1), 11th Cir. R. 3-1 (2016).

RESPECTFULLY RECOMMENDED in chambers at Miami, Florida, this 22nd day of November, 2017.

  
CHRIS McALILEY  
UNITED STATES MAGISTRATE JUDGE

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<sup>4</sup> It is proper to dismiss an *in forma pauperis* complaint before process is issued. *See Neitzke*, 490 U.S. at 325 ("Dismissals on th[e] grounds [of frivolousness or maliciousness] are often made *sua sponte* prior to issuance of process so as to spare prospective defendants the inconvenience and expense of answering such complaints."); *see also Scavella v. Help at Home, Inc.*, Case No. 2:17-cv-11-WKW, 2017 WL 2485380 at \*1 (M.D. Ala. June 8, 2017) (dismissing *in forma pauperis* complaint prior to service of process because it failed to state a claim on which relief can be granted).

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-23623-CIV-GRAHAM/MCALILEY

SAMUEL RIVERA ROSADO,

Plaintiff,

v.

LUCID ENERGY, INC.,

Defendant.

---

**SECOND REPORT AND RECOMMENDATION AND NOTICE OF  
WITHDRAWING PRIOR REPORT AND RECOMMENDATION**

Plaintiff, Samuel Rivera Rosado, filed a Motion for Permission to Appeal *In Forma Pauperis*, which the Honorable Donald L. Graham referred to me. [DE 19, 20]. On March 7, 2018, I entered a Report and Recommendation, [DE 21], recommending that the Court deny the Motion because Rosado did not identify the issues he intends to present on appeal, as required by Rule 24 of the Federal Rules of Appellate Procedure. *See* Fed. R. App. P. 24(a)(1)(C). While my Report and Recommendation was pending, Rosado filed an affidavit that states the issues he intends to raise on appeal. [DE 23]. In light of Rosado's belated affidavit, I **WITHDRAW** my previous Report and Recommendation [DE 21] and review once again Rosado's Motion. For the reasons that follow, I recommend that the Court deny the Motion.

**I. Background**

Plaintiff, Samuel Rivera Rosado, filed a *pro se* Complaint against Defendant Lucid Energy, Inc. ("LEI") seeking \$250 million in damages for alleged copyright

infringement. [DE 1]. Along with his Complaint, Rosado filed a motion to proceed with his lawsuit *in forma pauperis*, which Judge Graham referred to me. [DE 4, 6]. I recommended that the Court deny Rosado's motion to proceed *in forma pauperis* and dismiss the Complaint with prejudice pursuant to 28 U.S.C. § 1915(e)(2), for two reasons: the Complaint fails to state a claim upon which relief may be granted and it is frivolous. [DE 7].

Rosado objected to that recommendation and Judge Graham considered those objections and conducted a *de novo* review. He adopted my Report and Recommendation, denied the motion to proceed *in forma pauperis* and dismissed the Complaint with prejudice. [DE 12, 13, 14]. Rosado timely filed a notice of appeal. [DE 16]. He thereafter filed the motion now before the Court, asking for leave to bring that appeal *in forma pauperis*. [DE 19].

## II. Analysis

The guidelines for proceeding *in forma pauperis* on appeal are set forth in 28 U.S.C. § 1915. The statute provides, in relevant part, that “[a]n appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.” 28 U.S.C. § 1915(a)(3). “Good faith is demonstrated where an appeal seeks appellate review of any issue not frivolous.” *SunTrust Bank N.A. v. Esposito*, Case No. 6:17-cv-1891-Orl-18TBS, 2017 WL 7310108, at \* 2 (M.D. Fla. Dec. 28, 2017) (quoting *Coppedge v. United States*, 369 U.S. 438 (1962)). “A frivolous case is one without arguable merit.” *Id.* (citing *Sun v. Forrester*, 939 F.2d 924, 925 (11th Cir. 1991)). An appeal filed *in forma pauperis* is frivolous “when it appears the Plaintiff has little or no chance of success



meaning that the factual allegations are clearly baseless or that the legal theories are indisputably meritless.” *Taylor v. United States*, Case No. 13-60269-Civ-SCOLA, 2014 WL 11531633, at \*2 (S.D. Fla. Jan. 22, 2014) (citing *Carroll v. Gross*, 984 F.2d 392, 393 (11th Cir. 1993)) (quotation marks omitted).

Rosado identifies two issues that he intends to present on appeal: (1) “Plaintiff’s complaint lawsuit [sic] against Lucid Energy, Inc. for copy-right [sic] infringement that was not addressed on the merits” and (2) the “District Court erred by considering [the] claim as one to correct illegal sentence rather than correctly identifying [the] claim as one alleging copy-right [sic] infringement.” [DE 23 at 1].

With respect to the first issue, Rosado is mistaken when he claims the Court did not review his Complaint on the merits. In fact, the Court accepted as true Rosado’s allegations that LEI built a pipeline from his copyrighted technical drawings, and the Court determined, as a matter of law, that the manufacture of a product depicted in copyrighted technical drawings does not constitute copyright infringement. [*See Report and Recommendation*, DE 7 at 5 (citing cases)]. That is, the Court determined that the Complaint did not state a claim for copyright infringement. It also dismissed the lawsuit as frivolous, as it essentially repeats allegations Rosado made in an earlier federal lawsuit for copyright infringement, which another Court dismissed with prejudice for the same reasons this Court dismissed this lawsuit. *Id.* at 5. Rosado has offered no reasons why this Court’s decision was an error, and I can think of none. In sum, there is no basis upon which an appeal based on this claim would appear to have any merit.

The second argument Rosado wants to make on appeal, that the Court erroneously considered his lawsuit “as one to correct [an] illegal sentence” [DE 23, p. 1], also has no merit. Although he does not say so, it appears Rosado is referring to this sentence in the court order that dismissed his lawsuit: “This matter was initiated when Petitioner filed a motion to vacate his sentence.” [See DE 14, p. 1]. That statement appears to be an error, as Rosado seeks only an award of money damages from defendants for copyright infringement; he did not seek any relief regarding his sentence.<sup>1</sup> Regardless of the error, it is plain that this Court dismissed this lawsuit purely and solely for the reasons stated in that Order. Specifically, the Court entirely relied on the reasons I offered in my Report and Recommendation for dismissing the lawsuit, and those were limited to the merits of Rosado’s copyright claim. [DE 7, 14].

### **III. Recommendation**

For the foregoing reasons, I respectfully **RECOMMEND** that the Court **DENY** the Motion for Permission to Appeal *In Forma Pauperis*, [DE 19], and certify that Rosado’s appeal is not taken in good faith.

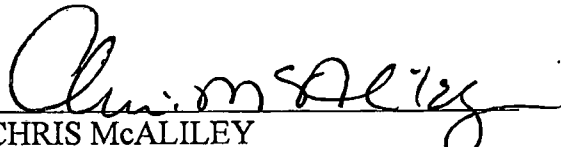
I **FURTHER RECOMMEND** that the Court direct the Clerk to notify the Court of Appeals of its ruling in accordance with Rule 24 of the Federal Rules of Appellate Procedure. *See* Fed. R. App. P. 24(a)(4) (providing that the district clerk must immediately notify the parties and the court of appeals when the district court denies a motion to proceed *in forma pauperis* on appeal and/or certifies that the appeal is not taken in good faith).

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<sup>1</sup> Rosado is incarcerated serving a criminal sentence.

No later than fourteen days from the date of this Report and Recommendation the parties may file any written objections to this Report and Recommendation with the Honorable Donald L. Graham, who is obligated to make a *de novo* review of only those factual findings and legal conclusions that are the subject of objections. Only those objected-to factual findings and legal conclusions may be reviewed on appeal. See *Thomas v. Arn*, 474 U.S. 140 (1985), *Henley v. Johnson*, 885 F.2d 790, 794 (11th Cir. 1989), 28 U.S.C. § 636(b)(1), 11th Cir. R. 3-1 (2016).

RESPECTFULLY RECOMMENDED in chambers at Miami, Florida, this 30th day of May, 2018.

  
CHRIS McALILEY  
UNITED STATES MAGISTRATE JUDGE

Copies to: The Honorable Donald L. Graham

Samuel Rivera Rosado  
Inmate #180695  
South Florida Reception Center-South Unit  
Inmate Mail/Parcels  
13910 NW 41st Street  
Doral, FL 33178

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

Case No. 17-23623-CIV-GRAHAM/MCALILEY

SAMUEL RIVERA ROSADO,

Plaintiff,

v.

LUCID ENERGY, INC.,

Defendant.

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ORDER

THIS CAUSE came before the Court originally on pro se Plaintiff, Samuel Rivera Rosado's Motion for permission to Appeal *In Forma Pauperis*. [D.E. 19, 20]. The matter is now before the Court on the Magistrate Judge's Second Report and Recommendation and Notice of Withdrawing Prior Report and Recommendation. [D.E. 26].

On March 1, 2018, Plaintiff filed a motion for permission to appeal *in forma pauperis* the Court's January 29, 2018 Order dismissing his case with prejudice. [D.E. 19]. The matter was assigned to the Honorable United States Magistrate Judge Chris McAliley. [D.E. 20]. On March 7, 2018, Magistrate Judge McAliley issued a report recommending that Plaintiff's Complaint be dismissed because he failed to state the issues that he intended to present on appeal as required by Rule 24 of the Federal Rules of Appellate Procedure. See Fed. R. App. 24(a)(1)(C). [D.E. 21].

In his objections to the Magistrate Judge's report filed on March 20, 2018 [D.E. 22], Plaintiff noted no objection, and submitted, in a separate filing, an affidavit that stated the issues he intends to raise on appeal. [D.E. 23]. According to his affidavit, Plaintiff intends to present on appeal: (1) that his claim was not addressed on the merits; and (2) that the District Court erred by considering his claim as "one to correct illegal sentence." Id.

Plaintiff filed his affidavit correcting his initial filing before this Court ruled on the pending Report and Recommendation. As a result, on May 30, 2018, Magistrate Judge McAliley issued a Second Report and Recommendation and Notice of Withdrawing Prior Report and Recommendation. [D.E. 26]. On June 14, 2018, Plaintiff filed his Second Objection to Magistrate's Report and Recommendation [D.E. 27]. In his Second Objection, Plaintiff not only objects to the recommendation to deny his motion to appeal *in forma pauperis* but also requests the appointment of another Magistrate Judge to his case. Id. In support of his request for re-assignment, Plaintiff relies on a scrivener's error in this Court's January 29, 2018 Order [D.E. 14] adopting the Magistrate's Report and Recommendation to dismiss his case with prejudice. Specifically, Plaintiff argues that the Magistrate Judge "overlooked and misapprehended" his claim [D.E. 27] because in its Order adopting the Magistrate Judge's report, the Court incorrectly

stated that this matter was initiated when Plaintiff filed his "motion to vacate." [D.E. 14].

Notwithstanding Plaintiff's assertion in his Second Objection [D.E. 27], the Magistrate Judge thoroughly reviewed his copyright infringement claims before finding that his case is without arguable merit and recommending dismissal. Moreover, despite the scrivener's error, the Order correctly stated that after a de novo review of the file, including Plaintiff's objections [D.E. 12], and the addendum to his objections [D.E. 13], the Court dismissed his case as frivolous and denied his application to proceed *in forma pauperis*. [D.E. 14]. It is clear from the Magistrate Judge's Report [D.E. 7] and reading the Court's Order adopting the Report and Recommendation in its entirety that Plaintiff's claim was considered on its merits.

Moreover, upon the Magistrate Judge's Second Report and Recommendation [D.E. 26], the Court, after a de novo review of Plaintiff's case including his complaint, prior objections [D.E. 12 and 13], and his Second Objection [D.E. 27], finds that Plaintiff's complaint fails to state a claim for copyright infringement. Also, as it did before, the Court finds Plaintiff's case is frivolous because Plaintiff repeats allegations made in an earlier federal lawsuit for copyright infringement, which another Court dismissed with prejudice for the same reasons this Court dismissed the lawsuit. [See Report and Recommendation, D.E. 7 at 5 (citing

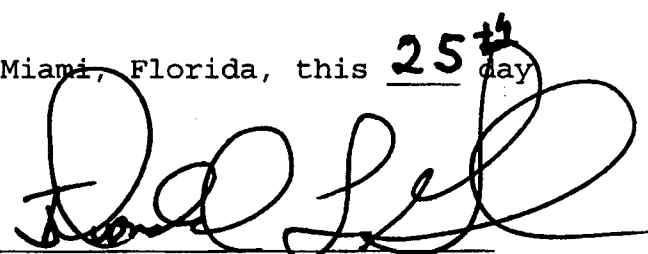
cases)]. Having considered Plaintiff's second objections, the Court finds them without merit.

THE COURT has conducted a de novo review of the file and is otherwise fully advised in the premises. Accordingly, it is ORDERED AND ADJUDGED that United States Magistrate Judge McAliley's Report is hereby WITHDRAWN in its entirety [D.E. 21]. It is further

ORDERED AND ADJUDGED that United States Magistrate Judge McAliley's Second Report is hereby RATIFIED, AFFIRMED and APPROVED in its entirety [D.E. 26]. It is further

ORDERED AND ADJUDGED that Plaintiff's Motion for Permission to Appeal *in forma pauperis* [D.E. 19] is DENIED as Plaintiff's appeal is not taken in good faith.

DONE AND ORDERED in Chambers at Miami, Florida, this 25<sup>th</sup> day of June, 2018.

  
DONALD L. GRAHAM  
UNITED STATES DISTRICT JUDGE

cc: All counsel of record  
Samuel Rivera Rosado, pro se

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 18-10551-E

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SAMUEL RIVERA ROSADO,

Plaintiff-Appellant,

versus

LUCID ENERGY, INC.,

Defendant-Appellee.

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Appeal from the United States District Court  
for the Southern District of Florida

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Before: MARTIN, JORDAN and BRANCH, Circuit Judges.

BY THE COURT:

Samuel Rivera Rosado has filed a motion for reconsideration, pursuant to 11th Cir. R. 27-2, of this Court's order dated February 19, 2019, denying his motion for leave to proceed *in forma pauperis* and dismissing his appeal, in the appeal of the dismissal of his copyright infringement complaint. Because Rosado has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motion, his motion for reconsideration is DENIED.