

## APPENDIX A

### UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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NO. 18-13350

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Plaintiff-Appellants,  
PRO SE.  
ALENS CHARLES

v.

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*Defendants-Appellees.*  
*Respondent.*

Rick Bradshaw palm beach county sheriff,

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Appeals from the United States District Court for the Southern District of Florida  
Donald M. Middlebrooks District Judge  
(9:17-cv-80861-DMM)

Submitted: August 2, 2017  
Filed: July 20, 2017  
Amended: February 15, 2018

Before: Ed Carnes, Chief Judge, Wilson, and Hull, Circuit Judges,  
And Donald M. Middlebrooks District Judge.

The United States District Judge Donald M. Middlebrooks for the Southern District of Florida, sitting by designation.

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 18-13350  
Non-Argument Calendar

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D.C. Docket No. 9:17-cv-80861-DMM

ALENS CHARLES,

Plaintiff-Appellant,

versus

RIC L. BRADSHAW,  
as Sheriff of Palm Beach County Sheriff's Office,

Defendant-Appellee.

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

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(November 1, 2019)

Before ED CARNES, Chief Judge, WILSON, and HULL, Circuit Judges.

PER CURIAM:

Alens Charles appeals the dismissal of his 42 U.S.C. § 1983 action for excessive force against Ric Bradshaw, as sheriff of the Palm Beach County Sheriff's Department, for failure to timely serve him.

I.

Charles, acting pro se, originally filed a § 1983 complaint against Bradshaw on July 20, 2017. The district court entered an order on August 7 instructing Charles on how to serve Bradshaw and noting that he must serve process on him within ninety days of filing the complaint as required by Federal Rule of Civil Procedure 4(m). On August 28 Charles filed an amended complaint that also named Bradshaw as the defendant.

As of October 5, Charles had still not asked the district court clerk's office to issue a summons, so the court ordered him to serve Bradshaw by October 18, which was ninety days after Charles had filed his original complaint. The court also ordered him to file proof of service by October 25. Charles did not serve Bradshaw by October 18. On November 1, the court ordered Charles to file, by November 10, either (1) proof of service on Bradshaw or (2) a showing of good cause why Charles was unable to timely serve Bradshaw with process. That order warned Charles that failure to comply with the November 1 order and Rule 4(m)

would result in the dismissal of the action without prejudice. Still Charles did not comply.

Instead Charles filed a letter with the district court on November 22 implying that he had served a “notice” of the case on Bradshaw and asked the court if he was “doing the right thing” with regard to handling his case. He was not. So the court again gave Charles detailed instructions about how to serve Bradshaw with the summons and a copy of the complaint. The court again told Charles that failure to comply with Rule 4(m) and the court’s order would result in dismissal of his case without prejudice.

On December 12, Charles filed an alleged proof of service on the Palm Beach County Sheriff’s Office. Bradshaw filed a motion to quash Charles’ service as untimely and improperly served. On February 15, 2018, the district court granted Bradshaw’s motion. One reason was that Charles had failed to timely serve process on Bradshaw within ninety days of his filing of a complaint, as required by Rule 4(m). This is Charles’ appeal.<sup>1</sup>

## II.

A court “must dismiss the action without prejudice” as to a defendant if that defendant is not served within ninety days of the plaintiff filing the complaint and the plaintiff fails to show good cause for not serving the defendant within the

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<sup>1</sup> Bradshaw filed a motion to dismiss this appeal for lack of jurisdiction, which this Court denied.

required timeframe. Fed. R. Civ. P. 4(m). We review a district court's dismissal without prejudice of a plaintiff's complaint for failure to timely serve a summons and complaint under Rule 4(m) only for abuse of discretion. Rance v. Rocksolid Granit USA, Inc., 583 F.3d 1284, 1286 (11th Cir. 2009).

Even "when a district court finds that a plaintiff fails to show good cause for failing to effect timely service pursuant to Rule 4(m), the district court must still consider whether any other circumstances warrant an extension of time based on the facts of the case." See Lepone-Dempsey v. Carroll Cty. Comm'rs, 476 F.3d 1277, 1282 (11th Cir. 2007). "Only after considering whether any such factors exist may the district court exercise its discretion and either dismiss the case without prejudice or direct that service be effected within a specified time." Id.

The district court did not abuse its discretion in this case. Charles failed to timely serve Bradshaw under Rule 4(m) and did not show good cause for his failure. And the district court also considered the circumstances of Charles' case as required by Lepone-Dempsey before exercising its discretion to dismiss Charles' complaint.<sup>2</sup>

**AFFIRMED.**

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<sup>2</sup> Because Charles failed to timely serve Bradshaw, we do not address whether that service was proper.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
CASE NO. 17-80861-CV-MIDDLEBROOKS/BRANNON

ALENS CHARLES,

Plaintiff,

v.

RIC L. BRADSHAW, *as Sheriff of Palm  
Beach County Sheriff's Office*,

Defendant.

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**ORDER**

THIS CAUSE comes before the Court on *pro se* Plaintiff Alens Charles's ("Plaintiff") Motion to Reopen Case (DE 21), Amended Motion to Reopen Case (DE 22), and Motion for Leave to Appeal *In Forma Pauperis* (DE 24). Defendant Ric L. Bradshaw's ("Defendant") has not responded to the Motion to Reopen Case or Amended Motion to Reopen Case, and the time for him to have done so has expired.

**I. MOTIONS TO REOPEN CASE**

On February 15, 2018, I granted Defendant's Motion to Dismiss because Plaintiff's service was untimely, and, alternatively, even if Plaintiff's service was not untimely, Plaintiff did not follow Rule 4(c) of the Federal Rules of Civil Procedure because he was the one who served process on Defendant. (DE 19 (hereinafter, the "Order")). Eleven days later, an individual named Vanessa Charles sent a letter to the Court claiming to have been the one to have served the Defendant on November 30, 2017. (DE 17). The instant Motions to Reopen Case followed on March 28, 2018 (DE 21) and May 14, 2018 (DE 22), based on Vanessa Charles's letter stating that she, not the Plaintiff, served process on Defendant.

Plaintiff's Motions to Reopen Case are denied for several reasons. First, liberally construing the Motions to Reopen Case as motions to alter or amend judgment under Rule 59(e),

the Motions to Reopen Case were not timely filed because any such motion must be filed within 28 days after the entry of judgment, and the earliest Motion to Reopen Case was filed 41 days after the Order. Second, even if I were to construe Vanessa Charles's letter to be a timely motion to reconsider under Rule 59(e), the letter does not warrant reconsideration of the Order dismissing this matter. The representations that Ms. Charles makes in the letter are not set forth in an affidavit or are otherwise under oath, as required by Rule 4(L)(1)<sup>1</sup> of the Federal Rules of Civil Procedure for a server's affidavit. Even if the representations were set forth in an affidavit, the fact that Ms. Charles, not Plaintiff, allegedly served process on Defendant only negates one of the two independent bases for dismissing Plaintiff's Complaint.

Presuming that Ms. Charles was the individual who served process, she purportedly did so on November 30, 2017, which still would have been untimely under Rule 4(m). Whether Plaintiff's ninety days to serve process started when he filed his initial Complaint on July 20, 2017 or when he paid the filing fee on August 2, 2017, the alleged service on November 30, 2017 would have been, at a minimum, one month late. As I mentioned in the Order, Plaintiff's time to serve process did not begin when he filed his Amended Complaint on August 28, 2017, because he did not add a new defendant when he filed the Amended Complaint. (DE 19 at 3-4). Moreover, even if Plaintiff's time to serve process started upon the filing of his Amended Complaint (which it did not), the alleged service on November 30, 2017 still would have been three days late. Furthermore, the Court finds the purported service date of November 30, 2017 to be curious given the fact Plaintiff's "Notice of Acknowledgement of Service" filed with the Court has two signatures on a copy of the summons dated "12/10/17." (DE 15). Accordingly,

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<sup>1</sup> Although the Rule uses a lowercase "L" (i.e., 4(l)) to refer to the relevant subsection, to avoid confusion with subsection 1, I will use an uppercase "L" in referencing this section of Rule 4.

even liberally construing Plaintiff's post-dismissal filings in the light most favorable to the Plaintiff as a *pro se* litigant, Plaintiff's purported service of process was untimely, and he did not timely move for an extension of time to serve process.<sup>2</sup> *See Albra v. Advan, Inc.*, 490 F.3d 826, 829 (11th Cir. 2007) ("[A]lthough we are to give liberal construction to the pleadings of *pro se* litigants, we nevertheless have required them to conform to procedural rules."). As best as the Court can tell, dismissing Plaintiff's Complaint without prejudice does not bar Plaintiff from resuming this action because the conduct alleged in the Complaint occurred in February, 2017. *Chappell v. Rich*, 340 F.3d 1279, 1283 (11th Cir. 2003) (holding that there is four-year statute of limitations for 42 U.S.C. § 1983 claims under Florida law). Finding no basis to reconsider the Order dismissing Plaintiff's Amended Complaint, Plaintiff's Motions to Reopen Case are denied.

## II. MOTION TO APPEAL *IN FORMA PAUPERIS*

Plaintiff also moves the Court to permit him to appeal the Order dismissing this matter *in forma pauperis*. (DE 24). Applications to appeal *in forma pauperis* are governed by 28 U.S.C. § 1915 and Federal Rule of Appellate Procedure 24. A court of the United States may authorize a party to proceed *in forma pauperis* upon an affidavit of indigency. 28 U.S.C. § 1915(a); *see Fed. R. App. P. 24(a)(1)*. An appeal, however, "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); *accord Fed. R. App. P. 24(a)(3)(A)*. A party who seeks appellate review of an issue does so in good faith if the issue is not frivolous from an objective standard. *See Coppedge v. United States*, 369 U.S. 438, 445 (1962). An *in forma pauperis* action is frivolous "if it is without arguable merit either in law

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<sup>2</sup> The Court also notes that when Plaintiff responded to the Court's Order to Show Cause requiring him to respond to Defendant's Motion to Dismiss for Insufficient Service of Process (DE 17), Plaintiff *never disputed* Defendant's representation that Plaintiff was the one who served process on Defendant. (DE 18).

or fact." *Napier v. Preslicka*, 314 F.3d 528, 531 (11th Cir. 2002). Alternatively, where a claim is arguable, but ultimately will be unsuccessful, it should be allowed to proceed. *See Cofield v. Ala. Pub. Serv. Comm'n*, 936 F.2d 512, 515 (11th Cir. 1991).

Based on the record, I find that Plaintiff is indigent. However, the basis for Plaintiff's appeal is frivolous because it lacks "arguable merit" and has little or no chance of success as a matter of law. *Napier*, 314 F.3d at 531. § 1915(a)(3). It is readily apparent that Plaintiff failed to timely serve process on Defendant. Thus, leave to appeal *in forma pauperis* is unwarranted. When this Court dismissed Plaintiff's Complaint, it did so "without prejudice," which means that this Court did not address the merits of Plaintiff's Complaint, and that Plaintiff can bring another lawsuit against Defendant for the same claims if he wanted to do so in a *separate* case. Accordingly, it is

**ORDERED and ADJUDGED** that

1. Plaintiff's Motions to Reopen Case (DE 21 & 22) are **DENIED**.
2. Plaintiff's Motion for Leave to Appeal *In Forma Pauperis* (DE 24) is **DENIED**.

**DONE AND ORDERED** in Chambers at West Palm Beach, Florida, this 14<sup>th</sup> day of August, 2018.



Donald M. Middlebrooks  
United States District Judge

Copies to: Counsel of Record;  
Alens Charles, *Pro Se*  
4070 Arthurium Avenue  
Lake Worth, FL 33462

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-80861-CV-MIDDLEBROOKS/BRANNON

ALENS CHARLES,

Plaintiff,

v.

RIC L. BRADSHAW, *as Sheriff of Palm  
Beach County Sheriff's Office*,

Defendant. /

**ORDER GRANTING DEFENDANT'S MOTION TO DISMISS**

THIS CAUSE comes before the Court on Defendant Ric L. Bradshaw's ("Defendant"), Motion, filed in his official capacity as the Sheriff of Palm Beach County, to Dismiss Plaintiff's Amended Complaint for Insufficient Service of Process and Lack of Personal Jurisdiction ("Motion"), filed on December 20, 2017. (DE 16). After *pro se* Plaintiff Alens Charles ("Plaintiff") failed to timely respond to Defendant's Motion, the Court ordered Plaintiff to show cause, by February 21, 2018, why Defendant's Motion should not be granted. (DE 17). Plaintiff responded to the Court's Order on February 9, 2018. (DE 18). For reasons stated below, Defendant's Motion is granted, and Plaintiff's Complaint is dismissed without prejudice.

**I. BACKGROUND**

Plaintiff originally filed his Complaint on July 20, 2017. (DE 1). On August 7, 2017, the Court granted Plaintiff's motion for leave to file an Amended Complaint (DE 6), which he did on August 28, 2017 (DE 9). The Court entered an Order of Instructions to *Pro Se* Litigant on August 7, 2017, instructing Plaintiff on how to serve Defendant, and that he must serve process on Defendant within ninety days of filing his Complaint pursuant to Rule 4(m). (DE 8). As of October 5, 2017, Plaintiff had not even asked the Clerk's office to issue a summons, and so the Court ordered Plaintiff to serve Defendant by October 18, 2017, which was ninety (90) days after

Plaintiff filed the original Complaint. (DE 10). The Order also required Plaintiff to file proof of service by October 25, 2017. (*Id.*). In response, Plaintiff caused the Clerk of Court to issue a summons as to Defendant on October 11, 2017 (DE 11), but Plaintiff did not provide proof of service by the Court-ordered deadline. On November 1, 2017, the Court again ordered Plaintiff to file, by November 10, 2017, either (1) proof of service on Defendant, or (2) a showing of good cause why Plaintiff was unable to timely serve Defendant with process. (DE 12). That Order also informed Plaintiff that failure to comply with Rule 4(m) and the Court's order would result in the dismissal of the action without prejudice. (*Id.*).

Plaintiff again did not comply with the Court-ordered deadline to file proof of service, and instead filed a Letter to the Court ("Letter") on November 22, 2017. (DE 13). The Letter implied that Plaintiff served a "notice" of the case on Defendant and asked the Court if he was "doing the right thing" with regards to handling his case. (*Id.*). For the fourth time, the Court gave Plaintiff detailed instructions about how to serve Defendant with the summons and a copy of the complaint. (DE 14). The Court ordered Plaintiff to file a "Return of Service" Affidavit and cited directly to Fed. R. Civ. P. 4(c), governing how to execute service on Defendant. (*Id.*). The Court again told Plaintiff that a failure to comply with (1) Rule 4(m) for timely service of process and (2) this Court's Order requiring a Return of Service Affidavit by December 18, 2017 would result in the dismissal of his case without prejudice. (*Id.*).

On December 12, 2017, Plaintiff filed alleged proof of service on the Palm Beach County Sheriff's Office. (DE 15). It appears that the summons and complaint were served on Sergeant Ryan Miller and Gail Arbour, and Plaintiff's signature on a copy of the summons dated "12/10/17" seems to indicate that Plaintiff himself served process. (*Id.*) Defendant filed the

instant Motion on December 20, 2017 to quash Plaintiff's process as untimely and improperly served under Rule 12(b)(5), and for lack of personal jurisdiction under Rule 12(b)(2). (DE 16).

## II. DISCUSSION

Defendant argues in its Motion that Plaintiff's Amended Complaint should be dismissed because (1) Plaintiff failed to timely serve process on Defendant by October 18, 2017, pursuant to Rule 4(m) (DE 16 at 5-6), and (2) even if the Court extended the time for Plaintiff to serve process, Plaintiff improperly served Defendant under Rule 12(b)(5) because Plaintiff "personally delivered a copy of the Summons and Amended Complaint by dropping it off with the Sheriff's legal department by hand" (DE 16 at 7-8).

Under Rule 4(m), a defendant must be served within ninety days after the complaint is filed. Fed. R. Civ. P. 4(m). A failure to do so will result in the Court dismissing the action without prejudice, or, upon finding good cause, extending the time for service. Fed. R. Civ. P. 4(m). "Filing an amended complaint does not toll the Rule 4(m) service period and thereby provide an additional 90 days for service" unless the amended complaint adds a new defendant. 4B Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure*, Time Limit for Service § 1137 (4th ed.); *see Kennedy v. Grova*, 2012 WL 1368139, at \*3 (S.D. Fla. Apr. 19, 2012) ("[T]he 120-day period provided by Rule 4(m) is not restarted by the filing of an amended complaint except as to those defendants newly added in the amended complaint." (quoting *Bolden v. City of Topeka, Kan.*, 441 F.3d 1129, 1148 (10th Cir. 2006))); *see also Lindley v. Birmingham, Ala.*, 452 F. App'x 878, 880 (11th Cir. 2011) (restarting Rule 4(m) period for service only because amended complaint named new defendant).

Good cause to extend the time for service "exists 'only when some outside factor[,] such as reliance on faulty advice, rather than inadvertence or negligence, prevented service.'" (quoting *Wright & Miller*, § 1137 (4th ed.); *see also Kennedy v. Grova*, 2012 WL 1368139, at \*3 (S.D. Fla. Apr. 19, 2012) ("[T]he 120-day period provided by Rule 4(m) is not restarted by the filing of an amended complaint except as to those defendants newly added in the amended complaint." (quoting *Bolden v. City of Topeka, Kan.*, 441 F.3d 1129, 1148 (10th Cir. 2006))); *see also Lindley v. Birmingham, Ala.*, 452 F. App'x 878, 880 (11th Cir. 2011) (restarting Rule 4(m) period for service only because amended complaint named new defendant)).

*Lepone-Dempsey v. Carroll Cty. Comm'rs*, 476 F.3d 1277, 1281 (11th Cir. 2007) (quoting *Prisco v. Frank*, 929 F.2d 603, 604 (11th Cir. 1991) (per curiam)). In addition, “a district court has the discretion to extend the time for service of process” even “absent a showing of good cause.” *Id.* at 1282 (citations omitted). Without good cause, a district court “must still consider whether any other circumstances warrant an extension of time based on the facts of the case,” including “if the applicable statute of limitations would bar the refiled action, or if the defendant is evading service or conceals a defect in attempted service.” *Id.* (citing Fed. R. Civ. P. 4(m)) (noting that “the running of the statute of limitations . . . does not require that the district court extend time for service of process . . . [but should] at least [be] consider[ed]”).

Here, Plaintiff did not serve process on Defendant within the 90 days allotted by Rule 4(m). Plaintiff's original Complaint was filed on July 20, 2017 (DE 1). When Plaintiff filed an Amended Complaint on August 28, 2017, he did not add any new defendants. (DE 9). In his Response to the Court's Order to Show Cause, Plaintiff argues for the first time that he had ninety days from the filing of his Amended Complaint to serve Defendant, until November 27, 2017. (DE 18). However, since Plaintiff did not add new defendants in filing his Amended Complaint, the deadline for Plaintiff to serve process was October 18, 2017, ninety days from when his original Complaint was filed. *See Lindley*, 452 F. App'x at 880. Plaintiff's only purported service on Defendant occurred on December 12, 2017 (DE 15, 16), well after the October 18 deadline. Thus, Plaintiff did not timely serve Defendant pursuant to Rule 4(m).

The Court does not find good cause to extend Plaintiff's deadline to serve Defendant past October 18, 2017. Plaintiff knew what he needed to do in order to serve Defendant, as evidenced by the Pro Se Instructions (DE 8), and the Court's Orders instructing Plaintiff on how to properly serve process both before (DE 10) and after (DE 12, 14) the October 18, 2017 deadline. At no

point did Plaintiff ask the Court to extend the deadline to serve Defendant. There is no evidence that Defendant was evading service. The Court is uncertain which statute of limitations would even apply to this action because, like Plaintiff's original Complaint, his Amended Complaint "intermingle[s] allegations about several police encounters . . . and makes conclusory allegations about police brutality." (DE 7). Without good cause to extend the deadline for service, Plaintiff's alleged service on Defendant on December 12, 2017 was untimely.

Even if the Court were to consider Plaintiff's attempt to serve Defendant on December 12, 2017 as timely, Plaintiff's service on Defendant was insufficient. Rule 4(c) provides that service of process shall be effected by serving a summons and copy of the complaint "*within the time allowed by Rule 4(m) . . . [by] [a]ny person who is at least 18 years of age and not a party*" to the suit. Fed. R. Civ. P. 4(c) (emphasis added). Importantly, "[w]here a defendant challenges service of process, the plaintiff bears the burden of establishing its validity." *Fitzpatrick v. Bank of N.Y. Mellon*, 580 F. App'x 690, 694 (11th Cir. 2014) (citation omitted). As the Eleventh Circuit set out, "[a] defendant's actual notice is not sufficient to cure defectively executed service," and "although we are to give liberal construction to the pleadings of *pro se* litigants, we nevertheless have required them to conform to procedural rules." *Albra v. Advan, Inc.*, 490 F.3d 826, 829 (11th Cir. 2007) (citations and internal quotations omitted).

Here, Defendant represents, and Plaintiff does not dispute, that Plaintiff "hand delivered a copy of the Summons and the Amended Complaint to the Sheriff's Office." (DE 15; DE 16 at 3, Ex. A). Thus, service was not only untimely, but defective, because Plaintiff, as a party to the suit, cannot personally serve Defendant. Although Plaintiff is proceeding *pro se*, he still must comply with all procedural rules. *Albra*, 490 F.3d at 829. Plaintiff has not met his burden of establishing the validity of service in the face of Defendant's challenges. Accordingly, even if

the Court decided to extend the deadline to include Plaintiff's service on December 12, 2017, that service was improper under Fed. R. Civ. P 12(b)(5) because it did not comply with Fed. R. Civ. P. 4(c).

When a party fails to timely serve process under Rule 4(m), a court can only dismiss an action without prejudice on that basis "on motion or on its own after notice to the plaintiff." Fed. R. Civ. P. 4(m). As previously discussed, the Court repeatedly gave Plaintiff notice of the deadline for service and that a failure to comply with the Rule 4(m) deadline will result in the dismissal of his case without prejudice. (DE 10, 12, 14).<sup>1</sup> Accordingly, it is hereby

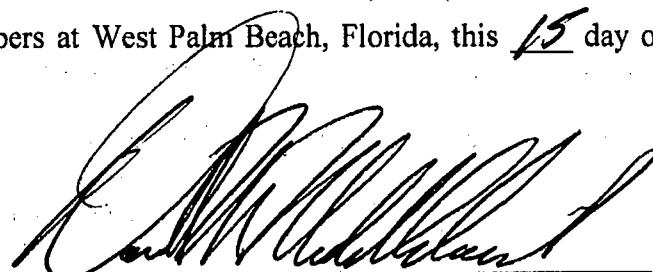
**ORDERED AND ADJUDGED** that

(1) Defendant's Motion to Dismiss for Insufficient Service of Process and Lack of Personal Jurisdiction (DE 16) is **GRANTED**.

(2) Plaintiff's Amended Complaint (DE 9) is **DISMISSED WITHOUT PREJUDICE**.

(3) The Clerk of Court shall **CLOSE THIS CASE** and **DENY** all pending motions are **AS MOOT**.

**DONE AND ORDERED** in Chambers at West Palm Beach, Florida, this 15 day of February, 2018.



DONALD M. MIDDLEBROOKS  
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record;  
Alens Charles, *Pro Se*  
4070 Arthurium Avenue  
Lake Worth, FL 33462

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<sup>1</sup> The Court does not consider Defendant's motion to dismiss under Rule 12(b)(2) because it finds that service was untimely and insufficient under Rule 4(m) and Rule 12(b)(5).