

A1  
**APPENDIX A**  
**17-2314 Docket**

**General Docket**  
**Court of Appeals, 2nd Circuit**

Docketed: 07/27/2017

**Court of Appeals Docket #:** 17-2314

**Nature of Suit:** 3440 CIVIL RIGHTS-Other

Sun v. Asiello

Termed: 02/23/2018

**Appeal From:** NDNY (SYRACUSE)

**Fee Status:** Paid

**Case Type Information:**

1) Civil

2) Private

3) -

**Originating Court Information:**

**District:** 0206-5: 17-cv-63

**Trial Judge:** Thomas J. McAvoy, U.S. District Judge

**Trial Judge:** Daniel J. Stewart, U.S. Magistrate Judge

**Date Filed:** 01/23/2017

**Date Order/Judgment:** 07/17/2017

**Date NOA Filed:** 07/26/2017

**Prior Cases:** None

**Current Cases:** None

**Panel Assignment:** Not available

|                                       |                    |
|---------------------------------------|--------------------|
| Xiu Jian Sun, Servant: The Church     | Xiu Jian Sun, -    |
| of Jesus Christ of Latter-day saints, | [NTC Pro Se]       |
| AKA the spiritual Adam                | 2nd Floor          |
| Plaintiff - Appellant                 | 54-25 153rd Street |

Flushing, NY 11355

John P. Asiello  
Defendant-Appellee  
New York State Office of the Attorney General  
120 Broadway New York, NY 10271

Oren L. Zeve, Esq.,  
[COR LD NTC Government]  
New York State Office of the Attorney General  
120 Broadway New York, NY 10271

Jonathan Lippman  
Defendant – Appellee

Oren L. Zeve, Esq.,  
[COR LD NTC Government]  
(see above)

Janet DiFiore  
Defendant–Appellee

Oren L. Zeve, Esq.,  
[COR LD NTC Government]  
(see above)

Eugene F. Pigott, Jr.  
Defendant–Appellee

Oren L. Zeve, Esq.,  
[COR LD NTC Government  
(see above)]

James A. Costello  
Defendant–Appellee

Oren L. Zeve, Esq.,  
[COR LD NTC Government  
(see above)]

Eric T. Schneiderman,  
Attorney General of the  
State of New York  
Defendant–Appellee

Oren L. Zeve, Esq.,  
[COR LD NTC  
Government]  
(see above)

Bruce J. Boivin,  
Assistant Attorney  
General of Counsel  
Defendant-Appellee

Oren L. Zeve, Esq.,  
[COR LD NTC  
Government] (see above)

Xiu Jian Sun, Servant: The Church of Jesus Christ

of Latter-day saints, AKA the spiritual Adam,  
Plaintiff-Appellant,

v.

John P. Asiello, Jonathan Lippman, Janet DiFiore,  
Eugene F. Pigott, Jr., James A. Costello, Eric T.  
Schneiderman, Attorney General of the State of New  
York, Bruce J. Boivin, Assistant Attorney General of  
Counsel,

Defendants-Appellees.

|            |          |                                                                                                                                                                                   |
|------------|----------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 07/27/2017 | <u>1</u> | NOTICE OF CIVIL APPEAL,<br>with district court docket, on<br>behalf of Appellant Xiu Jian<br>Sun, copy to pro se, FILED.<br>[2088915] [17-2314] [Entered:<br>07/28/2017 02:45 PM] |
| 07/27/2017 | 2        | PAYMENT OF DOCKETING<br>FEE, on behalf of Appellant<br>Xiu Jian Sun, district court<br>receipt # SYR049869, FILED.<br>[2088922] [17-2314] [Entered:<br>07/28/2017 02:49 PM]       |
| 07/27/2017 | <u>3</u> | DISTRICT COURT ORDER,<br>dated 07/17/2017, RECEIVED.<br>[2088926] [17-2314] [Entered:<br>07/28/2017 02:50 PM]                                                                     |
| 07/27/2017 | <u>4</u> | ELECTRONIC INDEX, in lieu<br>of record, copy to pro se, FILED.<br>[2088931] [17-2314] [Entered:<br>07/28/2017 02:50 PM]                                                           |

A4

|                                         |                                                                                                                                                                                                                                                |
|-----------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 07/28/2017 <u>6</u><br>1 pg, 9.26 KB    | INSTRUCTIONAL FORMS, to<br>Pro Se litigant, copy to pro se,<br>SENT. [2088942] [17-2314]<br>[Entered: 07/28/2017 02:53 PM]                                                                                                                     |
| 08/07/2017 <u>9</u><br>3 pg, 342.48 KB  | ACKNOWLEDGMENT AND<br>NOTICE OF APPEARANCE<br>FORM, on behalf of Appellant<br>Xiu Jian Sun, FILED. Service<br>date 08/03/2017 by US mail.<br>[2097792] [17-2314] [Entered:<br>08/10/2017 02:03 PM]                                             |
| 08/07/2017 <u>10</u><br>3 pg, 351.6 KB  | FORM D-P, on behalf of<br>Appellant Xiu Jian Sun,<br>FILED. Service date 08/03/<br>2017 by US mail. [2097798]<br>[17-2314] [Entered: 08/10/2017<br>02:05 PM]                                                                                   |
| 08/07/2017 <u>11</u><br>3 pg, 305.02 KB | LR 31.2 SCHEDULING<br>NOTIFICATION, on behalf of<br>Appellee John P. Asiello,<br>informing Court of proposed due<br>date 10/26/2017, RECEIVED.<br>Service date 08/03/2017 by US<br>mail. [2097807] [17-2314]<br>[Entered: 08/10/2017 02:11 PM] |
| 08/08/2017 <u>12</u><br>4 pg, 426.84 KB | PAPERS, copies of previously<br>filed documents, RECEIVED.<br>[2097810] [17-2314] [Entered:<br>08/10/2017 02:14 PM]                                                                                                                            |

A5

08/15/2017 13  
1 pg, 9.7 KB

NOTICE, to Appellee John P. Asiello, Bruce J. Boivin, James A. Costello, Janet DiFiore, Jonathan Lippman, Eugene F. Pigott, Jr. and Eric T. Schneiderman, for failure to file an appearance, SENT. [2100604] [17-2314] [Entered: 08/15/2017 08:40 AM]

08/22/2017 14  
2 pg, 93.13 KB

NOTICE OF APPEARANCE AS SUBSTITUTE COUNSEL, on behalf of Appellee John P. Asiello, Bruce J. Boivin, James A. Costello, Janet DiFiore, Jonathan Lippman, Eugene F. Pigott, Jr. and Eric T. Schneiderman, FILED. Service date 08/22/2017 by US mail. [2106857] [17-2314] [Entered: 08/22/2017 10:34 AM]

08/22/2017 15

ATTORNEY, Oren L. Zeve, [14], in place of attorney Barbara D. Underwood, SUBSTITUTED. [2107258] [17-2314] [Entered: 08/22/2017 12:19 PM]

08/22/2017 16  
2 pg, 94.48 KB

ACKNOWLEDGMENT AND NOTICE OF APPEARANCE, on behalf of Appellee John P. Asiello, Bruce J. Boivin, James A. Costello, Janet DiFiore,

A6

Jonathan Lippman, Eugene F. Pigott, Jr. and Eric T. Schneiderman, FILED. Service date 08/22/2017 by US mail. [2107299] [17-2314] [Entered: 08/22/2017 12:29 PM]

09/22/2017 20  
1 pg, 9.11 KB

NEW CASE MANAGER,  
Brenda Mojica, copy to pro se,  
ASSIGNED. [2131289]  
[17-2314] [Entered: 09/22/2017  
10:54 AM]

09/22/2017 24  
1 pg, 36.67

SO-ORDERED  
SCHEDULING  
NOTIFICATION, setting  
Appellant Xiu Jian Sun Brief  
due date as 10/26/2017. Joint  
Appendix due date as 10/26/  
2017, copy to pro se, FILED.  
[2131451] [17-2314] [Entered:  
09/22/2017 12:31 PM]

10/16/2017 25  
14 pg, 196.62KB

BRIEF, on behalf of Appellant  
Xiu Jian Sun, FILED. Service  
date 10/13/2017 by US mail.  
[2148879] [17-2314] [Entered:  
10/17/2017 10:01 AM]

10/16/2017 26  
223pg, 82.88 MB

APPENDIX, volume 1 of 1, (pp.  
1-223), on behalf of Appellant  
Xiu Jian Sun, FILED. Service  
date 10/13/2017 by US mail.  
[2149166] [17-2314] [Entered:

A7

10/17/2017 12:19 PM]

11/02/2017 33  
2 pg, 136.14 KB

LR 31.2 SCHEDULING  
NOTIFICATION, on behalf of  
Appellee John P. Asiello, Bruce  
J. Boivin, James A. Costello,  
Janet DiFiore, Jonathan  
Lippman, Eugene F. Pigott, Jr.  
and Eric T. Schneiderman,  
informing Court of proposed  
due date 01/15/2018,  
RECEIVED. Service date  
11/02/2017 by US mail.  
[2163306] [17-2314] [Entered:  
11/02/2017 02:43 PM]

11/03/2017 36  
1 pg. 37.18KB

SO-ORDERED  
SCHEDULING  
NOTIFICATION, setting  
Appellee John P. Asiello, Bruce  
J. Boivin, James A. Costello,  
Janet DiFiore, Jonathan  
Lippman, Eugene F. Pigott, Jr.  
and Eric T. Schneiderman Brief  
due date as 01/15/2018, copy to  
pro se, FILED. [2163812]  
[17-2314] [Entered: 11/03/2017  
09:17 AM]

12/26/2017 37  
13 pg, 375.28 KB

MOTION, to dismiss, on behalf  
of Appellee John P. Asiello,  
Bruce J. Boivin, James A.  
Costello, Janet DiFiore,  
Jonathan Lippman, Eugene F.

A8

Pigott, Jr. and Eric T. Schneiderman, FILED. Service date 12/26/2017 by US mail. [2201326] [17-2314] [Entered: 12/26/2017 04:24 PM]

01/02/2018 42 RESPONSE TO MOTION to dismiss [37], on behalf of Appellant Xiu Jian Sun, FILED. Service date 01/02/2018 by US mail. [2204877] [42] [17-2314] [Entered: 01/03/2018 08:59 AM]

01/03/2018 46  
2 pg, 17.25 KB DEFECTIVE DOCUMENT, RESPONSE TO MOTION to dismiss, [42], on behalf of Appellant Xiu Jian Sun, copy to pro se, FILED. [2205470] [17-2314] [Entered: 01/03/2018 01:42 PM]

02/07/2018 54  
2 pg, 73.25 KB STRIKE ORDER, striking Appellant Xiu Jian Sun response to a motion [42] from the docket, copy to pro se, FILED. [2230871] [17-2314] [Entered: 02/07/2018 10:06 AM]

02/15/2018 56  
4 pg, 452.67 KB PAPERS, on behalf of Appellant Sun, RECEIVED. [2240287] [17-2314] [Entered: 02/21/2018 12:19 PM]

A9

|                 |           |                                                       |
|-----------------|-----------|-------------------------------------------------------|
| 02/23/2018      | <u>58</u> | NEW CASE MANAGER,                                     |
| 1 pg, 9.09 KB   |           | Atasha Joseph, ASSIGNED.                              |
|                 |           | [2242773] [17-2314] [Entered:<br>02/23/2018 02:31 PM] |
|                 |           |                                                       |
| 02/23/2018      | <u>59</u> | MOTION ORDER, granting                                |
| 1 pg, 18.28 KB  |           | motion to dismiss [37] filed by                       |
|                 |           | Appellee Janet DiFiore,                               |
|                 |           | Jonathan Lippman, Eugene F.                           |
|                 |           | Pigott, Jr., Bruce J. Boivin,                         |
|                 |           | Eric T. Schneiderman, John P.                         |
|                 |           | Asiello and James A. Costello,                        |
|                 |           | by ALK GC, DC, copy sent to                           |
|                 |           | pro se, FILED. [2242782] [59]                         |
|                 |           | [17-2314] [Entered: 02/23/2018<br>02:34 PM]           |
|                 |           |                                                       |
| 03/16/2018      | <u>60</u> | CERTIFIED COPY OF                                     |
| 1 pg, 510.71 KB |           | ORDER, dated 02/23/2018,                              |
|                 |           | determining the appeal to                             |
|                 |           | NDNY, copy sent to pro se,                            |
|                 |           | ISSUED. [Mandate] [2258932]                           |
|                 |           | [17-2314] [Entered: 03/16/2018<br>03:50 PM]           |

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☒ Documents and Docket Summary

☐ Documents Only

☒ Include Page Numbers

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A10

**PACER Service Center  
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[https://ecf.ca2.uscourts.gov/n/beam/servlet/  
TransportRoom](https://ecf.ca2.uscourts.gov/n/beam/servlet/TransportRoom)

B1

**APPENDIX B**

Case 17-2314, Document 1-1, 07/27/2017, 2088915,  
Page1 of 2

United States Court of Appeals for the Second Circuit  
Thurgood Marshall U.S. Courthouse  
40 Foley Square, New York, NY 10007

ROBERT A. KATZMANN CHIEF JUDGE

Date: July 28, 2017

Docket #: 17-2314

Short Title: Sun v. Asiello

CATHERINE O'HAGAN WOLFE

CLERK OF COURT

DC Docket #: 17-cv-63

DC Court: NDNY (SYRACUSE)

DC Judge: Stewart

DC Judge: McAvoy

**DOCKETING NOTICE**

A notice of appeal filed by **Xiu Jian Sun** in the above referenced case was docketed today as **17-2314**. This number must appear on all documents related to this case that are filed in this Court. For pro se parties the docket sheet with the caption page, and an Acknowledgment and Notice of Appearance Form are enclosed. In counseled cases the docket sheet is available on PACER. Counsel must access the Acknowledgment and Notice of Appearance Form from this Court's website <http://www.ca2.uscourts.gov>.

The form must be completed and returned within 14 days of the date of this notice. The form requires the

following information:

YOUR CORRECT CONTACT INFORMATION:

Review the party information on the docket sheet and note any incorrect information in writing on the Acknowledgment and Notice of Appearance Form.

The Court will contact one counsel per party or group of collectively represented parties when serving notice or issuing our order. Counsel must designate on the Acknowledgment and Notice of Appearance a lead attorney to accept all notices from this Court who, in turn will, be responsible for notifying any associated counsel.

CHANGE IN CONTACT INFORMATION: An attorney or pro se party who does not immediately notify the Court when contact information changes will not receive notices, documents and orders filed in the case.

An attorney and any pro se party who is permitted to file documents electronically in CM/ECF must notify the Court of a change to the user's mailing address, business address, telephone number, or e-mail. To update contact information, a Filing User must access PACER's Manage My Appellate Filer Account, <https://www.pacer.gov/psco/cgi-bin/cmecf/ea-login.pl>. The Court's records will be updated within 1 business day of a user entering the change in PACER.

B3

A pro se party who is not permitted to file documents electronically must notify the Court of a change in mailing address or telephone number by filing a letter with the Clerk of Court.

CAPTION: In an appeal, the Court uses the district court caption pursuant to FRAP 12(a), 32(a). For a petition for review or original proceeding the Court uses a caption pursuant to FRAP 15(a) or 21(a), respectively. Please review the caption carefully and promptly advise this Court of any improper or inaccurate designations in writing on the Acknowledgment and Notice of Appearance form. If a party has been terminated from the case the caption may reflect that change only if the district court judge ordered that the caption be amended.

APPELLATE DESIGNATIONS: Please review whether appellant is listed correctly on the party listing page of the docket sheet and in the caption. If there is an error, please note on the Acknowledgment and Notice of Appearance Form. Timely submission of the Acknowledgment and Notice of Appearance Form will constitute compliance with the requirement to file a Representation Statement required by FRAP 12(b).

For additional information consult the Court's instructions posted on the website.

Inquiries regarding this case may be directed to  
212-857-8653

B4

Case 17-2314, Document 4-1, 07/27/2017, 2088931,  
Page 1 of 1

**United States Court of Appeals for the Second  
Circuit Thurgood Marshall U.S. Courthouse  
40 Foley Square New York, NY 10007**

**ROBERT A. KATZMANN CHIEF JUDGE**

Date: July 28, 2017

Docket #: 17-2314

Short Title: Sun v. Asiello

**CATHERINE O'HAGAN WOLFE**

CLERK OF COURT

DC Docket #: 17-cv-63

DC Court: NDNY (SYRACUSE)

DC Judge: Stewart DC Judge: McAvoy

**NOTICE OF RECORD ON APPEAL FILED**

In the above referenced case the document indicated  
below has been filed in the Court.

☐ Record on Appeal - Certified List

☐ Record on Appeal - CD ROM

☐ Record on Appeal - Paper Documents

☒ Record on Appeal - Electronic Index

☐ Record on Appeal - Paper Index

Inquiries regarding this case may be directed to 212-  
857-8653.

B5

Case 17-2314, Document 6, 07/28/2017, 2088942,  
Page1 of 1

**United States Court of Appeals for the Second  
Circuit Thurgood Marshall U.S. Courthouse  
40 Foley Square New York, NY 10007**

**ROBERT A. KATZMANN  
CHIEF JUDGE**

**CATHERINE O'HAGAN WOLFE  
CLERK OF COURT**

**Distribution of Instructions & Forms for Pro Se  
Parties in U.S & Private Civil Cases**

- X Acknowledgment and Notice of Appearance
- X Docketing Notice
- X Docket Report
- X How to Appeal Your Civil Case
- X How to Appeal as a Pro Se Party
- X Form D-P
- X T-1080 Form
- N/A Financial Affidavit
- N/A Local Rule 24.1 Statement
- X Certificate of Service
- X Format Motion
- X Format Brief
- X Format Appendix
- X Pro Se Scheduling Notification
- X Oral Argument Statement (Local Rule 34.1(a))
- X Form 6 Certificate of compliance
- N/A Form 7 Declaration of Inmate Filing (only if  
detained/incarcerated)

B6

Case 17-2314, Document 12, 08/08/2017, 2097810,  
Page 1 of 4

Case 17-2314, Document 11, 08/07/2017, 2097807,  
Page 1 of 3

**UNITED STATES COURT OF APPEALS FOR  
THE SECOND CIRCUIT**

**PRO SE SCHEDULING NOTIFICATION (NON -  
AGENCY CASE)**

**THIS SECTION MUST BE COMPLETED BY  
APPELLANT**

**CASE TITLE:**

The Church of Jesus Christ of Latter-day saints  
Servant: Xiu Jian Sun, the spiritual Adam  
Plaintiff-Appellant

v.

|                                            |                     |
|--------------------------------------------|---------------------|
| JOHN P. ASIELLO,                           | RECEIVED            |
| JONATHAN LIPPMAN,                          | 2017 AUG 8 PM 10:31 |
| JANET DIFIORE,                             | CLERK'S OFFICE      |
| EUGENE F. PIGOTT, JR.,                     | U.S. COURT OF       |
| JAMES A. COSTELLO,                         | APPEALS             |
| ERIC T. SCHNEIDERMAN,                      | COUNTER 1           |
| Attorney General of the State of New York, |                     |
| BRUCE J. BOIVIN, Assistant                 |                     |
| Attorney General, of Counsel,              |                     |
| Defendants-Appellees                       |                     |

B7

USCA DOCKET NUMBER:

DISTRICT: 0206-5:17-cv-63

DISTRICT/AGENCY NUMBER: \_\_\_\_\_

APPELLANT: Xiu Jian Sun, The spiritual Adam,  
The Church of Jesus Christ of Latter-day saints

APPELLANT'S ADDRESS: 54-25 153<sup>rd</sup> St., 2FL,  
Flushing, NY 11355.

APPELLANT'S PHONE NUMBER: 646-675-0308

Pursuant to Local Rule 31.2(a)(1)(A), I request that my brief and appendix be accepted for filing no later than 10/26/2017. This date is within 91 days of the later of (1) the receipt of the last transcript in my case or (2) when no transcript is ordered, the required filing date of my Form D-P with the Court.

I understand that if I fail to return this signed scheduling proposal as stated above, the Court will issue an order setting a 40-day deadline to file my brief. If I fail to file my brief, the case may be dismissed.

I also understand that in the absence of extraordinary circumstances, such as a personal illness or family death, the Court will not grant a motion to extend the time to file a brief.

Local Rule 27.1(f)(1).

08/03/2017

Date

Xiu Jian Sun, the spiritual Adam

Signature of Appellant/Petitioner

Servant: Xiu Jian Sun, the spiritual Adam

B8

Case 17-2314, Document 12, 08/08/2017, 2097810,  
Page2 of 4

Case 17-2314, Document 10, 08/07/2017, 2097798,  
Page1 of 3

**UNITED STATES COURT OF APPEALS FOR  
THE SECOND CIRCUIT**

**CIVIL APPEAL TRANSCRIPT INFORMATION  
(FORM D-P) FOR PRO SE APPELLANTS**

A PRO SE APPELLANT MUST FILE THE  
ORIGINAL OF THIS FORM WITH THE CLERK OF  
THE SECOND CIRCUIT IN ALL CML APPEALS  
WITHIN 14 CALENDAR DAYS AFTER FILING A  
NOTICE OF APPEAL.

**THIS SECTION MUST BE COMPLETED BY  
APPELLANT**

**CASE TITLE:**

The Church of Jesus Christ of Latter-day saints

Servant: Xiu Jian Sun, the spiritual Adam

Plaintiff-Appellant

Docket Number:

v.

17-2314

JOHN P. ASIELLO,  
JONATHAN LIPPMAN,  
JANET DIFIORE,  
EUGENE F. PIGOTT, JR.,  
JAMES A. COSTELLO,  
BRUCE J. BOIVIN, Assistant  
Attorney General, of Counsel,

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CLERK'S OFFICE  
U.S. COURT OF  
APPEALS  
COUNTER 1

B9

ERIC T. SCHNEIDERMAN,

Attorney General of the State of New York,

Defendants-Appellees

DISTRICT: SECOND COURT

JUDGE: ROBERT T. KATZMANN

COURT REPORTER \_\_\_\_\_

APPELLANT: Xiu Jian Sun, the spiritual Adam

PRO SE APPELLANT: 5425 153<sup>rd</sup> St., 2FL, Flushing,

NY 11355. 646-675-0308

Check the applicable provision:

☒ I am ordering a transcript.

☐ I am not ordering a transcript

Reason for not ordering a transcript:

☐ Copy is already available

☐ No transcribed proceedings

☐ Other (Specify in the space below):

PROVIDE A DESCRIPTION, INCLUDING DATES,  
OF THE PROCEEDINGS FOR WHICH A  
TRANSCRIPT IS REQUIRED (i.e., oral argument,  
order from the bench, etc.)

METHOD OF PAYMENT

☐ Funds

☐ CJA Voucher (CJA 21)

INSTRUCTIONS TO COURT REPORTER:

☐ PREPARE TRANSCRIPT OF PRE-TRIAL  
PROCEEDINGS

B10

- ☐ PREPARE TRANSCRIPT OF TRIAL  
☐ PREPARE TRANSCRIPT OF OTHER POST-  
TRIAL PROCEEDINGS  
☐ OTHER (Specify In the space below):

DELIVER TRANSCRIPT TO: (APPELLANT'S  
NAME, ADDRESS, TELEPHONE)

The Church of Jesus Christ of Latter-day saints  
Servant: Xiu Jian Sun, the spiritual Adam  
54-25 153rd St., 2FL, Flushing, NY 11355  
(646) 675-0308

I certify that I have made satisfactory arrangements  
with the court reporter for payment of the cost of the  
transcript. See FRAP 10(b). I understand that unless  
I have already ordered the transcript, I shall order its  
preparation at the time required by FRAP and the  
Local Rules.

APPELLANT'S SIGNATURE  
Xiu Jian Sun, the spiritual Adam

DATE  
08/03/2017

COURT REPORTER ACKNOWLEDGMENT: This  
section is to be completed by the court reporter. Return  
one copy to the Clerk of the Second Circuit. \_\_\_\_\_

DATE ORDER RECEIVER \_\_\_\_\_  
ESTIMATED COMPLETION DATE \_\_\_\_\_  
ESTIMATED NUMBER OF PAGES \_\_\_\_\_  
SIGNATURE OF COURT REPORTER \_\_\_\_\_  
DATE \_\_\_\_\_

B11

Case 17-2314, Document 12, 08/08/2017, 2097810,  
Page 3 of 4

Case 17-2314, Document 9, 08/07/2017, 2097792,  
Page 1 of 3

RECEIVED  
2017 AUG 8 PM 10:31  
CLERK'S OFFICE  
U.S. COURT OF  
APPEALS  
COUNTER 1

**ACKNOWLEDGMENT AND  
NOTICE OF APPEARANCE**

Short Title: XIU JIAN SUN, the spiritual Adam V.  
JOHN P. ASIELLO, JONATHAN LIPPMAN, JANET  
DIFIORE, EUGENE F. PIGOTT, JR., JAMES A.  
COSTELLO, ERIC T. SCHNEIDERMAN, Attorney  
General of the State of New York, BRUCE J. BOIVIN,  
Assistant Attorney General, of Counsel,  
Docket No.: 17-2314

Lead Counsel of Record (name/firm) or Pro se Party  
(name): Xiu Jian Sun, the spiritual Adam  
Appearance for (party/designation): Xiu Jian Sun, the  
spiritual Adam

**DOCKET SHEET  
ACKNOWLEDGMENT/AMENDMENTS**

Caption as indicated is:

x Correct

   Incorrect. See attached caption page with  
corrections.

B12

Appellate Designation is:

☒ Correct

☐ Incorrect. The following parties do not wish to participate in this appeal: Parties: \_\_\_\_\_

☐ Incorrect. Please change the following parties' designations: Party Correct Designation

Contact Information for Lead Counsel/Pro Se Party is:

☒ Correct

☐ Incorrect or Incomplete, and should be amended as follows:

Name: \_\_\_\_\_ Finn \_\_\_\_\_

Address: \_\_\_\_\_ Telephone: \_\_\_\_\_

Fax: \_\_\_\_\_ Email: \_\_\_\_\_

#### RELATED CASES

☒ This case has not been before this Court previously.

☐ This case has been before this Court previously.

The short title, docket number, and citation are: \_\_\_\_\_

☐ Matters related to this appeal or involving the same issue have been or presently are before this Court. The short titles, docket numbers, and citations are: \_\_\_\_\_

#### CERTIFICATION

I certify that (☒) I am admitted to practice in this Court and, if required by LR 46.1(a)(Z), have renewed my admission on \_\_\_\_\_ OR that ( ☐ ) I applied for admission on \_\_\_\_\_ or renewal on \_\_\_\_\_.

If the Court has not yet admitted me or approved my

B13

renewal, I have completed Addendum A.

Signature of Lead Counsel of Record: \_\_\_\_\_

Type or Print Name: \_\_\_\_\_

OR

Signature of pro se litigant: Xiu Jlan Sun, the spiritual Adam

Type or Print Name: Xiu Jlan Sun, the spiritual Adam(The Church of Jesus Christ of Latter-day saints

X I am a pro se litigant who is not an attorney.

   I am an incarcerated pro se litigant.

B14

Case 17 2314, Document 12, 08/08/2017, 2097810,  
Page4 of 4

Case 17-2314, Document 11, 08/07/2017, 2097807,  
Page2 of 3

Case 17-2314, Document 10, 08/07/2017, 2097798,  
Page2 of 3

Case 17-2314, Document 9, 08/07/2017, 2097792,  
Page2 of 3

**UNITED STATES COURT OF APPEALS FOR  
THE SECOND CIRCUIT**

**CAPTION                      CERTIFICATE OF SERVICE**

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The Church of Jesus Christ of Latter-day saints  
Servant: Xiu Jian Sun, the spiritual Adam  
Plaintiff

v.

Docket Number: 17-2314

|                                            |                     |
|--------------------------------------------|---------------------|
| JOHN P. ASIELLO,                           |                     |
| JONATHAN LIPPMAN,                          | RECEIVED            |
| JANET DIFIORE,                             | 2017 AUG 8 PM 10:31 |
| EUGENE F. PIGOTT, JR.,                     | CLERK'S OFFICE      |
| JAMES A. COSTELLO,                         | U.S. COURT OF       |
| BRUCE J. BOIVIN, Assistant                 | APPEALS             |
| Attorney General, of Counsel,              | COUNTER 1           |
| ERIC T. SCHNEIDERMAN,                      |                     |
| Attorney General of the State of New York, |                     |
| Defendants                                 |                     |

---

1. Simon Chen, hereby certify under penalty of perjury that on Aug 03, 2017. I served a copy of 1) Scheduling Notification; 2) Form D-P; 3) Acknowledgment and Notice Appearance.

by (select all applicable) • •

☐ Personal Delivery      ☒ United States Mail  
☐ Federal Express or other Overnight Courier  
☐ Commercial Carrier      ☐ E-Mail (on consent)

on the following parties:

| Name                 | Address                                       | City        | State        | Zip    | Code |
|----------------------|-----------------------------------------------|-------------|--------------|--------|------|
| Barbara D. Underwood | New York State Office of the Attorney General | 120Broadway | New York, NY | 10271. |      |

• A party must serve a copy of each paper on the other parties, or their counsel, to the appeal or proceeding. The Court will reject papers for filing if a certificate of service is not simultaneously filed

• • If different methods of service have been used on different parties, please complete a separate certificate of service for each party.

08/03/2017

Today's Date

Simon Chen

Signature

Certificate of Service Form (Last Reviewed 12/2015)

B16

Case 17-2314, Document 13, 08/15/2017, 2100604,  
Page 1 of 1

**United States Court of Appeals for the Second Circuit**  
**Thurgood Marshall U.S. Courthouse**  
**40 Foley Square New York, NY 10007**

**ROBERT A. KATZMANN**

CHIEF JUDGE

Date: August 15, 2017

Docket #: 17-2314

Short Title: Sun v. Asiello

**CATHERINE O'HAGAN WOLFE**

CLERK OF COURT

DC Docket #: 17-cv-63

DC Court: NDNY (SYRACUSE)

DC Judge: McAvoy

DC Judge: Stewart

**ACKNOWLEDGMENT AND NOTICE OF  
APPEARANCE DEFAULT NOTICE**

Pursuant to Second Circuit Local Rule 12.3, the appellee's counsel Acknowledgment and Notice of Appearance was due on August 11, 2017. The Court has not received the Acknowledgment and Notice of Appearance on behalf of appellee's counsel.

If appellee's counsel does not file an Acknowledgment

B17

and Notice of Appearance within 14 days of the date of this notice, when the appeal is placed on the calendar, appellee's counsel will not be heard at oral argument except by permission of the Court.

Inquiries regarding this case may be directed to 212-857-8653.

B18

Case 17-2314, Document 14-1, 08/22/2017, 2106857,  
Page1 of 1

NOTICE OF APPEARANCE FOR SUBSTITUTE,  
ADDITIONAL, OR AMICUS COUNSEL

Short Title: Sun v. Asiello Docket No.: 17-2314

Substitute, Additional, or Amicus Counsel's Contact  
Information is as follows:

Name: Oren L. Zeve

Firm: NYS Office of the Attorney General

Address: 120 Broadway, 25th Floor

Telephone: 212-416-8882 Fax: 212-416-8962

E-mail: oren.zeve@ag.ny.gov

Appearance for: appellees (party/designation)

Select One:

☐ Substitute counsel (replacing lead counsel: \_\_\_\_\_  
(name/firm)

☒ Substitute counsel (replacing other counsel:  
Barbara D. Underwood (name/firm)

☐ Additional counsel (co-counsel with: \_\_\_\_\_ (name/firm)

☐ Amicus (in support of: \_\_\_\_\_ (party/designation)

CERTIFICATION

I certify that:

☒ I am admitted to practice in this Court and, if  
required by Interim Local Rule 46.1(a)(2), have  
renewed

my admission on June 2014 OR

☐ I applied for admission on.

Signature of Counsel: /s/ Oren L. Zeve

Type or Print Name: Oren L. Zeve

B19

Case 17-2314, Document 16-1, 08/22/2017, 2107299,  
Page 1 of 1

**ACKNOWLEDGMENT AND NOTICE OF  
APPEARANCE**

Short Title: Sun v. Asiello      Docket No.: 17-2314  
Lead Counsel of Record (name/firm) or Pro se Party  
(name): Oren L. Zeve, Assistant Solicitor General  
Appearance for (party/designation): appellees

**DOCKET SHEET  
ACKNOWLEDGMENT/AMENDMENTS**

Caption as indicated is:

- ☒ (X) Correct  
☐ ( ) Incorrect. See attached caption page with  
corrections.

Appellate Designation is:

- ☒ (X) Correct  
☐ ( ) Incorrect. The following parties do not wish to  
participate in this appeal: Parties: \_\_\_\_\_  
☐ ( ) Incorrect. Please change the following parties'  
designations:

|              |                            |
|--------------|----------------------------|
| <u>Party</u> | <u>Correct Designation</u> |
|--------------|----------------------------|

Contact Information for Lead Counsel/Pro Se Party is:

- ☒ (X) Correct  
☐ ( ) Incorrect or Incomplete, and should be amended  
as follows:

Name: Oren L. Zeve

B20

Firm: NYS Office of the Attorney General  
Address: 120 Broadway, 25th Floor  
Telephone: 212-416-8882 Fax: 212-416-8962  
Email: oren.zeve@ag.ny.gov

#### RELATED CASES

- ( ) This case has not been before this Court previously.
- ( ) This case has been before this Court previously.  
The short title, docket number, and citation are:
- ( X ) Matters related to this appeal or involving the same issue have been or presently are before this Court. The short titles, docket numbers, and citations are: Sun v Pollak, 17-1217; Sun v. Dillon, 16-3557; Sun v. Katzmman, 16-3103; Sun v. Cavallo, 16-950

#### CERTIFICATION

I certify that ( X ) I am admitted to practice in this Court and, if required by LR 46.1(a)(2), have renewed my admission on June 2014 OR that ( ) I applied for admission on \_\_\_\_\_ or renewal on \_\_\_\_\_. If the Court has not yet admitted me or approved my renewal, I have completed Addendum A.

Signature of Lead Counsel of Record: /s/ Oren L. Zeve  
Type or Print Name: Oren L. Zeve

OR

Signature of pro se litigant: \_\_\_\_\_  
Type or Print Name: \_\_\_\_\_

- ( ) I am a pro se litigant who is not an attorney.  
( ) I am an incarcerated pro se litigant.

B21

Case 17-2314, Document 16-2, 08/22/2017, 2107299,  
Page1 of 1

Case 17-2314, Document 14-2, 08/22/2017, 2106857,  
Page1 of 1

**CERTIFICATE OF SERVICE**

I hereby certify that, on the 22nd of August 2017,  
I served or caused to be served one copy of the  
appellees' Notice of Substitution and the Notice of  
Appearance by United States Postal Service first  
class/priority mail upon the following named person(s)

Xiu Jian Sun  
2nd Flr.  
54-25 153rd Street  
Flushing, NY 11355

/s/ Oren L. Zeve

B22

Case 17-2314, Document 20, 09/22/2017, 2131289,  
Page 1 of 1

**United States Court of Appeals for the Second Circuit**  
**Thurgood Marshall U.S. Courthouse**  
**40 Foley Square New York, NY 10007**

**ROBERT A. KATZMANN**

CHIEF JUDGE

Date: September 22, 2017

Docket #: 17-2314cv

Short Title: Sun v. Asiello

**CATHERINE O'HAGAN WOLFE**

CLERK OF COURT

DC Docket #: 17-cv-63

DC Court: NDNY (SYRACUSE)

DC Judge: McAvoy

DC Judge: Stewart

**NOTICE OF CASE MANAGER CHANGE**

The case manager assigned to this matter has been changed. Inquiries regarding this case may be directed to 212-857-8563.

B23

Case 17-2314, Document 24, 09/22/2017, 2131451,  
Page 1 of 1

**UNITED STATES COURT OF APPEALS  
for the SECOND CIRCUIT**

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 22th day of September, two thousand and seventeen,

Xiu Jian Sun, Servant: The Church  
of Jesus Christ of Latter-day saints, **ORDER**  
AKA the spiritual Adam, Docket No: 17-2314  
Plaintiff - Appellant,

v.

John P. Asiello, Jonathan Lippman,  
Janet DiFiore, Eugene F. Pigott, Jr.,  
James A. Costello, Eric T.  
Schneiderman, Attorney General of the  
State of New York, Bruce J. Boivin,  
Assistant Attorney General of Counsel,  
Defendants - Appellees.

APPELLANT has filed a scheduling notification, pro se, pursuant to the Court's Local Rule 31.2, setting October 26, 2017 as the brief and joint appendix filing date.

The scheduling notification hereby is so ordered.

For The Court:  
Catherine O'Hagan Wolfe,  
Clerk of Court  
Catherine O'Hagan Wolfe

C1  
**APPENDIX C**

Case 17-2314, Document 25, 10/16/2017, 2148879,  
Page 1 of 14

17-2314

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**UNITED STATES COURT OF APPEALS FOR  
THE SECOND CIRCUIT**

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The Church of Jesus Christ of Latter-Day Saints  
Servant: XIU JIAN SUN, the spiritual Adam  
Plaintiff - Appellant,

v.

|                                                                                                                                                                                                                                                                                |                                                                                               |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------|
| Pharisees: JOHN P. ASIELLO,<br>JONATHAN LIPPMAN, JANET<br>DIFIORE, EUGENE F. PIGOTT,<br>JR., JAMES A. COSTELLO,<br>ERIC T. SCHNEIDERMAN,<br>ATTORNEY GENERAL OF<br>THE STATE OF NEW YORK,<br>BRUCE J. BOMN, ASSISTANT<br>ATTORNEY GENERAL, OF COUNSEL<br>Defendant - Appellee. | RECEIVED<br>2017 OCT 16<br>AM 9:25<br>CLERK'S OFFICE<br>U.S. COURT OF<br>APPEALS<br>COUNTER 1 |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------|

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**On Appeal from the United States District Court  
for the Southern District of New York**

---

**Brief of Appellant** Xiu Jian Sun, the spiritual Adam  
The Church of Jesus Christ of Latter-day saints  
Servant: Xiu Jian Sun, the spiritual Adam Pro Se  
54-25 153rd St., 2FL, Flushing, NY 11355  
646-675-0308

**TABLE OF CONTENTS**

|                                                                 | Page(s) |
|-----------------------------------------------------------------|---------|
| Table of Contents .....                                         | 2, C2   |
| Statutes & Rules .....                                          | 3, C3   |
| Statement of Subject Matter and Appellate<br>Jurisdiction ..... | 4, C4   |
| Statement of the Issues Presented for Review ..                 | 5, C5   |
| Statement of the Facts .....                                    | 6, C5   |
| Conclusion .....                                                | 7, C6   |
| Certificate of Compliance .....                                 | 8, C7   |
| Certificate of Service .....                                    | 14, C15 |

**Statutes & Rules**

**The Doctrine and Covenants Section 42**

83. And thus ye shall do in all cases which shall come before you.
84. And if a man or woman shall rob, he or she shall be delivered up unto the law of the land.
85. And if he or she shall steal, he or she shall be delivered up unto the law of the land.
86. And if he or she shall lie, he or she shall be delivered up unto the law of the land.
87. And if he or she do any manner of iniquity, he or she shall be delivered up unto the law, even that of God.
88. And if thy brother or sister offend thee, thou shalt take him or her between him or her and thee alone; and if he or she confess thou shalt be reconciled.
89. And if he or she confess not thou shalt deliver him or her up unto the church, not to the members, but to the elders. And it shall be done in a meeting, and that not before the world.
90. And if thy brother or sister offend many, he or she shall be chastened before many.
91. And if any one offend openly, he or she shall be rebuked openly, that he or she may be ashamed. And if he or she confess not, he or she shall be delivered up unto the law of God.

**STATEMENT OF SUBJECT MATTER AND  
APPELLATE JURISDICTION**

1. In the nights between March 7th and 8th, 2016, the Lord god of host Jehovah sent the messenger said to servant (Plaintiff) though the angel, "Secret gang organization (秘密帮派组织)."
2. The Lord god of hosts sent messenger through the angel said to servant: 'Pharisees don't even open the door'. (Words given on the date of October 5th, 2015, on the way home from the court. (法利赛人连门都不开).
3. Jehovah, the Lord god of host, sent the son of god, (the revived Messiah) from God's temple gave words to servant, said: ' Pharisees not even move a finger of his." (法利赛的人一个手指头都不动).

C5

Case 17-2314, Document 25, 10/16/2017, 2148879,  
Page5 of 14

### **Statement of the Issues Presented for Review**

1. November 26th-27th, 2012. the Lord god of host Jehovah sent the messenger said to servant (Plaintiff) through the angel: "Did not keep promise".(没有信守承诺)
2. Jehovah, the lord god of host sends the messenger through the angel says, "In contempt of words from Israel family's angel." (蔑视以色列家使者的言语)

Case 17-2314, Document 25, 10/16/2017, 2148879,  
Page6 of 14

### **STATEMENT OF THE FACTS**

The Lord god Jehovah sent the messenger, said to spiritual Adam through the angel, 'unjust judge.' (不公正的法官)

C6

Case 17-2314, Document 25, 10/16/2017, 2148879,  
Page7 of 14

## CONCLUSION

The Doctrine and Covenants Section 42

92. If any shall offend in secret, he or she shall be rebuked in secret, that he or she may have opportunity to confess in secret to him or her whom he or she has offended, and to God, that the church may not speak reproachfully of him or her.

93. And thus shall ye conduct in all things.

Dated: October 5, 2017  
Queens, New York

The Church of Jesus Christ of Latter-day saints

Servant:

Xiu Jian Sun, the spiritual Adam  
54-25 153rd St 2FL  
Flushing, NY 11355  
(646) 675-0308  
Plaintiff-Appellant

C7

Case 17-2314, Document 25, 10/16/2017, 2148879,  
Page8 of 14

Case 17-2314, Document 1-2, 07/27/2017, 2088915,  
Page2 of 13

Case 17-2314, Document 3, 07/27/2017, 2088926,  
Page1 of 5

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page212 of 223

Case 1:17-cv-00063-TJM-DJS Document 27  
Filed 07/26/17 Page 2 of 9

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page 206 of 223

Case 1:17-cv-00063-TJM-DJS Document 26  
Filed 07/17/17 Page 1 of 5

**CERTIFICATE OF COMPLIANCE**

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK**

\_\_\_\_\_X

XIU JIAN SUN, Servant: The Church  
of Jesus Christ of Latter-Day Saints, 1:17- cv-63  
a/k/a the spiritual Adam,  
Plaintiff

v.

JOHN P. ASIELLO, JONATHAN

LIPPMAN, JANET DIFIORE,  
EUGENE F. PIGOTT, JR.,  
JAMES A. COSTELLO, ERIC T.  
SCHNEIDERMAN, Attorney  
General of the State of  
New York, and BRUCE J. BOIVIN,  
Assistant Attorney  
General, of Counsel,  
Defendants,

\_\_\_\_\_X

**Thomas J. McAvoy, S.U.S.D.J.**

**DECISION & ORDER**

Before the Court is Defendants' motion to dismiss Plaintiff's Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). See dk. # 21. Plaintiff filed the Amended Complaint in response to Defendants' motion to dismiss the initial Complaint filed in this case. See dk. # 7. Plaintiff has responded to the motion, and the Court has determined to resolve the matter without oral argument.

**I. BACKGROUND**

Plaintiff filed his initial Complaint on January 23, 2017. See dk. # 1. That Complaint named as Defendants the Clerk of Court of the New York Court of Appeals, the Former Chief Judge of that Court, the Current Chief Judge, an Associate Judge, and a former assistant Deputy Clerk. The Complaint listed the names of the Defendants, connecting some of them

to docket numbers of cases from the Court of Appeals. Those cases were connected to particular Defendants. Plaintiff refers to the Defendants as "Pharisees." After naming the parties, the Complaint described messengers who appeared to the Plaintiff (the "servant") to provide religious messages such as "[s]ecret gang organization," "Pharisees don't even open the door," and "Trial with god's law. Apply for jury to prevent insult and unfair behavior." Most of these phrases were followed by characters in an Asian language that the Court is unable to understand. The characters may be in Mandarin Chinese, as the Plaintiff's Complaint requests "a Mandarin Chinese Court interpreter for my appeal court day."

Plaintiff filed an Amended Complaint after the Defendants filed their motion to dismiss. The Amended Complaint is nearly identical to the initial Complaint. See dkt. # 12. The allegations concerning divine messages are the same. The Amended Complaint simply adds as Defendants Eric Schneiderman, the Attorney General of New York, and Bruce J. Boivin, an Assistant Attorney General. Those allegations reference specific case numbers and note that Defendants served as defense counsel in those cases.

Defendants filed a renewed motion to dismiss and Plaintiff responded, bringing the case to its present posture.

## II. LEGAL STANDARD

Defendants have filed a motion to dismiss the Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). In addressing such motions, the Court must accept "all factual allegations in the complaint as true, and draw[] all reasonable inferences in the plaintiff's favor." Holmes v. Grubman, 568 F.3d 329, 335 (2d Cir. 2009). This tenet does not apply to legal conclusions. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. at 678. "To survive a motion to dismiss. A complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Id. (quoting Bell Atl. v. Twombly, 550 U.S. 544, 570 (2007)). When, as here, the Plaintiff proceeds pro se, the Court "'construe [the complaint] broadly, and interpret [it] to raise the strongest arguments that [it] suggests.'" Weixel v. Bd. of Educ. of N.Y., 287 F.3d 138, 146 (2d Cir. 2002) (quoting Cruz v. Gomez, 202 F.3d 593, 597 (2d Cir. 2000)). "This is especially true when dealing with pro se complaints alleging civil rights violations." Id.

## III. ANALYSIS

Defendants seek dismissal on various grounds. They also seek dismissal without leave to re-plead,

contending that a second amended complaint would be futile.

Federal Rule of Civil Procedure 8(a) provides that:

A pleading that states a claim for relief must contain:

- (1) a short and plain statement of the grounds for the court's Jurisdiction, unless the court already has Jurisdiction and the claim needs no new jurisdictional support;
- (2) a short and plain of the statement of the claim showing the pleader is entitled to relief; and
- (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

FED. R. Civ. P. 8(a). The Amended Complaint falls woefully short of these requirements. Plaintiff names parties and includes oblique references to cases which apparently arose in New York state courts. The Complaint does not, however, explain why those court cases are relevant, what injury the Plaintiff suffered, and what role the Defendants played in causing those injuries. Plaintiff does not assert any causes of action, and does not seek any relief but that a Mandarin Chinese interpreter be appointed for him when he appears in Court. While the Defendants speculate that the case may arise from judicial rulings for which

they would likely enjoy immunity, nothing in the case indicates the nature of the claims that Plaintiff hopes to raise against these Defendants. The mere presence of docket numbers for court cases does not necessarily indicate that Defendants are sued because of their judicial decisions or for some other reasons. The Complaint is simply unintelligible. Plaintiff has not stated a claim, much less a claim upon which relief could be granted. The Court will therefore grant the Defendants' motion.

Defendants argue that the claim should be dismissed with prejudice. "A pro se complaint is to be read liberally. Certainly the court should not dismiss without granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated." Cuoco v. Moritsugu, 222 F.3d 99, 112 (2d Cir. 2000) (quoting Gomez v. USAA Fed. Sav. Bank, 171 F.3d 794, 795 (2d Cir. 1999)). At the same time, "a futile request to replead should be denied." Id. The Court finds that preventing Plaintiff from re-pleading the Complaint would be to assign too much meaning to the references to court cases in the Complaint. Nothing in the Amended Complaint explains why these cases are referenced. The Court will therefore provide the Plaintiff with a final opportunity to file an Amended Complaint. That Complaint should state causes of action directly and provide sufficient facts to understand the bases for those causes of action.

#### IV. CONCLUSION

For the reasons stated above, the Defendants' motion to dismiss the Amended Complaint, dkt. # 21, is hereby GRANTED with leave to re-plead. Plaintiff may file a Second Amended Complaint within 21 days of the date of this Order. Failure to file a Second Amended Complaint within the time provided by this Order will cause the Court to consider the case dismissed with prejudice.

**IT IS SO ORDERED**

**DATED:** July 17, 2017

**Thomas J. McAvoy**

Thomas J. McAvoy

Senior, U.S. District Judge

C14

Case 17-2314, Document 25, 10/16/2017, 2148879,  
Page13 of 14

Case 1:17-cv-00063-TJM-DJS Document 29  
Filed 08/11/17 Page 1 of 2

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK**

**JUDGMENT IN A CIVIL CASE**

XIU JIAN SUN

Plaintiff(s)

vs.

CASE NUMBER:

JOHN P. ASIELLO, et al

1:17-CV-63 (TJM/DJS)

Defendant(s)

**Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Plaintiff's amended complaint is dismissed with prejudice in accordance with the Honorable Senior District Judge Thomas J. McAvoy's Decision & Order filed on July 17, 2017 [see dkt. ## [12) and [26] ].

DATED: August 11, 2017

---

Clerk of Court  
s/ C. M. Ligas  
Deputy Clerk

C15

Case 17-2314, Document 25, 10/16/2017, 2148879,  
Page14 of 14

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page223 of 223

**UNITED STATES COURT OF APPEALS FOR THE  
SECOND CIRCUIT**

**CAPTION                      CERTIFICATE OF SERVICE •**

The Church of Jesus Christ of  
Latter-day saints Servant: Xiu  
Jian Sun, the spiritual Adam  
Plaintiff

v.                                      Docket Number: 17-2314

JOHN P. ASIELLO,  
JONATHAN LIPPMAN,  
JANET DIFIORE,  
EUGENE F. PIGOTT, JR.,  
JAMES A. COSTELLO,  
ERIC T. SCHNEIDERMAN,  
Attorney General of the State of New York,  
BRUCE J. BOIVIN, Assistant  
Attorney General, of Counsel,  
Defendants

---

I. Simon Chen, hereby certify under penalty of  
perjury that on 10-13-2017. I served a copy of 1.  
Brief of Appellant. 2. Appendix of Appellant.

C16

by (select all applicable) • •

☐ Personal Delivery      ☒ United States Mail  
☐ Federal Express or other Overnight Courier  
☐ Commercial Carrier      ☐ E-Mail (on consent)

on the following parties:

| Name                                                     | Address | City | State | Zip | Code |
|----------------------------------------------------------|---------|------|-------|-----|------|
| <u>Oren L. Zeve</u> & Barbara D. Underwood               |         |      |       |     |      |
| NYS Office of the Attorney General                       |         |      |       |     |      |
| 120 Broadway 25 <sup>th</sup> Floor, New York, NY 10271. |         |      |       |     |      |

• A party must serve a copy of each paper on the other parties, or their counsel, to the appeal or proceeding. The Court will reject papers for filing if a certificate of service is not simultaneously filed

• • If different methods of service have been used on different parties, please complete a separate certificate of service for each party.

10/13/2017

Today's Date

Simon Chen

Signature

Certificate of Service Form (Last Reviewed 12/2015)

D1  
**APPENDIX D**

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page 1 of 223  
17-2314

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**UNITED STATES COURT OF APPEALS FOR  
THE SECOND CIRCUIT**

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The Church of Jesus Christ of Latter-Day Saints  
Servant: XIU JIAN SUN, the spiritual Adam  
Plaintiff - Appellant,

v.

|                                                                                                                                                                                                                                                                                |                                                                                               |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------|
| Pharisees: JOHN P. ASIELLO,<br>JONATHAN LIPPMAN, JANET<br>DIFIORE, EUGENE F. PIGOTT,<br>JR., JAMES A. COSTELLO,<br>ERIC T. SCHNEIDERMAN,<br>ATTORNEY GENERAL OF<br>THE STATE OF NEW YORK,<br>BRUCE J. BOMN, ASSISTANT<br>ATTORNEY GENERAL, OF COUNSEL<br>Defendant - Appellee. | RECEIVED<br>2017 OCT 16<br>AM 9:25<br>CLERK'S OFFICE<br>U.S. COURT OF<br>APPEALS<br>COUNTER 1 |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------|

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**On Appeal from the United States District Court  
for the Southern District of New York**

---

**Appendix of Appellant Xiu Jian Sun, the spiritual  
Adam**

The Church of Jesus Christ of Latter-day saints  
Servant: Xiu Jian Sun, the spiritual Adam Pro Se  
54-25 153rd St., 2FL, Flushing, NY 11355  
646-675-0308

**TABLE OF CONTENTS**

|     |                                                                                                 |                      |
|-----|-------------------------------------------------------------------------------------------------|----------------------|
| 1.  | U.S. District Court Eastern District<br>of New York Docket Sheet .....                          | 3, D3                |
| 2.  | Complaint .....                                                                                 | 8, D15               |
| 3.  | Summons in a Civil Action .....                                                                 | 14, D30              |
| 4.  | Proof of Service .....                                                                          | 40, D60              |
| 5.  | Notice Motion of to Dismiss .....                                                               | 61, D62              |
| 6.  | Memorandum of Law in Support of<br>Defendant's Motion to Dismiss .....                          | 63, D64              |
| 7.  | Report in Opposition .....                                                                      | 101, D137; 198, D185 |
| 8.  | Summons Issued .....                                                                            | 123, D143            |
| 9.  | Memorandum of Law in Support of<br>Defendant's Motion to Dismiss the<br>Amended Complaint ..... | 154, D165            |
| 10. | Decision & Order .....                                                                          | 204, C8              |
| 11. | Notice of Appeal .....                                                                          | 209, D192            |
| 12. | Judgment .....                                                                                  | 219, C14, D197       |
| 13. | Certificate of Service .....                                                                    | 221, C15             |

D3

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page5 of 223

Case 17-2314, Document 1-2, 07/27/2017, 2088915,  
Page10 of 13

Case 1:17-cv-00063-TJM-DJS As of: 07/27/17  
04:29 PM EDT 1 of 4  
Case 17-2314, Document 4-2, 07/27/2017, 2088931,  
Page2 of 5

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page57 of 223

Case 1:17-cv-00063-TJM-DJS Document 5-7  
Filed 02/02/17 Page 1 of 2

APPEAL,PRO SE  
U.S. District Court Northern District of New York –  
Main Office (Syracuse) [LIVE - Version 6.1.1]  
(Albany)

**CIVIL DOCKET FOR CASE #:**  
**1:17-cv-00063-TJM-DJS**

Sun v. Asiello et al  
Assigned to: Senior Judge Thomas J. McAvoy  
Referred to: Magistrate Judge Daniel J. Stewart  
Cause: 42:1983 Civil Rights Act  
Date Filed: 01/23/2017  
Date Terminated: 08/11/2017  
Jury Demand: Plaintiff  
Nature of Suit: 440 Civil Rights: Other  
Jurisdiction: Federal Question

**Plaintiff**

D4

**Xiu Jian Sun**

Servant: The Church of Jesus Christ  
of Latter-day saints

also known as the spiritual Adam

represented by **Xiu Jian Sun**

54-25 153rd Street 2nd Floor

Flushing, NY 11355

646-675-0308

PRO SE

V.

**Defendant John P. Asiello**

represented by **Bruce J. Boivin**

Office of Attorney General-Albany

State of New York

The Capitol Albany, NY 12224

518-776-2590, Fax: 518-915-7740

Email: [bruce.boivin@ag.ny.gov](mailto:bruce.boivin@ag.ny.gov)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

**Defendant Jonathan Lippman**

represented by **Bruce J. Boivin**

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

**Defendant Janet DiFiore**

represented by **Bruce J. Boivin**

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

**Defendant Eugene F. Pigott, Jr.**

represented by **Bruce J. Boivin**

(See above for address)

D5

LEAD ATTORNEY  
ATTORNEY TO BE NOTICED

**Defendant James A. Costello**  
represented by **Bruce J. Boivin**  
(See above for address)  
LEAD ATTORNEY  
ATTORNEY TO BE NOTICED

**Defendant Eric T. Schneiderman**  
Attorney General of the State of New York

**Defendant Bruce J. Boivin**  
Assistant Attorney General of Counsel

| Date Filed | #        | Docket Text                                                                                                                                                                                                                                                                                                                                  |
|------------|----------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 01/23/2017 | <u>1</u> | COMPLAINT WITH JURY<br>DEMAND: against John P. Asiello,<br>Jonathan Lippman, Janet DiFiore,<br>Eugene F. Pigott, Jr and James A.<br>Costello, (Filing fee \$400 receipt<br>number SYR048146) filed by Xiu<br>Jian Sun, Pro Se. (Attachments: # <u>1</u><br>Civil Cover Sheet, # <u>2</u> Mailing<br>Envelope) (jmb) (Entered:<br>01/25/2017) |
| 01/23/2017 | <u>2</u> | Summons Issued as to John P.<br>Asiello. (Attachments: # <u>1</u><br>Summons issued for Jonathan<br>Lippman, # <u>2</u> Summons issued for<br>Janet DiFiore, # <u>3</u> Summons issued<br>for Eugene F. Pigott, Jr., # <u>4</u><br>Summons issued for James A.<br>Costello) {Copies sent to the pro se                                       |

D6

plaintiff for service upon the defendants.} (jmb) (Attachment 1 replaced on 1/26/2017) (jmb,). (Entered: 01/25/2017)

- 01/23/2017 3 G.O. 25 FILING ORDER ISSUED: Initial Rule 16 Conference set for 4/25/2017 at 9:00 AM in Albany before Magistrate Judge Daniel J. Stewart. Civil Case Management Plan must be filed and Mandatory Disclosures are to be exchanged by the parties on or before 4/18/2017. (Pursuant to Local Rule 26.2, mandatory disclosures are to be exchanged among the parties but are NOT to be filed with the Court.) {Copy sent to the pro se plaintiff for his records and for service upon the defendants} (jmb) (Entered: 01/25/2017)
- 01/23/2017 4 PRO SE HANDBOOK and NOTICE issued and sent to Xiu Jian Sun by regular mail, to be signed and returned by the pro se plaintiff. (jmb) (Entered: 01/25/2017)
- 02/02/2017 5 PROOF OF SERVICE as to all debts by U.S. Postal Mail on 1/31/17 filed by Xiu Jian Sun (Attachments: # 1 Proof of Service, # 2 Proof of Service, # 3 Proof of

D7

Service, # 4 Proof of Service, # 5 Copy of Civil Cover Sheet, # 6 Copy of Complaint, # 7 Copy of Docket Sheet, # 8 Envelope) (sfp,) (Entered: 02/02/2017)

02/03/2017 6 PRO SE NOTICE returned executed by Xiu Jian Sun. (jmb) (Entered: 02/17/2017)

02/22/2017 7 First MOTION to Dismiss for Failure to State a Claim Motion Hearing set for 4/10/2017 10:00 AM in Albany before Senior Judge Thomas J. McAvoy Response to Motion due by 3/24/2017 Reply to Response to Motion due by 3/30/2017. filed by John P. Asiello, James A. Costello, Janet DiFiore, Jonathan Lippman, Eugene F. Pigott, Jr. (Attachments: # 1 Memorandum of Law, # 2 Appendix to MOL-unreported cases) (Boivin, Bruce) (Entered: 02/22/2017)

02/23/2017 8 COURT TEXT NOTICE to plaintiff advising his response to defendants' 7 MOTION to Dismiss for Failure to State a Claim is to be filed by 3/24/17. [Served by mail.] (sfp,) (Entered: 02/23/2017)

03/07/2017 9 CERTIFICATE OF SERVICE by

D8

John P. Asiello, James A. Costello,  
Janet DiFiore, Jonathan Lippman,  
Eugene F. Pigott, Jr re 7 First  
MOTION to Dismiss for Failure to  
State a Claim (Boivin, Bruce)  
(Entered: 03/07/2017)

03/20/2017 10 RESPONSE in Opposition re 7  
First MOTION to Dismiss for  
Failure to State a Claim filed by  
Xiu Jian Sun. (sfp,) (Entered:  
03/20/2017)

03/30/2017 TEXT NOTICE: The Rule 16 Initial  
Conference scheduled for April 25,  
2017 at 9:00 AM before Magistrate  
Judge Daniel J. Stewart and the  
deadline to file a proposed Civil  
Case Management Plan and  
exchange Mandatory Disclosures  
are ADJOURNED pending a  
decision on Defendants' Motion to  
Dismiss. {Copy of this Text Notice  
mailed to pro se plaintiff}. (mab)  
(Entered: 03/30/2017)

04/03/2017 COURT'S TEXT NOTICE to parties  
advising that the pending motion  
for 4/10/17 is on submit basis,  
appearances are not required.  
[Served this notice by mail.] (sfp, )  
(Entered: 04/03/2017)

04/05/2017 11 CIVIL CASE MANAGEMENT

D9

PLAN by Xiu Jian Sun. (hmr)  
(Entered: 04/07/2017)

- 04/05/2017 12 AMENDED COMPLAINT against John P. Asiello, James A. Costello, Janet DiFiore, Jonathan Lippman, Eugene F. Pigott, Jr, Eric T. Schneiderman and Bruce J. Boivin filed by Xiu Jian Sun. (Attachments: # 1 Envelope)(hmr) Modified on 4/7/2017 (hmr). (Entered: 04/07/2017)
- 04/07/2017 CLERK'S CORRECTION OF DOCKET ENTRY re 12 Amended Complaint: Clerk added "Eric T. Schneiderman and Bruce J. Boivin" after against to this docket entry. (hmr) (Entered: 04/07/2017)
- 04/07/2017 13 Summonses Issued as to Bruce J. Boivin, Eric T. Schneiderman. (Copies sent to pro se plaintiff on 4/7/2017 for service upon the defendants.) (Attachments: # 1 Summons Issued for Bruce J. Boivin) (hmr) (Entered: 04/07/2017)
- 04/07/2017 14 Letter Motion from AAG Bruce J. Boivin for John P. Asiello, James A. Costello, Janet DiFiore, Jonathan Lippman, Eugene F. Pigott, Jr requesting that the court conduct a sua sponte review of the

D10

amended complaint for legal sufficiency and stay the time for defendants to respond to the amended complaint submitted to Judge McAvoy . (Attachments: # 1 Appendix unreported case referenced in letter) (Boivin, Bruce) (Entered: 04/07/2017)

04/10/2017 Minute Entry: MOTION CALENDAR held 4/10/2017 before Sr. District Judge Thomas J. McAvoy in Albany, NY: APP/CR/CRD: None. Defts Costello, Lippman, DiFiore, Asiello & Pigott, Jr.'s 7 First MOTION to Dismiss for Failure to State a Claim – TAKEN ON SUBMIT. (cml) (Entered: 04/10/2017)

04/10/2017 15 AFFIDAVIT of Service for "Notice of Appearance" served on U.S. District Court on 4/3/17. (sfp, ) (Entered: 04/10/2017)

04/10/2017 16 AFFIDAVIT of Service for "Notice of Appearance" served on Bruce J. Boivin on 4/3/17. (sfp, ) (Entered: 04/10/2017)

04/13/2017 17 TEXT ONLY ORDER denying Defendants 14 Letter Request requesting that the court conduct

D11

a sua sponte review of the amended complaint for legal sufficiency and stay the time for defendants to respond to the amended complaint; SO ORDERED-Authorized on 4/13/2017 by Sr. District Judge Thomas J. McAvoy (cml) [CRD traditionally served this text only order upon non-NEF pltf @ 54-25 153rd St., 2nd Floor, Flushing, NY 11355 address] (Entered: 04/13/2017)

- 04/17/2017 18 ORDER denying as moot deft's 7 Motion to Dismiss for Failure to State a Claim. Signed by Senior Judge Thomas J. McAvoy on 4/17/17. (Copy served via regular mail) (sfp, ) (Entered: 04/17/2017)
- 04/17/2017 19 Proof of Service upon Bruce J. Boivin by certified mail re Summons filed by Simon Chen, server. (sfp,) (Entered: 04/17/2017)
- 04/17/2017 20 Proof of Service by certified mail upon Eric T. Schneiderman re summons filed by Simon Chen, Server. (sfp, ) (Entered: 04/17/2017)
- 05/02/2017 21 MOTION to Dismiss for Failure to State a Claim Motion Hearing set for 6/12/2017 10:00 AM in Albany

D12

before Senior Judge Thomas J. McAvoy Response to Motion due by 5/26/2017 Reply to Response to Motion due by 6/1/2017. filed by John P. Asiello, James A. Costello, Janet DiFiore, Jonathan Lippman, Eugene F. Pigott, Jr. (Attachments: # 1 Memorandum of Law in support of defendants' motion to dismiss, # 2 Appendix to MOL (unreported cases)) (Boivin, Bruce) (Entered: 05/02/2017)

05/02/2017 TEXT NOTICE to AAG Bruce Boivin, re: 21 MOTION to Dismiss for Failure to State a Claim. Please electronically file proof of service of the above document. (see) (Entered: 05/02/2017)

05/02/2017 22 CERTIFICATE OF SERVICE by John P. Asiello, James A. Costello, Janet DiFiore re 21 MOTION to Dismiss for Failure to State a Claim (Boivin, Bruce) (Entered: 05/02/2017)

05/04/2017 23 COURT TEXT NOTICE to plaintiff advising his response to defendants' 21 MOTION to Dismiss for Failure to State a Claim is to be filed by 5/26/17. [Served by mail.] (sfp, ) (Entered: 05/04/2017)

D13

- 05/22/2017 24 RESPONSE in Opposition re 21 MOTION to Dismiss for Failure to State a Claim filed by Xiu Jian Sun. (sfp, ) (Entered: 05/22/2017)
- 05/23/2017 25 REPLY to Response to Motion re 21 MOTION to Dismiss for Failure to State a Claim filed by John P. Asiello, James A. Costello; Janet DiFiore, Jonathan Lippman, Eugene F. Pigott, Jr. (Boivin, Bruce) (Entered: 05/23/2017)
- 06/05/2017 TEXT NOTICE to parties advising that the pending motion for 6/12/17 is on submit basis, appearances are not required. [Served by mail.] (sfp, ) (Entered: 06/05/2017)
- 06/12/2017 Minute Entry: MOTION CALENDAR held 6/12/2017 before Sr. District Judge Thomas J. McAvoy in Albany, NY: APP: None; CR: T. Casal; CRD/mcp. Defts Costello, Lippman, DiFiore, Asiello & Pigott, Jr.'s 21 MOTION to Dismiss for Failure to State a Claim - TAKEN ON SUBMIT. (cml) (Entered: 06/12/2017)
- 07/17/2017 26 DECISION AND ORDER granting Defts' 21 Motion to Dismiss 21

D14

Amended Complaint with leave to re-plead. Pltf may file a Second Amended Complaint by 8/7/17. Failure to file a Second Amended Complaint by 8/7/17 will cause the Court to consider the case dismissed. Signed by Senior Judge Thomas J. McAvoy on 7/17/17. (Copy served via regular mail) (sfp, ) (Entered: 07/17/2017)

07/26/2017 27 NOTICE OF APPEAL as to 26 Order on Motion to Dismiss for Failure to State a Claim, by Xiu Jian Sun. Filing fee \$ 505, receipt number SYR049869. (sfp,) (Entered: 07/27/2017)

07/27/2017 28 ELECTRONIC NOTICE AND CERTIFICATION sent to US Court of Appeals re 27 Notice of Appeal. [Served by mail.] (sfp,) (Entered: 07/27/2017)

08/11/2017 29 FINAL JUDGMENT in favor of Defendants against Plaintiff Xiu Jian Sun dtd 8/11/2017 (cml) [ CRD traditionally served via regular & certified mail [ USPS 7016 2140 0000 0974 3503] upon non-NEF pltf @ 54-25 153rd Street, 2nd Floor, Flushing, NY 11355 address] (Entered: 08/11/2017)

D15

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page10 of 223  
Case 1:17-cv-00063- TJM-DJS Document 1  
Field 01/23/17 Page 1 Of 3

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page54 of 223  
Case 1:17-cv-00063- TJM-DJS Document 5-6  
Field 02/02/17 Page 1 Of 3

UNITED STATES DISTRICT COURT NORTHERN  
DISTRICT OF NEW YORK

\_\_\_\_\_x

The Church of Jesus Christ of Latter-day saints

Servant:

Xiu Jian Sun, the spiritual Adam                      1:17-cv-63  
Plaintiff                                                      TJM-DJS

Vs.

|                      |                            |
|----------------------|----------------------------|
| Pharisees:           | COMPLAINT                  |
| JOHN P. ASIELLO      | JURY TRIAL DEMANDED        |
| JONATHAN LIPPMAN     |                            |
| JANET DIFIORE        | U.S. DISTRICT.N.D. OF N.Y. |
| EUGENE F. PIGOTT, JR | FILED                      |
| JAMES A. COSTELLO    | JAN 23 2017                |
| Defendants           | AT—O'CLOCK—                |
|                      | Lawrence K. Baerman.       |
|                      | Clerk. Syracuse            |

\_\_\_\_\_x

TO UNITED STATES DISTRICT COURT NORTHERN

DISTRICT OF NEW YORK

The complaint of the plaintiff, -god's servant, Xiu Jian Sun, the spiritual Adam respectfully shows and alleges as follows

1. At all times hereinafter mentioned, plaintiff, Xiu Jian Sun, the spiritual Adam, is a resident of the State of New York, living at 54-25 153rd St., 2FL Flushing NY 11355.
2. Pharisees:
  - 2-1. At all times hereinafter mentioned, defendant, John P. Asiello, located at 20 Eagle St., Albany, NY 12207; (518) 455-7700, (Docket No. 2015-00029, Index No. 9436-2014, STATE OF NEW YORK DEPARTMENT OF MOTOR VEHICLES; File No: 4932-2014, Docket No. 2014-08945, Defendants William Yeung and Law Office of Yeung & Wang PLLC; Docket No. 2014-00693, Index Number: 2728-2013, Wu Hua Jing M.D. PHD & Dustin T. Nguyen M.D; Betty Law & Wan J. Law Docket No. 2015-06399, Index Number: 13994-2014; Dick Bailey Service INC, Bill & Lynne Bailey Docket No. 2016-00379, Index Number: 11709-2015) .
  - 2-2. At all times hereinafter mentioned, defendant, Jonathan Lippman, located at 20 Eagle St., Albany, NY 12207; (Docket No. 2015-00029; Index No.

D17

9436-2014, STATE OF NEW YORK  
DEPARTMENT OF MOTOR VEHICLES) .

- 2-3. At all times hereinafter mentioned, defendant, Eugene F. Pigott, JR, located at 20 Eagle St., Albany, NY 12207; (File No: 4932-2014, Docket No.2014-08945, Defendants William Yeung and Law Office of Yeung & Wang PLLC) .
- 2-4. At all times hereinafter mentioned, defendant, James A. Costello, located at 20 Eagle St., Albany, NY 12207; ( File No: 4932-2014, Docket No.2014-08945, Defendants William Yeung and Law Office of Yeung & Wang PLLC) .
- 2-5. At all times hereinafter mentioned, defendant, Janet DiFiore, located at 20 Eagle St., Albany, NY 12207; (Docket No. 2014-00693, Index Number: 2728-2013, Wu Hua Jing M.D. PHD & Dustin T. Nguyen M.D).
3. In the nights between March 7th and 8th, 2016, the Lord god of host Jehovah sent the messenger said to servant (Plaintiff) though the angel, "Secret gang organization(秘密帮派组织)."
4. The Lord god of hosts sent messenger through the angel said to servant: 'Pharisees don't even open the door'. (Words given on the date of October 5th,

2015, on the way home from the court. (法利赛人连门都不开).

5. Jehovah, the Lord god of host, sent the son of god, (the revived Messiah) from God's temple gave words to servant, said:' Pharisees not even move a finger of his." (法利赛的人一个手指头都不动) .
6. Jehovah,- the Lord god of host gives the words to servant (Plaintiff) in the temple he made, "Trial with god's law. Apply for jury to prevent insult and unfair behavior."
7. I (servant) would like to request a Mandarin Chinese court interpreter for my appeal court day.

Dated: Queens New York  
January, 18 2017

The Church of Jesus Christ of Latter-day saints

Servant: Xiu Jian Sun, the spiritual Adam  
Xiu Jian Sun, the spiritual Adam  
54-25 153rd St 2FL  
Flushing, NY 11355  
646-675-0308  
Plaintiff

D19

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page13 of 223

Case 1:17-cv-00063- TJM-DJS Document 1-1  
Field 01/23/17 Page 1 Of 2

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page52 of 223  
Case 1:17-cv-00063- TJM-DJS Document 5-5  
Field 02/02/17 Page 1 Of 2

### **CIVIL COVER SHEET**

JS 44 (Rev. 07116) **CV 16-3937**

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law. except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974. is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRCCTIONS ON NEAT PAGE OF THIS FORM)

#### **1. (a) PLAINTIFFS**

**The Church of Jesus Christ of Latter-day saints**  
**Servant: Xiu Jian Sun, the spiritual Adam**

(b) County of Residence of First Listed Plaintiff Queens

(c:) Attorneys (Firm Name, Address, and Telephone Number)

DEFFNDANTS; John P. Asiello; Jonathan Lippman  
Janet Difiore; Eugene F. Pigott, JR; James A. Costello;

D20

County of Residence of First Listed Defendant Albany  
(IN U.S. PLAINTFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE  
THE LOCATION OF THE TRACT OF LAND  
INVOLVED.

Attorneys (If Known)

**II. BASIS OF JURISDICTION** (Place an "X" in One  
Box Only

- ☐ 1 U.S. Government Plaintiff  
☐ 2 U.S. Government Defendant  
☐ 3 Federal Question (U.S. Government Not a Party)  
☐ 4 Diversity (Indicate Citizenship of Parts in Item III)

**III. CITIZENSHIP OF PRINCIPAL PARTIES**  
(Place an "X" in One Box for Plaintiff and One Box for  
Defendant)

|                                                                  | PTF                        | DEF                        |
|------------------------------------------------------------------|----------------------------|----------------------------|
| Citizen of This State                                            | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 |
| Citizen of Another State                                         | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 |
| Citizen of Subject of a Foreign Country                          | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 |
| Incorporated or Principal Place<br>of Business In Another State  | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Incorporated and Principal Place<br>of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Foreign Nation                                                   | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

**IV. NATURE OF SUIT** (Place an "X" in One Box Only)

**CONTRACT**  
☐ 110 Insurance

**TORTS**  
**RSOSAL INJURY**

# D21

|                                |                        |
|--------------------------------|------------------------|
| __ 120 Marine                  | __ 310 Airplane        |
| __ 130 Miller Act              | __ 315 Airplane        |
| __ 140 Negotiable Instrument   | Product Liability      |
| __ 150 Recovery of             | __ 320 Assault Libel   |
| Overpayment &                  | & Slander              |
| Enforcement Judgment           | __ 330 Federal         |
| __ 151 Medicate Act            | Employees Liability    |
| __ 152 Recovery of Defaulted   | __ 340 Marine          |
| Student Loans (Excludes        | __ 345 Marine Product  |
| Veterans)                      | Liability              |
| __ 153 Recovery of             | __ 350 Motor Vehicle   |
| Overpayment of                 | __ 355 Motor Vehicle   |
| Veteran's Benefits             | Product Liability      |
| __ 160 Stockholders Suits      | __ 360 Other Personal  |
| __ 190 Other Contract          | Injury                 |
| __ 195 Contact Product         | __ 362 Personal Injury |
| Liability                      | Medical Malpractice    |
| __ 196 Franchise               | RSOSAL INJURY          |
| REAL PROPERTY                  | __ 365 Personal Injury |
| __ 210 Land Condemnation       | Product Liability      |
| __ 220 Foreclosure             | __ 367 Health Card     |
| __ 230 Rent Lease              | Pharmaceutical         |
| __ 240 Torts to Land           | Personal Injury        |
| __ 245 Tort Product Liability  | Product Liability      |
| __ 290 All Other Real Property | __ 368 Asbestos        |
|                                | Personal Injury        |
|                                | Product Liability      |
| CIVIL RIGIITS                  | RSOSAL PROPERTY        |
| __ 440 Other Civil Rights      | __ 370 Other Fraud     |
| __ 441 Voting                  | __ 371 Truth in        |
| __ 442 Employment              | Lending                |
| __ 443 Housing /               | __ 380 Other Personal  |

D22

|                         |                  |
|-------------------------|------------------|
| Accommodations          | Property Damage  |
| ___ 445 Amer w /        | ___ 385 Property |
| Disabilities-Employment | Damage Product   |
| ___ 446 Amer w /        | Liability        |
| Disabilities-Other      |                  |
| ___ 448 Education       |                  |

|                      |                       |
|----------------------|-----------------------|
| FORFEITURE/PENALTY   | BANKRUPTCY            |
| ___ 625 Drug Related | ___ 422 Appeal 28 USC |
| Seizure of Property  | 158                   |
| 21 USC 881           | ___ 423 Withdrawal 28 |
| ___ 690 Other        | USC 157               |

OTHER STATUTES

|                                                                               |
|-------------------------------------------------------------------------------|
| ___ 375 False Claims Act                                                      |
| ___ 376 Qui Tarn (31 USC 3729(a))                                             |
| ___ 400 State Reappointment                                                   |
| ___ 410 Antitrust                                                             |
| ___ 430 Banks and Banking                                                     |
| ___ 450 Commerce                                                              |
| ___ 460 Deportation                                                           |
| ___ 470 Racketeer Influenced and Corrupt<br>Organizations                     |
| ___ 480 Consumer Credit                                                       |
| ___ 490 Cable/Sat TV                                                          |
| ___ 850 Securities/Commodities/Exchange                                       |
| ___ 890 Other Statutory Actions                                               |
| ___ 891 Agricultural Acts                                                     |
| ___ 893 Environmental Mailers                                                 |
| ___ 895 Freedom of Information Act                                            |
| ___ 896 Arbitration                                                           |
| ___ 899 Administrative Procedure Act / Review of<br>Appeal of Agency Decision |
| ___ 950 Constitutionality of State Statutes                                   |

PROPERTY RIGHTS

- 820 Copyrights
- 830 Patient
- 840 Trademark

SOCIAL SECURITY

- 861 HIA (1395(F))
- 862 Black Lung (923)
- 863 DIWC/DIWW (405(g))
- 864 SSID Title XVI
- 865 RSI (405(g))

LABOR

- 710 Fair Labor Standards Act
- 720 Labor/Management Relations
- 740 Railway Labor Act
- 751 Family and Medical Leave Act
- 790 Other Labor Litigation
- 791 Employee Retirement Income Security Act

PRISONER PETITIONS

- 463 Alien Detainee
- 510 Motions to Vacate Sentence
- 530 General
- 535 Death Penalty Other
- 540 Mandamus & Other
- 550 Civil Rights
- 555 Prison Condition
- 560 Civil Detainee Conditions of Confinement

FEDERAL TAX SUITS

- 870 Taxes (U.S. Plaintiff or Defendant)
- 871 IRS-Third Party 26 USC 7609

IMMIGRATION

- 462 Naturalization Application
- 465 Other Immigration Actions

**V. ORIGIN** (Place an "X" in One Box Only)

- ☒ Original Proceeding  
☐ 2 Removed from Stale Court  
☐ 3 Remanded from Appellate Court  
☐ 4 Reinstated or Reopened  
☐ 5 Transferred from Another District  
☐ 6 Multidistrict Litigation

**VI. CAUSE OF ACTION**

Brief description of cause:

**Secret gang organization; Pharisees don't even open the door; Pharisees not even move his one finger.**

**VII. REQUESTED IN COMPLAINT:**

☒ CHECK IF THIS IS A CLASS ACTION  
UNDER RULE 23. F.R. Cv P  
DEMAND \$

CHECK YES only if demanded in complaint  
JURY DEMAND: ☒ Yes ☐ No

**VIII. RELATED CASE(S) IF ANY**

JUDGE: \_\_\_\_\_

DOCKET NUMBER: 2015-00029, 2014-08945,

2014-00693, 2015-06399, 2016-00379

SIGNATURE OF ATTORNEY OF RECORD

DATE: 07/15/2016

FOR OFFICE USE ONLY

RECEIPT # \_\_\_\_\_

AMOUNT 400.00

JUDGE TJM

SYRO48146

APPLYING IFF No

MAG. JUDGE DJS

1:17-cv-63-001

D25

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page14 of 223

Case 1:17-cv-00063- TJM-DJS Document 1-1 Field  
01/23/17 Page 2 Of 2

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page53 of 223

Case 1:17-cv-00063- TJM-DJS Document 5-5 Field  
02/02/17 Page 2 Of 2

JS 44 Reverse (Rev. 12/12)

INSTRUCTIONS FOR ATTORNEYS COMPLETING  
CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings filed service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows;

1.(a) **Plaintiffs-Defendants.** Enter names (last, first, middle initial)of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or

defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) **County or Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) **Attorneys,** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

**II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.

United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.

United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.

Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the

United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.

Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked, (See Section III below **NOTE: federal question actions take precedence over diversity cases.**)

**III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

**IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

**V. Origin.** Place an "X" in one of the six boxes.

Original Proceedings. (1) Cases which originate in the United States district courts.

Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.

Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.

Reinstated or Reopened. (4) Check this box for cases

reinstated or reopened in the district court. Use the reopening date as the filing date. Transferred from Another District. (S) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers. Multidistrict Litigation. (6) Check. this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

VI. Cause of Action. Report the civil statute directly related to the cause of action and give a brief description of the cause. Do not cite jurisdictional statutes unless diversity. Example: U.S. Civil Statute: 47 USC SSJ Brief Description: Unauthorized reception of cable service

**VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P. Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction. Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

**VIII. Related Cases,** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

D29

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page16 of 223

Case 1:17-cv-00063- TJM-DJS Document 2  
Field 01/23/17 Page 1 Of 2

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page43 of 223

Case 1:17-cv-00063- TJM-DJS Document 5  
Field 02/02/17 Page 2 Of 2

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page18 of 223

Case 1:17-cv-00063- TJM-DJS Document 2-1  
Field 01/23/17 Page 1 Of 2

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page45 of 223

Case 1:17-cv-00063- TJM-DJS Document 5-1  
Field 02/02/17 Page 2 Of 2

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page20 of 223

Case 1:17-cv-00063- TJM-DJS Document 2-2  
Field 01/23/17 Page 1 Of 2

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page47 of 223

Case 1:17-cv-00063- TJM-DJS Document 5-2  
Field 02/02/17 Page 2 Of 2

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page22 of 223

Case 1:17-cv-00063- TJM-DJS Document 2-3  
Field 01/23/17 Page 1 Of 2

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page49 of 223

Case 1:17-cv-00063- TJM-DJS Document 5-3

D30

Field 02/02/17 Page 2 Of 2

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page24 of 223

Case 1:17-cv-00063- TJM-DJS Document 2-4  
Field 01/23/17 Page 1 Of 2

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page51 of 223

Case 1:17-cv-00063- TJM-DJS Document 5-4  
Field 02/02/17 Page 2 Of 2

AO 440 (Rev. 12/09) Summons in a Civil Action

**UNITED STATES DISTRICT COURT  
for the Northern District of New York**

---

Xiu Jian Sun  
Plaimiff

Civil Action No.  
1:17-CV-63(TJM/DJS)

v.

John P. Asiello; Jonathan  
Lippman; Janet DiFiore;  
Eugene F. Pigott, Jr. and  
James A. Costello  
Defendant

---

**SUMMONS IN A CIVIL ACTION**

To: (Defendant's name and address)

John P. Asiello  
20 Eagle Street, Albany, New York 12207

Jonathan Lippman  
20 Eagle Street, Albany, New York 12207

D31

Janet DiFiore  
20 Eagle Street, Albany, New York 12207

Eugene F. Pigott, Jr.  
20 Eagle Street, Albany, New York 12207

James A. Costello  
20 Eagle Street, Albany, New York 12207

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it)- or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed R. Civ. P. 12 (a)(2) or (3)-you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Xiu Jian Sun, a/k/a the spiritual Adam  
54-25 153rd Street, 2nd Floor.  
Flushing, NY 11355

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Date: 01/23/2017

CLERK OF COURT

s/ Joanne Bleskoski, Deputy Clerk

Signature of Clerk or Deputy Clerk

D32

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page 26 of 223

Case 1:17-cv-00063- TJM-DJS Document 3  
Filed 01/23/17 Page 1 of 14

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page 106 of 223

Case 1:17-cv-00063- TJM-DJS Document 11  
Filed 04/05/17 Page 1 of 14

**UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF NEW YORK**

**NOTICE**

**THE ATTACHED FILING ORDER IS A TIME  
SENSITIVE DOCUMENT**

This filing order is to be served on all parties to the action along with the complaint or petition for removal within sixty (60) days of filing this action.

The attached Civil Case Management Plan must be completed and filed with the clerk no later than seven (7) days prior to the conference date referenced below.

**CONFERENCE DATE/TIME: April 25, 2017, at 9:00  
AM**

**CONFERENCE LOCATION: Albany, New York**

**BEFORE MAGISTRATE JUDGE: DANIEL J. STEWART**

D33

CONTENTS:

General Order #25 (Filing Order)

Case Management Plan

Case Assignment/Motion Schedules and Filing  
Locations

Consent Form to Proceed before U.S. Magistrate  
Judge

**NOTE: ALL CIVIL ACTIONS SHALL BE REFERRED INTO THE NORTHERN DISTRICT'S PILOT MANDATORY MEDIATION PROGRAM EXCEPT THOSE CASES THAT HAVE BEEN DESIGNATED AS EXEMPT UNDER SECTION 2.1 (A) OF GENERAL ORDER #47.** If the ADR track below has been checked, this case will be referred into the Mandatory Mediation Program. Counsel are directed to review the Pilot Mandatory Mediation Plan prior to the Rule 16 Conference. Please refer to General Order #47 - Pilot Mandatory Mediation Program which is available on the Court's website at [www.nynd.uscourts.gov](http://www.nynd.uscourts.gov).

x Conventional Track

U.S. DISTRICT.N.D. OF N.Y.

FILED

APR - 05 2017

AT—O'CLOCK—

Lawrence K. Baerman. Clerk. Syracuse

D34

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page27 of 223  
Case 1:17-cv-00063- TJM-DJS Document 3  
Field 01/23/17 Page 2 Of 14

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page107 of 223  
Case 1:17-cv-00063- TJM-DJS Document 11  
Field 04/05/17 Page 2 Of 14

**UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF NEW YORK**

**GENERAL ORDER #25**

**I. PURPOSE**

It is the policy of this court to help litigants resolve their civil disputes in a just, timely and cost-effective manner. To that end, this court has adopted an Expense and Delay Reduction Plan in accordance with the Civil Justice Reform Act of 1990. This will tailor the level of individualized case management needs to such criteria as case complexity, and the amount of time reasonably needed to prepare the case for trial.

**II. SCOPE**

This order applies to all civil cases filed in this court except: multi-district litigation, case remanded from the appellate court, reinstated and reopened cases, and cases in the following Nature of Suit (NOS) categories indicated on the JS44 Civil Cover Sheet: Prisoner Petitioners (463,510-560), Forfeiture/Penalty (625,690), Bankruptcy Appeals (422,423), Social Security Appeals (861-865), Contracts (only NOS 150,151,152,153, and

other contract actions which involve the collection of debts owed to the United States), and Real Property (only NOS 220).

\*Note - When the Court deems it appropriate, Rule 16 Scheduling Conferences will be held in the above excepted actions.

The Court has adopted the guidelines of civility as outlined in the New York State Bar Association Guidelines on Civility in Litigation, a copy of which is available on the courts web-site at [www.nynd.uscourts.gov](http://www.nynd.uscourts.gov).

### **III.SERVICE**

**A. Timing:** When serving a Complaint or Notice of Removal, the filing party shall serve on all other parties a copy of this General Order and the attached materials. Service of process should be completed within **Sixty (60)** days from the initial filing date. This expedited service is necessary to fulfill the dictates of the Civil Justice Reform Act Expense and Delay Reduction Plan of this court and to ensure adequate time for pretrial discovery and motion practice. However, in no event shall service of process be completed after the time specified in Fed. R. Civ. P. 4, or any other Rule or Statute which may govern service of process in a given action.

**B. Filing Proof(s) of Service:** Proof(s) of service of process are to be filed with the clerk's office no later than five (5) days after service of the complaint or notice of removal with a copy of this General Order.

**C. Non Compliance with Sixty (60) Day Service Requirement:**In the event that the filing party cannot comply with the Sixty (60) day service requirement,

requirement, that party shall immediately notify the assigned Magistrate Judge and request an adjournment of the initial Rule 16 case management conference date contained in the attached Civil Case Management Plan.

If an adjournment of the conference date is granted, it shall be the responsibility of the filing party to notify all parties to the action of the new date, time and location for the case management conference. Proof of service of such notice shall then be immediately filed with the clerk's office.

#### **IV. ADDITIONAL PARTIES**

Any party who, after the filing of the original complaint or notice of removal, causes a new party to be joined in the action shall promptly serve on that new party a copy of General Order 25 along with any additional Uniform Pretrial Scheduling Order that has been entered by the court.

#### **V. REMOVED CASES**

In cases removed to this court from a state court, the removing defendant(s) shall serve on the plaintiff(s) and all other parties, at the time of service of the notice of removal, a copy of this General Order with the attached materials. The filing of a motion for remand does not relieve the moving party of any obligation under this General Order unless the assigned judge or magistrate judge specifically grants such relief.

#### **VI. TRANSFERRED CASES**

The clerk shall serve a copy of this General Order on all parties that have appeared in any action transferred to this district. The clerk shall set a return

date for the initial Rule 16 case management conference on the form attached to the General Order. It shall be the obligation of the plaintiff or plaintiff's counsel to arrange for completion of the attached Case Management Plan and to file the Plan with the clerk and to serve this General Order upon any party who had not appeared in the action at the time of transfer.

Attorneys appearing in transferred cases are reminded of their obligation to be properly admitted to this district in accordance with Local Rule 83.1. Attorneys must also be registered for electronic filing. Refer to Section XII of this General Order.

#### **VII. MATERIALS INCLUDED WITH THIS GENERAL ORDER PACKET**

- A) Notice of Initial Rule 16 Case Management Conference
- B) Civil Case Management Plan
- C) Case Assignment Form
- D) Notice and Consent Form to Exercise of Jurisdiction by a United States Magistrate Judge

#### **VIII. ADR PROGRAMS**

It is the mission of this court to do everything it can to help parties resolve their disputes as fairly, quickly, and efficiently as possible. The Court has adopted a Mandatory Mediation Program - see General Order #47 available on the Court's website. All civil cases that are not exempt under General Order #47 and are filed after January 1, 2014, as well as all cases where a Rule 16 Conference is scheduled after January 1, 2014, will be placed into the Mandatory Mediation Program. The Court may also refer other pending cases into the

Mandatory Mediation Program. The parties are directed to review the Mandatory Mediation Plan requirements prior to the Rule 16 Pretrial Conference. At the Rule 16 Pretrial Conference, the assigned Magistrate Judge will set a deadline for the completion of Mediation under General Order #47. The referral of a case to the Mandatory Mediation Program does not delay or defer other dates established in the Scheduling Order and has no effect on the scheduled progress of the case toward trial.

**A) Settlement Conferences:**

The parties are advised that the court will honor a request for a settlement conference at any stage of the proceeding. A representative of the parties with the authority to bind the parties must be present with counsel or available by telephone at any settlement conference.

**B) Consent to Jury or Court Trial Before A United States Magistrate Judge:**

By written stipulation, the parties to any civil action may elect to have a magistrate judge (instead of the assigned Article III judge) conduct all proceedings in any civil case, including presiding over a jury or bench trial. A trial before a magistrate judge is governed by the same procedural and evidentiary rules as trial before a district judge. The right to appeal is automatically preserved to the United States Court of Appeals under the same standards which govern appeals from an Article III judge. Parties often consent to resolution of their civil disputes by magistrate judge bench or jury trial because magistrate judges have less crowded calendars.

## **IX: DISCOVERY**

**A. Discovery Motions:** Prior to bringing a discovery dispute to a Magistrate Judge, the parties must confer in good faith in accordance with the provisions of Local Rule 7.1(d). In addition, no non-dispositive or discovery motions should be presented to the Court unless authorized by the Magistrate Judge after communication with the Magistrate Judges' chambers.

**B. Filing Discovery:** Parties are directed not to file discovery material unless it is being filed in accordance with Local Rule 26.2.

For additional information on local requirements related to depositions and discovery please refer to Section V. of the Local Rules of this court.

## **X. MOTIONS**

**A. Motion Return Dates:** Please refer to the attached case assignment form for a complete listing of the motion return dates for the judges and magistrate judges of this court.

For additional information on local requirements related to motion practice, please refer to Local Rule 7.1.

## **XI. CASE MANAGEMENT CONFERENCE**

Except in actions exempted under Section II of this order, or when otherwise ordered by the court, the parties shall, as soon as practicable, but no later than **twenty-one (21) days** before the Rule 16 conference, confer to jointly address each item contained in the attached Case Management Plan packet. The completed plan is to be filed with the clerk not later than **seven (7) days** prior to the conference date. The

NOTICE setting the date, time, and location for the initial Rule 16 conference with the court is included as part of this filing order. Mandatory disclosures under Fed. R. Civ. P. 26(a) shall be exchanged at least **seven (7) days** prior to the conference date, unless the parties have obtained prior approval from the assigned Magistrate Judge to extend that deadline. The Civil Justice Reform Act Plan of this court requires the court to set ""early, firm"" trial dates, such that the trial is scheduled to occur within **eighteen (18) months** after the filing of the complaint, unless a judicial officer certifies that (I) the demands of the case and its complexity make such a trial date incompatible with serving the ends of justice; or (II) that trial cannot reasonably be held within such time because of the complexity of the case or the number or complexity of pending criminal cases.

## **XII. ELECTRONIC FILING**

As of January 1, 2004, all documents submitted for filing by attorneys admitted to practice in the Northern District of New York shall be filed electronically using the CM/ECF system. Refer to General Order #22 for procedures for filing documents electronically. Attorneys must be registered for both PACER and CM/ECF. Consult the CM/ECF section of the courts web-site at [www.nynd.uscourts.gov](http://www.nynd.uscourts.gov) for PACER registration, CM/ECF registration, CM/ECF training dates, and General Order #22.

## **REVISED GENERAL ORDER #25**

**Dated: June 23, 2016**

s/

**Hon. Glenn T Suddaby.**

**Chief U.S. District Judge**

- The 1/3/2010 revision added Magistrate Judge Andrew T. Baxter.
- The 4/18/2011 revision added U.S. District Judge Mae A. D'Agostino and Magistrate Judge Victor E. Bianchini.
- The 12/16/2011 revision reflects Hon. Gary L. Sharpe as Chief Judge.
- The 2/12/2012 revision added Magistrate Judge Therese Wiley Dancks.
- The 9/1/2012 revision added Magistrate Judge Christian F. Hummel.
- The 10/1/2012 revision reflects the retirement of Senior Judge Neal P. McCurn.
- The 10/25/2012 revision includes information on Mandatory Mediation - See Gen. Order #47.
- The 11/4/2013 revision includes changes to deadlines for mandatory disclosures under Fed. Rule 26(a), and changes the date for the filing of the civil case management plan from 14 days prior to the conference to 7 days prior to the conference.
- The 12/29/2014 revision added U.S. District Judge Brenda K. Sannes.
- The 10/1/2015 revision reflects Hon. Glenn T. Suddaby as Chief Judge, added Magistrate Judge Daniel J. Stewart, and reflects the retirement of Hon. Randolph F. Treece.
- The 1/1/2016 revision reflects Hon. Gary L. Sharpe taking senior status.
- The 6/23/2016 revision relates to amended G.O. #47 Mandatory Mediation Program.

D42

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page 30 of 223

Case 1:17-cv-00063- TJM-DJS Document 3  
Field 01/23/17 Page 5 Of 14

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page 110 of 223

Case 1:17-cv-00063- TJM-DJS Document 11  
Field 04/05/17 Page 5 Of 14

**CIVIL CASE MANAGEMENT PLAN  
UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK**

Xiu Jlan Sun

VS

John P. Asiello, et al

No.1:17-CV-63 TJM/DJS

**IT IS HEREBY ORDERED that**, Pursuant to Rule 16(b), Federal Rules of Civil Procedure, a status and scheduling conference will be held in this case before the Honorable DANIEL J. STEWART, United States Magistrate Judge on **April 25, 2017, at 9:00 AM** at the United States Courthouse, at Room Number 406, Albany, New York.

Counsel for all parties or individuals appearing pro se in the above-captioned action are directed to confer in accordance with Fed. R. Civ. P. 26(t) with respect to all of the agenda items listed below, no later than **twenty-one (21) days** before the scheduled Rule 16 Conference. Following that Rule 26(t) meeting, a report of the results of the conference, in the format set forth below, must be filed with the clerk no later than

seven (7) days prior to the scheduled Rule 16 conference with the Court. Matters which the Court will discuss at the status conference will include the following: (insert a separate subparagraph as necessary if parties disagree):

**1) JOINDER OF PARTIES:** Any application to join any person as a party to this action shall be made on or before the 03 day of April, 2017.

**2) AMENDMENT OF PLEADINGS:** Any application to amend the pleadings to this action shall be made on or before the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

**3) DISCOVERY:** All discovery in this action shall be completed on or before the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_. (Discovery time table is to be based on the complexity of the action)

**4) MOTIONS:** All motions, including discovery motions, shall be made on or before the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_. (Non-Dispositive motions including discovery motions may only be brought after the parties have complied with Section IX of General Order #25)

**5) PROPOSED DATE FOR THE COMMENCEMENT OF TRIAL:** The action will be ready to proceed to trial on or before the 25 day of April, 2017. It is anticipated that the trial will take approximately \_\_\_\_ days to complete. The parties request that the trial be held in Albany, N.Y. (The proposed date for the commencement of trial must be within 18 months of the filing date).

6) HAVE THE PARTIES FILED A JURY DEMAND: YES (YES) /     (NO).

7) DOES THE COURT HAVE SUBJECT MATTER JURISDICTION? ARE THE PARTIES SUBJECT TO THE COURT'S JURISDICTION? HAVE ALL PARTIES BEEN SERVED?

The federal department should have jurisdiction over the place. All parties had been served.

8) WHAT ARE THE FACTUAL AND LEGAL BASES FOR PLAINTIFF'S CLAIMS AND DEFENDANT'S DEFENSES (INCLUDE COUNTERCLAIMS & CROSSCLAIMS, IF APPLICABLE)?

In the nights between March 7<sup>th</sup> and 8<sup>th</sup>, 2016, the Lord god of host Jehovah sent the messenger said to servant (Plaintiff though the angel, "Secret gang organization". (秘密帮派组织).

9) WHAT FACTUAL AND LEGAL ISSUES ARE GENUINELY IN DISPUTE?

---

10) CAN THE ISSUES IN LITIGATION BE NARROWED BY AGREEMENT OR BY MOTIONS? ARE THERE DISPOSITIVE OR PARTIALLY DISPOSITIVE ISSUES APPROPRIATE FOR DECISION ON MOTION?

Can not be done by motion or agreement.

11) WHAT SPECIFIC RELIEF DO THE PARTIES SEEK? WHAT ARE THE DAMAGES SOUGHT?

荣耀 Glory

**12) DISCOVERY PLAN:**

**A. Mandatory Disclosures**

The parties will exchange the mandatory disclosures required under Rule 26(a)(1) at least seven (7) days prior to the date of the Rule 16 conference, unless they have obtained prior approval from the assigned Magistrate Judge to extend that deadline.

---

**B. Subjects of Disclosure**

The parties jointly agree that discovery will be needed to address the following subjects:

And if any one offend openly, he or she shall be rebuked openly, that he or she may be ashamed. And if he or she confess not, he or she shall be delivered up unto the law of God; If any shall offend in secret, he or she shall be rebuked in secret, that he or she may have opportunity to confess in secret to him or her whom he or she has offended, and to God, that the church may not speak reproachfully of him or her.

**C. Discovery Sequence**

Describe the parties' understanding regarding the timing of the discovery, and state whether it is anticipated that discovery will be phased to address different issues in stages.

---

**D. Written Discovery**

Describe the written discovery demands which the parties contemplate serving under Rules 33, 34

and 36, including when they will be promulgated, that areas to be covered, and whether there is any need for any party to exceed the number of interrogatories permitted under Rule 33.

---

**E. Depositions**

Set forth the parties' expectations regarding depositions, including the approximate number to be taken, their location, a general description of the deponents, and an indication of whether any non-party fact depositions are anticipated.

---

**F. Experts**

Set forth the parties' expectations regarding the retention of experts, and identify any particular issues to be addressed by the court concerning the retention and exchange of the information regarding experts, including whether the parties seek a variance from the expert disclosure requirements of the form uniform pretrial scheduling order typically issued by the court (i.e., initial expert disclosure at least ninety days, responsive expert disclosures at least forty - five days, and rebuttal reports due at least thirty days, before the close of discovery)

---

**G. Electronic Discovery**

Set forth the parties' understanding and expectations regarding discovery of electronically stored information. This description should include any agreements reached with respect to

the retention of electronically stored information and the manner in which It will be produced, if requested. The parties. should also identify any agreements regarding the manner in which electronically stored information subject to claims of privilege or work product protection will be handled, and whether a court order will be requested, either on stipulation or otherwise, to address this issue. If an agreement has been reached on the entry of such an order, provide a brief description of the provisions which will be included in a proposed order.

---

#### **H. Protective Orders**

If the parties anticipate requesting a protective order from the court pursuant to Rule 26(c), describe the basis for the request and nature of the proposed protective order.

---

#### **I. Anticipated Issues Requiring Court Intervention**

Provide a brief description of any discovery related issues which. the parties reasonably anticipate, may require court intervention.

---

**13) IS IT POSSIBLE TO REDUCE THE LENGTH OF TRIAL BY STIPULATIONS, USE OF SUMMARIES OR STATEMENTS, OR OTHER EXPEDITED MEANS OF PRESENTING EVIDENCE? IS IT FEASIBLE AND DESIRABLE TO BIFURCATE ISSUES FOR TRIAL?**

当庭说明, 当面提呈证据, 时间是由他们的量而定; 认罪, 弃罪, 远离罪就可以缩短审判时间.

Explain in court, present the evidence face to face, time is determined by them. plea guilty, abandon the crime, stay away of crime can shorten the trial time.

**14) ARE THERE RELATED CASES PENDING BEFORE THE JUDGES OF THIS COURT?**

---

**15) IN CLASS ACTIONS, WHEN AND HOW WILL THE CLASS BE CERTIFIED?**

---

**16) WHAT ARE THE PROSPECTS FOR SETTLEMENT? Please circle below the prospect for settlement:**

1-2-3-4-5-6-7-8 9-10

(VERYUNLIKELY) ----- (LIKELY)

CANNOT BE EVALUATED PRIOR TO \_\_\_\_ (DATE)

**HOW CAN SETTLEMENT EFFORTS BE ASSISTED?**

---

(Do not indicate any monetary amounts at this time, settlement will be explored by the Magistrate Judge at the time of the initial status conference)

**COMPLETE QUESTION 17 ONLY IF YOUR FILING ORDER COVER SHEET WAS CHECKED AS AN ADR TRACK CASE -Subject to Mandatory Mediation under General Order #47.**

**17) IF YOUR CASE WAS SELECTED AS A  
QUALIFYING MANDATORY MEDIATION CASE,  
CONFIRM THAT YOU HAVE:**

A. Reviewed General Order #47? YES/NO

B. Reviewed the List of Court Approved  
Mediators available on the NDNY website?  
YES/NO

C. Prepared to discuss with the Court, at the  
conference, whether your case should be opted  
out of the program? YES/NO

D. Discussed the time frame needed to complete  
Mandatory Mediation? YES/ NO

.....  
Pursuant to Fed. R. Civ. P. 26(f) a meeting was held on  
at \_\_\_\_\_ and was attended by:  
\_\_\_\_\_ for plaintiff(s)  
\_\_\_\_\_ for defendant(s) \_\_\_\_\_ (party name)  
\_\_\_\_\_ for defendant(s) \_\_\_\_\_ (party name)

At the Rule 16(b) conference, the Court will issue an  
order directing the future proceedings in this action.  
The parties are advised that failure to comply with  
this order may result in the imposition of sanctions  
pursuant to Federal Rules of Civil Procedure 16(f).

Please detach this case management plan form and  
file electronically with the clerk no later than seven (7)  
days in advance of the conference date.

**CASE ASSIGNMENT FORM**

**UNITED STATES DISTRICT COURT FOR THE**

D50

**NORTHERN DISTRICT OF NEW YORK**

CIVIL ACTION NUMBER 1:17-CV~63. IJM/DJS

ALL CORRESPONDENCE AND FILINGS SHOULD  
BEAR THE INITIALS OF THE ASSIGNED JUDGE  
AND MAGISTRATE JUDGE IMMEDIATELY  
FOLLOWING THE CIVIL ACTION NUMBER. (IE:  
CIVIL ACTION NO 5:11-CV-0123, NAM-DEP)

DOCUMENTS SHOULD BE FILED IN  
ACCORDANCE WITH GENERAL ORDER #22.

ACTION ASSIGNED TO THE JUDGE AND  
MAGISTRATE JUDGE CHECKED BELOW:

INITIALS  
X SENIOR JUDGE THOMAS J. MCAVOY (TJM)

X MAGISTRATE JUDGE DANIEL J. STEWART  
(DJS)

**PRO SE LITIGANTS;**

**SEND ALL ORIGINAL PAPERS TO THE CLERK'**  
**a OFFICE LISTED BELOW;**

Clerk, U.S. District Court  
Federal Building & Courthouse  
15 Henry Street, Binghamton NY 13901  
All papers filed with the Court must conform to Local  
Rule 10.1

-COUNSEL

ALL DOCUMENTS SHALL BE FILED  
ELECTRONICALLY ON THE COURT'S CM/ECF

D51

SYSTEM

PLEASE REFER TO GENERAL ORDER #22  
FOR PROCEDURES FOR FILING DOCUMENTS  
ELECTRONICALLY

ALL NON-DISPOSITIVE MOTIONS ARE TO BE  
MADE RETURNABLE ON A SUBMIT BASIS  
BEFORE THE ASSIGNED MAGISTRATE JUDGE.  
•PLEASE REFER TO LOCAL RULE 7.1(b)1. •ALL  
MOTIONS FILED AND MADE RETURNABLE  
BEFORE MAGISTRATE JUDGES WILL BE TAKEN  
ON A SUBMIT BASIS UNLESS: THE PARTIES  
REQUEST ORAL ARGUMENT AND/OR THE COURT  
DIRECTS THE PARTIES TO APPEAR FOR ORAL  
ARGUMENTS, PROVIDED, HOWEVER, THAT  
MAGISTRATE JUDGE DAVID E. PEEBLES  
REQUIRES ORAL ARGUMENT ON ALL MOTIONS  
UNLESS THE COURT DIRECTS OTHERWISE.

**For more specific schedules please visit our  
website at: [www.nynd.uscourts.gov](http://www.nynd.uscourts.gov)**

**MONTHLY MOTION SCHEDULES**

**SENIOR JUDGE THOMAS J. MCAVOY**

10:00 AM-2<sup>ND</sup> MONDAY OF EACH MONTH AT  
ALBANY

10:00 AM-4<sup>TH</sup> FRIDAY OF EACH MONTH AT  
BINGHAMTON

**MAGISTRATE JUDGE DANIEL J. STEWART**

09:30 AM-1<sup>ST</sup> THURSDAY OF EACH MONTH AT  
ALBANY. No oral argument on scheduled motion  
return date unless judge Stewart's chambers sua

sponte directs or grants the request of any party for oral argument.

**CONSENT TO THE EXERCISE OF CIVIL  
JURISDICTION BY A MAGISTRATE JUDGE**

In accordance with the provisions of 28 U.S.C. Section 636(c), you are hereby notified that the United States Magistrate Judges of this district court, in addition to their other duties, may, upon consent of all the parties in a civil case, conduct any or all proceedings in the case, including a jury or nonjury trial, and order the entry of a final judgment.

You should be aware that your decision to consent to the referral of your case to a United States Magistrate Judge for disposition is entirely voluntary and should be indicated by counsel endorsing the attached consent form for the plaintiff(s) and defendant(s). If the form is executed by all counsel for the parties (or by the parties if appearing pro se), it should be communicated solely to the clerk of the district court. ONLY if all the parties to the case consent to the reference to a magistrate judge will either the judge or magistrate judge to whom the case has been assigned be informed of your decision.

Your opportunity to have your case disposed of by a magistrate judge is subject to the calendar requirements of the court. Accordingly, the district judge to whom your case is assigned must approve the reference of the case to a magistrate judge for disposition.

D53

In accordance with 28 U.S.C. Section 636(c) (3), an appeal from a judgment entered by a magistrate judge will be taken to the United States Court of Appeals for this judicial circuit in the same manner as an appeal from any other judgment of a district court. See Also L.R. 72.2(b) (5).

Copies of the consent form are available in any office of the clerk of the court and on the court webpage at [www.nynd.uscourts.gov](http://www.nynd.uscourts.gov)

**\*\*ATTACHED FOR YOUR CONSIDERATION IS A  
BLANK CONSENT FORM\*\***

UNITED STATES DISTRICT COURT  
for the Northern District of New York

Xiu Jian Sun

Civil Action NO.:

v.

1: 17-CV -63 (TJM/DJS)

John P. Asiello, et al

**NOTICE, CONSENT, AND REFERENCE OF A  
CIVIL ACTION TO A MAGISTRATE JUDGE**

Notice of a magistrate judge's availability. A United States magistrate judge of this court is available to conduct all proceedings in this civil action (including a jury or nonjury trial) and to order the entry of a final judgment. The judgment may then be appealed directly to the United States court of appeals like any other judgment of this court. A magistrate judge may exercise this authority only if all parties voluntarily consent.

You may consent to have your case referred to a

magistrate judge. or you may withhold your consent without adverse substantive consequences. The name of any party withholding consent will not be revealed to any judge who may otherwise be involved with your case.

Consent to a magistrate judge's authority. The following parties consent to have a United States magistrate judge conduct all proceedings in this case including the trial, the entry of a final judgment, and all post-trial proceedings.

|                 |                      |       |
|-----------------|----------------------|-------|
| Parties printed | Signatures of        | Dates |
| names           | parties or attorneys |       |

|       |       |       |
|-------|-------|-------|
| _____ | _____ | _____ |
|-------|-------|-------|

#### REFERENCE ORDER

IT IS ORDERED: This case is. referred to a United States magistrate judge to conduct all proceedings and order the entry of a final judgment in accordance with 28 U.S.C. §636(c) and Fed. R. Cir. P. 73.

Date: \_\_\_\_\_

\_\_\_\_\_  
District Judge's signature

\_\_\_\_\_  
Printed name and title

NOTE: Return this form to the clerk of the court only if you are consent to the exercise of jurisdiction by a United States magistrate judge. Do not return this form to a judge

D55

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page 40 of 223

Case 1:17-cv-00063-TJM-DJS Document 4  
Filed 01/23/17 Page 1 of 2

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page 60 of 223

Case 1:17-cv-00063-TJM-DJS Document 6  
Filed 02/03/17 Page 1 of 3

UNITED STATES DISTRICT COURT for the  
NORTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT N.D. OF N.Y.

**FILED** Notice 1:17-CV-63  
FEB-3 2017, AT \_ O'CLOCK\_  
Lawrence K. Baerman Clerk-Syracuse

Court records indicate you have elected to pursue or defend an action in this Court without the assistance of an attorney. Although the Court Clerk's Office is here to assist you with your filings, it is important to note that, by statute, **Clerk's Office personnel are prohibited from giving legal advice.**<sup>1</sup>

**Clerk's Office Personnel are not allowed to:**

- Discuss the merits of your case or any specific claim or defense;
- Discuss the application of statutes, rules or case law

---

<sup>1</sup> Section 955 of Title 28 of the United States Code specifically precludes the Clerk and his deputies from practicing law in any Court of the United States.

to individual claims or defenses;

- Express an opinion on the validity of a claim or defense or the proper forum or jurisdiction in which you should bring your claims;
- Discuss the "best" procedure to accomplish a particular objective;
- Transmit any information to a Judicial Officer except as provided in the applicable statutes and local rules;
- Interpret the meaning or effect of any order, judgment or rules of the Court.

**Clerk's Office personnel are allowed to:**

- Give you basic case information contained within the public case file (for example, public documents filed and the dates they were filed, public scheduling notices, etc.);
- Show you the various Local Rules, General Orders or other publicly available statements of Court operations without giving you an interpretation of their meaning or effect;
- Provide you with Court-approved forms and guidance materials (for example, Pro Se Manual, Local Rules, General Orders, etc.). Court personnel can also provide guidance in filling out the form but cannot tell you what information you should provide on the form;

- Provide you with information regarding general deadlines and due dates without specific reference to your case. You are responsible for deadlines and due dates applicable to your case.

### IMPORTANT REMINDERS

- When you submit papers to the Court, you must also serve a copy on every party in the action. Local Rule ("L.R.") 5.1(a).
- You must immediately notify the Court of any change of address. L.R. 10.1(b)(2). Your failure to notify the Court of a change of address may result in the involuntary dismissal of your case for failure to prosecute. Fed. R. Civ. P. 41(b); L.R. 41.2(b)
- Unless the Court specifically directs otherwise, you should not file discovery materials (for example, interrogatories and document requests) with the Court except as necessary to support a motion. L.R. 26.2.
- If your opponent files a motion and you fail to oppose it, and the moving party has met its burden, the Court may consider your failure to oppose the motion as your consent to the relief requested in that motion. L.R. 7.1(b)(3).
- If your opponent files a motion for summary judgment, it shall contain a Statement of Material Facts. Among other things, you must respond to this Statement of Material Facts by admitting and/or denying each fact asserted therein supported

with a record citation. If you do not so respond, the Court will deem that you have admitted your opponent's Statement of Material Facts, which could result in the Court viewing the facts very favorably to the opposing party. L.R. 7.1(a)(3).

- Personal Privacy Protection: It is the obligation of parties to redact, or file under seal, documents which include social security numbers, names of minor children, dates of birth, financial account numbers, home addresses, drivers license numbers, medical records, employment history, and individual financial information. L.R. 8.1

ENCLOSURES

- Copy of the Local Rules of Practice for the Northern District of New York
- Copy of the Pro Se Handbook for the Northern District of New York
- Copy of the County Lawyer Referral Guide
- Forms are available on our website - [www.nynd.uscourts.gov](http://www.nynd.uscourts.gov)

Thank you

.....  
Acknowledgment of Receipt:

Xiu Jian Sun, the spiritual Adam  
Party Signature

01/31/2017

Joanne Bleskoski

Date

Deputy Clerk

If not handed out at Public Counter - Date this Notice  
was Mailed 1/23/2017

D59

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page42 of 223

Case 1:17-cv-00063-TJM-DJS Document 2  
Filed 01/23/17 Page 2 of 2

Case 1:17-cv-00063-TJM-DJS Document 5  
Filed 02/02/17 Page 1 of 2

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page44 of 223

Case 1:17-cv-00063-TJM-DJS Document 2-1  
Filed 01/23/17 Page 2 of 2

Case 1:17-cv-00063-TJM-DJS Document 5-1  
Filed 02/02/17 Page 1 of 2

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page46 of 223

Case 1:17-cv-00063-TJM-DJS Document 2-2  
Filed 01/23/17 Page 2 of 2

Case 1:17-cv-00063-TJM-DJS Document 5-2  
Filed 02/02/17 Page 1 of 2

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page48 of 223

Case 1:17-cv-00063-TJM-DJS Document 2-3  
Filed 01/23/17 Page 2 of 2

Case 1:17-cv-00063-TJM-DJS Document 5-3  
Filed 02/02/17 Page 1 of 2

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page50 of 223

Case 1:17-cv-00063-TJM-DJS Document 2-4  
Filed 01/23/17 Page 2 of 2

Case 1:17-cv-00063-TJM-DJS Document 5-4  
Filed 02/02/17 Page 1 of 2

D60

AO 440 (Rev. 06/12) Summons in a Civil Action (Page 2)

Civil Action No. 1:17-cv-63-(TJM/DJS)

### PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (I))

This summons for (name of individual and title, if any) John P. Asiello; Jonathan Lippman; Janet DiFiore; Eugene F. Pigott, Jr. and James A. Costello was received by me on (date) 01-31-2017.

☐ I personally served the summons on the individual at (place) \_\_\_\_\_ on (date) \_\_\_\_\_; or

☐ I left the summons at the individual's residence or usual place of abode with (name) \_\_\_\_\_, a person of suitable age and discretion who resides there, on (date) \_\_\_\_\_, and mailed a copy to the individual's last known address; or

☐ I served the summons on (name of individual) \_\_\_\_\_, who is designated by law to accept service of process on behalf of (name of organization) \_\_\_\_\_ on (date) \_\_\_\_\_; or

☐ I returned the summons unexecuted because \_\_\_\_; or  
☒ Other (specify): U.S. Postal mailed

My fees are \$ 5.00 for travel and \$ 5.00 for services, for a total of \$ 10.00

D61

I declare under penalty of perjury that this information  
is true.

Date: 01/31/2017

Simon Chen

Server's signature

Simon Chen

Printed name and title

169-51th Ave.,  
Whitestone, NY 11357

Additional information regarding attempted service,  
etc:

U.S. DISTRICT COURT.N.D. OF N.Y.

FILED

FEB-2 2017

AT \_ O'CLOCK\_

Lawrence K. Baerman Clerk-Syracuse

D62

Case 17-2314, Document 26, 10/16/2017, 2149166,

Page63 of 223

Case 1:17-cv-00063-TJM-DJS Document 7

Filed 02/22/17 Page 1 of 2

UNITED STATES DISTRICT COURT NORTHERN  
DISTRICT OF NEW YORK

---

XIU JIAN SUN,

Plaintiff,

NOTICE OF  
MOTION TO DISMISS

-against

JOHN P. ASIELLO; JONATHAN

17-CV-0063

LIPPMANN; JANET DIFIORE;

TJM/DJS

EUGENE F. PIGOTT JR.; JAMES A.

COSTELLO,

Defendants.

---

PLEASE TAKE NOTICE that upon the complaint, the accompanying memorandum of law; and upon all prior proceedings, defendants on April 10, 2017 at 10:30 a.m., or as soon thereafter as counsel can be heard, will make a motion at the United States District Court, Northern District of New York, Albany, New York, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for an order dismissing the complaint in its entirety with prejudice, together with such other or further relief as may be just.

PLEASE TAKE FURTHER NOTICE, that

D63

pursuant to Rule 7.1(c) of the Local Rules of Practice of the United States District Court for the Northern District of New York, any papers to be submitted in opposition to the within motion must be filed with Clerk and served upon counsel for the defendants no later than seventeen (17) days before the return date of the motion, exclusive of that day.

PLEASE BE FURTHER ADVISED that if you do not respond in opposition to the motion, the motion to dismiss, if appropriate, will be granted and judgment will be entered against you. If the motion to dismiss is granted, your case will be dismissed and there will not be any trial concerning any of the issues asserted in your complaint.

Dated: Albany, New York  
February 22, 2017

ERIC T. SCHNEIDERMAN  
Attorney General of the State of New York  
Attorney for Defendants  
The Capitol  
Albany, New York 12224-0341

By: Bruce J. Boivin  
Bruce J. Boivin  
Assistant Attorney General, of Counsel  
Bar Roll No. 507894  
Telephone: (518) 776-2590  
Email: Bruce.Boivin@ag.ny.gov

To: Xiu Jian Sun  
54-25 153rd St., 2d Floor, Flushing, NY 11355

D64

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page 65 of 223  
Case 1:17-cv-00063-TJM-DJS Document 7-1  
Filed 02/22/17 Page 1 of 9

UNITED STATES DISTRICT COURT NORTHERN  
DISTRICT OF NEW YORK

---

XIU JIAN SUN,

Plaintiff,

-against

17-CV-0063

JOHN P. ASIELLO; JONATHAN  
LIPPMANN; JANET DIFIORE;  
EUGENE F. PIGOTT JR.; JAMES  
A. COSTELLO,

TJM/DJS

Defendants.

---

MEMORANDUM OF LAW IN SUPPORT OF  
DEFENDANTS' MOTION TO DISMISS

ERIC T. SCHNEIDERMAN  
Attorney General of the State of New York  
Attorney for Defendants  
The Capitol  
Albany, New York 12224-0341

Bruce J. Boivin  
Assistant Attorney General, of Counsel  
Bar Roll No. 507894  
Telephone: (518) 776-2590

Date: February 22, 2017

D65

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page 66 of 223  
Case 1:17-cv-00063-TJM-DJS Document 7-1  
Filed 02/22/17 Page 2 of 9

Table of Contents

|                                                                                              |        |
|----------------------------------------------------------------------------------------------|--------|
| Preliminary Statement. ....                                                                  | 1, D66 |
| Statement of Facts .....                                                                     | 1, D66 |
| ARGUMENT .....                                                                               | 3, D69 |
| POINT I .....                                                                                | 3, D69 |
| THE COMPLAINT FAILS TO STATE<br>A CLAIM FOR WHICH RELIEF CAN<br>BE GRANTED .....             | 3, D69 |
| POINT II .....                                                                               | 4, D70 |
| ALL OF THE DEFENDANTS ARE<br>PROTECTED FROM LIABILITY BY<br>ABSOLUTE JUDICIAL IMMUNITY ..... | 4, D72 |
| POINT III .....                                                                              | 6, D72 |
| PLAINITFF SHOULD NOT BE<br>GRANTED LEA VE TO AMEND HIS<br>COMPLAINT .....                    | 6, D72 |
| Conclusion .....                                                                             | 7, D73 |

### **Preliminary Statement**

Plaintiff filed his complaint on January 23, 2017. Dkt. No. 1. The complaint names as defendants John P. Asiello, Chief Clerk and Legal Counsel to the New York State Court of Appeals, Jonathan Lippman, Former Chief Judge of the New York State Court of Appeals, Janet DiFiore, Chief Judge of the New York State Court of Appeal, Eugene F. Pigott, Jr, former Associate Judge of the New York State Court of Appeals, and James A. Costello, former Assistant Deputy Clerk to the New York State Court of Appeals, all of whom are identified in the complaint as "Pharisees," rather than by their judicial titles. Dkt. No. 1, 2.

The complaint does not assert the purported basis of this Court's jurisdiction to entertain the complaint, alleges no facts other than assertions that "the Lord god of host Jehovah" sent plaintiff several messages through the "angel," asserts no alleged wrongful conduct by any defendant for which plaintiff seek relief, asserts no causes of action, and does not seek any relief other than the appointment of a "Mandarin court interpreter for my appeal court day." See generally, Dkt. No. 1.

Defendants now move to dismiss the complaint on the grounds that the complaint fails to assert a cause of action for which relief can be granted, and that the defendants are protected from liability on the grounds of absolute judicial immunity.

### **Statement of Facts**

In his complaint, plaintiff describes himself as the

"spiritual Adam" of the Church of Jesus Christ of Latter Day Saints. Dkt. No 1, Caption and 1. He refers to the defendants as Pharisees who are locate at 20 Eagle St, Albany, NY. The Court is respectfully requested to take judicial notice of the fact that the New York State Court of Appeals is located at 20 Eagle St., Albany, NY.

Each defendant is a current or former Judge or clerk on the New York State Court of Appeals. The complaint contains no factual allegations which assert any wrongdoing by any of the defendants, asserts no cognizable cause of action, and does not seek any damages or other relief. Rather, plaintiff asserts, partly in English and partly in, presumably, Mandarin Chinese, that "the Lord god of host Jehovah" sent a messenger, at various times an "angel" or "the son of god," and declared: "Secret Gang organization"; "Pharisees don't even open door" (sic); "Pharisees not even move a finger of his" (sic); and "Trial with god's law. Apply for jury to prevent insult and unfair behavior." Dkt. No. 1, ~~ 3-6. The only request of the Court is for the appointment of a Mandarin Chinese court interpreter for his appeal court day. Dkt. No. 1, ~ 7.

The complaint makes an oblique reference to several court cases:

[Xiu Jian Sun] v. State of New York Department of Motor Vehicles, Docket No. 2015-00029, Index No 9436-2014;

[Xiu Jian Sun] v. William Yeung and Law Office of Yeung & Wang PLLC, Docket No. 4932-2014,

Index No. 2014-08945;  
[Xiu Jian Sun] v. Wu Hua Jing, MD. PHD &  
Dustin T Nguyen MD, Docket No 2014-00693;  
Index No 2738-2013;  
[XiuJian Sun] v. Betty Law & WanJ. Law,  
Docket No. 2015-06399, Index Number  
13994-2014; and  
[Xiu Jian Sun] v. Dick Baily Services, Inc,  
Docket No. 2016-00379, Index No. 11709-2015.

Dkt. No 1, ~ 2.

The New York State Court of Appeals, in fact,  
issued decisions dismissing the following cases, sua  
sponte, on the grounds that "no substantial  
constitutional question is directly involved":

Xiu Jian Sun v. State of New York Department  
of Motor Vehicles, 26 N.Y.3d 981 (2015)  
Xiu Jian Sun v. William Yeung et al., 26 N.Y.3d  
1084 (2016)  
Xiu Jian Sun v. Wuhua Jing, etc., et al., 27 N.  
Y.3d 989; (2016)  
Xiu Jian Sun, etc., v. Dick Bailey Service, Inc.,  
et al., 28N.Y.3d 1113 (2016)

Reading the complaint liberally, and drawing all  
inferences in plaintiff's favor, it appears that the  
instant complaint was filed because plaintiff takes  
issue with the dismissal of these cases.

In addition to the instant complaint, plaintiff filed  
two similar complaints in the Eastern District of New  
York, Sun v. Cavallo, et al. (16-cv-1083) and Sun v.  
Katzmann, et al, 16-cv-3937, both of which were

dismissed as frivolous. Copies of the decision are appended hereto.

**ARGUMENT**

**POINT I**

**THE COMPLAINT FAILS TO STATE A CLAIM  
FOR WHICH RELIEF CAN BE GRANTED**

Under Rule 12(b)(6), to survive a motion to dismiss, a complaint must allege facts sufficient "to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible "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 (2009).

"In order to state a cause of action under 42 U.S.C. § 1983, a plaintiff must allege that some person acting under color of state law deprived him of a federal right." *Washington v. James*, 782 F.2d 1134, 113 8 (2d Cir. 1986). "Because vicarious liability is inapplicable to ... § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Ashcroft*, 556 U.S. at 676; see *Farid v. Ellen*, 593 F.3d 233, 249 (2d Cir. 2010). "Such allegations must further be supported with specific factual support, linking the acts of a defendant to the injuries a plaintiff suffers." *McFadden v. So/faro*, Nos. 95-CV-1148, 95-CV-3790, 1998 U.S. Dist. LEXIS 5765, at \*19 (S.D.N.Y. Apr. 23, 1998).<sup>1</sup> "A plaintiff must thus allege a tangible connection between the acts of a defendant and the

---

<sup>1</sup> A copy of the decision is appended to this memorandum of law.

injuries suffered." Bass v. Jackson, 790 F .2d 260, 263 (2d Cir. 1986).

The instant complaint falls woefully short of this standard. The body of the complaint fails to assert the jurisdictional basis of the complaint, fails to allege that any of the defendants was acting under color of law, or deprived him of any federal right. Indeed, the body of the complaint does not mention any defendant and asserts no facts about any defendant. Furthermore, the complaint fails to assert what federal right was violated and does not seek any relief.

Accordingly, the complaint must be dismissed in its entirety.

#### **POINT II**

#### **ALL OF THE DEFENDANTS ARE PROTECTED FROM LIABILITY BY ABSOLUTE JUDICIAL IMMUNITY**

Chief Judge DiFiore, former Chief Judge Lippman, and former Associate Judge Pigott are immune from suit by the doctrine of absolute judicial immunity. That immunity extends to Chief Court Clerk Asiello and former Assistant Deputy Clerk Costello, both judicial employees, who perform functions closely with the judicial process.

While it is unclear what, if any relief plaintiff seeks, the complaint is barred whether plaintiff seeks money damages or injunctive relief, by the doctrine of absolute judicial immunity.

It is well-settled that judges enjoy absolute immunity from personal liability for acts committed

within their judicial jurisdiction. *Young v. Se/sky*, 41 F. 3d 47, 51 (2d Cir 1994). Indeed:

Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in *Bradley v. Fisher*, 13 Wall. 335 (1872).

*Pierson v. Ray*, 386 U.S. 547, 553-554 (1967).

"Since the seventeenth century, the common law has immunized judges from damage claims arising out of their judicial acts. See, e.g., *Floyd v. Barker*, 77 Eng. Rep. 1305 (Star Chamber 1607) (judges of courts of record)." *Tucker v. Outwater*, 118 F. 3d 930, 932 (2d Cir. 1997). "Without insulation from liability, judges would be subject to harassment and intimidation and would thus lose that independence without which no judiciary can either be respectable or useful." *Young*, 41F.3d at 51 (internal quotations and citations omitted). The Supreme Court has repeatedly reaffirmed the principles of absolute judicial immunity, *Tucker*, 118 F. 3d at 932-933 (collecting cases). It "has also specifically applied the doctrine of judicial immunity to actions brought pursuant to 42 U.S.C. § 1983." *Id.*

The doctrine of absolute judicial immunity is so comprehensive in its scope that "absolute immunity of a judge applies however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff." *Se/sky*, 41 F. 3d at

51 (internal quotations and citations omitted).

Such immunity has been extended to judges' law clerks "who perform functions closely associated with the judicial process" when they are performing discretionary acts of a judicial nature. *Cleavinger v. Saxner*, 474 U.S. 193, 200. Indeed, "[t]his same reasoning applies to court clerks and 'others who perform functions closely associated with the judicial process' when they are performing discretionary acts of a judicial nature which are essential to the judicial process, especially the filing of court documents and managing a court's calendar. {collecting cases}." *United States ex rel. Stuyvesant v. Holder*, 2010 U.S. Dist. LEXIS 145998\*5

To the extent the complaint is seeking some form of injunctive relief, the complaint is similarly barred by the doctrine of absolute judicial immunity. "[A]s amended in 1996, § 1983 provides that 'in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.' 42 U.S.C. § 1983." *Bliven v. Hunt*, 579 F.3d 204, 209-210 (2<sup>nd</sup> Cir. 2009). Plaintiff has not alleged that a declaratory decree has been violated or that declaratory relief was unavailable. Accordingly, the defendants enjoy absolute immunity from suit and the complaint must be dismissed.

### POINT III

**PLAINTIFF SHOULD NOT BE GRANTED LEAVE TO AMEND HIS COMPLAINT**

D73

Defendants respectfully submit that the complaint is so void of facts and allegations that no effort to flesh-out the threadbare recitals will result in a complaint which states a cause of action. Additionally, as all of the defendants are entitled to absolute immunity, amendment would be futile. See *Sun v. Cavallo, et al.* (16-cv-1083) (EDNY 2016); *Sun v. Katzmman, et al.*, 16-cv-3937 (EDNY 2016). Accordingly, we respectfully request that the Court not grant leave to amend the complaint.

### **Conclusion**

For the reasons cited above, the complaint should be dismissed in its entirety with prejudice.

Dated: Albany, New York  
February 22, 2017

ERIC T. SCHNEIDERMAN  
Attorney General of the State of New York  
Attorney for Defendants  
The Capitol  
Albany, New York 12224-0341

By: s/ Bruce J. Boivin  
Bruce J. Boivin  
Assistant Attorney General, of Counsel  
Bar Roll No. 507894  
Telephone: (518) 776-2590  
Email: Bruce.Boivin@ag.ny.gov

TO: Xiu Jian Sun  
54-25 1 53rd St., 2d Floor  
Flushing, NY 11355

D74

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page 75 of 223

Case 1:17-cv-00063-TJM-DJS Document 7-2  
Filed 02/22/17 Page 2 of 27

Case 1:16-cv-01083 ENV CLP Document 39,  
Filed 03/22/2016, Page 1 of 5 PageID#: 76

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page 172 of 223

Case 1:17-cv-00063-TJM-DJS Document 21-2  
Filed 05/02/17 Page 7 of 32

**NITED STATES DISTRICT COURT EASTERN  
DISTRICT OF NEW YORK**

-----X  
XIU JIAN SUN,  
Plaintiff MEMORANDUM & ORDER  
-against- 16-cv-1083(ENV)(CLP)  
ERNEST J. CAVALLO;  
TIMOTHY J. DUFFICY; FILED  
JAGESHWAR SHARNE; IN CLERK'S OFFICE  
THOMAS P. ALIOTTA; US DISTRICT  
PAUL KENNY; COURT E.D.N.Y.  
ANGELA G. IANNACCI, J.P.; MAR 22 2016  
ANTHONY MARANO; BROOKLYN OFFICE  
FRANCESCA E. CONNOLLY, JJ;  
DICCIA T. PINEDA-KIRWAN;  
ALLAN B. WEISS; EDGAR G. WALKER; REINALDO  
E. RIVERA; COLLEEN D. DUFFY, JJ; PETER B.  
SKELOS, J.P.; THOMAS A. DICKERSON; AKWEI  
OKO ACQUAYE; WILLIAM A. VISOVICH;  
MICHELLE WESTON J.P.; DAVID ELLIOT, JJ;  
MICHAEL L. PESCE, P.J.; MARTIN M. SOLOMON,  
JJ; JERRY GARGUILO, JJ; PETER J. O'DONOGHUE;

D75

LEONARD LIVOTE; WILLIAM F. MASTRO, J.P.;  
JOHN M. LEVENTHAL; BETSY BARROS, JJ; RUTH  
C. BALKIN; HECTOR D. LASALLE, JJ; APRILANNE  
AGOSTINO;  
LEN BROWN; DAVID S. SHOTTEN; VINCENT J.  
MARTORANA; Home Address of Pharisees family:  
60 Center Street, New York, New York 10007  
Our File No: 101002/15,

Defendants.

-----X  
VITALIANO, D.J.

On March 4, 2016, plaintiff Xiu Jian Sun, identifying as "god's servant" and "the spiritual Adam," filed this pro se action against numerous defendants, most of whom are judges of various state courts, ostensibly accusing them of violating a series of Biblical-style commandments.<sup>1</sup> For the reasons set forth below, the action is dismissed.

### **Background**

Sun does not plead any facts involving any of the defendants. Rather, in a mixture of English and what is presumably Mandarin Chinese, he asserts that he was instructed by Jehovah to bring this action against defendants, whom he dubs "Pharisees" involved in a "for profit, gang organization," ostensibly created to violate a litany of commandments contained in "The Doctrine of Covenants Section 42." See Compl. at 8-9.

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<sup>1</sup> On the same day, plaintiff paid the requisite filing fee.

While plaintiff requests a Mandarin Chinese court interpreter, he does not state any cognizable cause of action, damages or relief. Id. at 8-10.

### **Standard of Review**

In reviewing a pro se complaint, a district court must remain mindful that such a "complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." Erickson v. Pardus, 551 U.S. 89, 94 (2007) (internal quotation marks and citations omitted). Nonetheless, a pro se complaint must still satisfy the minimal requirement of pleading "enough facts to state a claim to relief that is plausible on its face," Bell Atl. Corp. v. Twombly, 550 U.S. 544, 547, 127 S. Ct. 1955, 1960, 167 L. Ed. 2d 929 (2007), and thus "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 663, 129 S. Ct. 1937, 1940, 173 L. Ed. 2d 868 (2009). At the pleading stage of the proceeding, the trial court must assume the truth of "all well-pleaded, nonconclusory factual allegations" in the complaint. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 123 (2d Cir. 2010) (citing Iqbal, 556 U.S. at 678). Although all allegations contained in the complaint are assumed to be true, this tenet is "inapplicable to legal conclusions." Iqbal, 556 U.S. at 678. As a corollary, a district court should generally not dismiss a pro se complaint without granting the plaintiff leave to amend if a valid claim could be stated. See Cuoco v. Moritsugu, 222 F.3d 99, 112 (2d Cir. 2000).

These principles notwithstanding, a district court

may dismiss a pro se action sua sponte even if the plaintiff has paid the requisite filing fee, if it determines that the action is frivolous, see Fitzgerald v. First East Seventh Street Tenants Corp., 221 F.3d 263, 363-64 (2d Cir. 2000), or that it lacks subject matter jurisdiction, Fed. R. Civ. P. 12(h)(3). An action is frivolous when "the factual contentions are clearly baseless, such as when allegations are the product of delusion or fantasy." Livingston v. Adirondack Beverage Co., 141 F.3d 434,437 (2d Cir. 1998) (internal quotations and citations omitted). Put simply, "a finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible, whether or not there are judicially noticeable facts available to contradict them." Denton v. Hernandez, 504 U.S. 25, 26, 112 S. Ct. 1728, 1730, 118 L. Ed. 2d 340 (1992); see also Scanlon v. Vermont, 423 F. App'x 78, 79 (2d Cir.2011) (summary order) ("An action is frivolous if it lacks an arguable basis in law and fact – i.e., where it is 'based on an indisputably meritless legal theory' or presents' factual contentions [which] are clearly baseless.'"(quoting Neitzke v. Williams, 490 U.S. 319,327, 109 S. Ct. 1827, 1833, 104 L. Ed. 2d 338 (1989))).

### Discussion

With these standards in mind, the Court cannot discern, even under the most liberal review, what harm plaintiff allegedly suffered, what acts of defendants allegedly caused that harm and what federal rights were allegedly infringed. Montero, 171 F.3d at 761-62. Moreover, the Court cannot imagine how, given the fevered contents of the present complaint, Sun could possibly amend his pleadings to state a plausible claim.

Indeed, even if Sun were to flesh out the specifics of his grievances, he complains only that defendants have violated some religious tenet, which would not be enforceable in federal court in any case. As previously noted, such circumstances necessitate dismissal without leave to amend. Livingston, 141 F.3d at 437.<sup>2</sup>

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<sup>2</sup> An additional barrier to Sun's complaint likely arises from the fact that defendants are almost all state court judicial officers. See, e.g., Ernest J. Cavallo, Timothy J. Dufficy, Thomas P. Aliotta, Angela G. Iannacci, Anthony Marano, Francesca E. Connolly, Diccia T. Pineda- Kirwan, Allan B. Weiss, Edgar G. Walker, Reinaldo E. Rivera, Colleen D. Duffy, Thomas A. Dickerson, William A. Viscovich, Michelle Weston, David Elliot, Michael L. Pesce, Martin M. Solomon, Jerry Garguilo, Peter J. O'Donoghue, Leonard Livote, William F. Mastro, John M. Leventhal, Betsy Barros, Ruth C. Balkin, Hector D. LaSalle and Vincent J. Martorana. It is well-settled that judges have absolute immunity from suit for judicial acts performed in their judicial capacities. Mireles v. Waco, 502 U.S. 9, 11, 112 S. Ct. 286, 288, 116 L. Ed. 2d 9 (1991) per curiam) ("judicial immunity is an immunity from suit, not just from the ultimate assessment of damages.") (citation omitted); Stump v. Sparkman, 435 U.S. 349, 356, 98 S. Ct. 1099, 1105, 55 L. Ed. 2d 331 (1978). This absolute "judicial immunity is not overcome by allegations of bad faith or malice," nor can a judge "be deprived of immunity because the action he took was in error ... or was in excess of his authority." Mireles, 502 U.S. at 11 (quoting Stump, 435 U.S. at 356); Bliven v. Hunt, 579 F.3d 204, 209 (2d Cir. 2009). Although, as previously

D79

noted, plaintiff fails to state the basis for his lawsuit, any claims he may seek to raise against these defendants would likely founder on their absolute immunity and require dismissal. see Tapp v. Champagne, 164 F. App'x 106 (2d Cir. 2006) (summary order) (affirming sua sponte dismissal of claims against judges protected by absolute immunity).

### Conclusion

Accordingly, the complaint is dismissed as frivolous and leave to amend is denied as futile.

Although plaintiff has paid the filing fee to commence this action, the Court certifies pursuant to 28 U.S.C. §1915(a)(3) that any appeal from this order would not be taken in good faith and therefore in forma pauperis status is denied for the purpose of an appeal. Coppedge v. United States, 369 U.S. 438, 444-45, 82 S. Ct. 917, 920-21, 8 L. Ed. 2d 21 (1962).

The Clerk of Court is directed to enter judgment accordingly and to close this case.

So Ordered.

Dated: Brooklyn, New York  
March 19, 2016

/S/ US DJ VITALIANO

ERIC N. VITALIANO  
United States District Judge

D80

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page80 of 223

Case 1:17-cv-00063-TJM-DJS  
Document 7-2 Filed 02/22/17  
Page 7 of 27  
FILED  
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AUG 02 2016  
BROOKLYN OFFICE

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page 177 of 223

Case 1:17-cv-00063-TJM-DJS Document 21-2  
Filed 05/02/17 Page 12 of 32

UNITED STATES DISTRICT COURT EASTERN  
DISTRICT OF NEW YORK

X

XIU JIAN SUN,                      NOT FOR PUBLICATION  
Plaintiff,                              MEMORANDUM  
-against-                              AND ORDER

16- CV- 3937(LDH) (LB)

ROBERT A. KATZMANN, CATHERINE O'HAGAN  
WOLFE, ERIC N. VITALIANO, CHERYLL. POLLAK,  
DOUGLAS C. PALMER, JANET HAMILTON,  
ERNEST J. CAVALLO, AKWEI OKO ACQUAYE,  
TIMOTHY J. DUFFICY, WILLIAM A. VISOVICH,  
JAGESHWAR SHARNA, MICHELLE WESTON J.P.,  
THOMAS P. ALIOTTA, DAVID ELLIOT, JJ, PAUL  
KENNY, MICHAEL L. PESCE, P.J., MARTIN M.

SOLOMON JJ, ANGELA G. IANNACCI, J.P.; ANTHONY MARANO; JERRY GARGUILO, JJ, FRANCESCA E. CONNOLLY, JJ, PETER J. O'DONOGHUE, DICCIA T. PINEDA-KIRWAN, LEONARD LIVOTE, ALLAN B. WEISS, EDGAR G. WALKER, WILLIAM F. MASTRO, J.P., REINALDO E. RIVERA, JOHN M. LEVENTHAL, COLLEEN D. DUFFY JJ, BETSY BARROS, JJ, PETER B. SKELOS, J.P., RUTH C. BALKIN, THOMAS A. DICKERSON, HECTOR D. LASALLE, JJ, APRILANNE AGOSTINO, DAVID S. SHOTTEN, LEN BROWN, VINCENT J. MARTORANA, ZACHARY CARTER, AARON M. BLOOM, New York City Law Department Office of Corporation Counsel, DAVID LAWRENCE, III, New York State Office of the Attorney General, DANIELE DEZAGO, JAMES W. TUFFIN, Law Offices of SANTANGELO, BENVENUTO & SLATTERY, JONES HIRSCH CONNORS MILLER & BULL P.C., MICHAEL P. KELLY, ESQ., JAMES P. CONNORS, ESQ., CHARLES T. GURA, ESQ., ANGELA M. EVANGELISTA, ESQ., MARSHALL DENNEHEY WARNER COLEMAN & GOGGIN, WILLIAM YEUNG, Law Office of YEUNG & WANG PLLC, CHRISTOPHER J. BAUM, THOMAS BAILEY, BAUM & BAILEY, P.C., D. STAN O'LOUGHLIN, Attorney General's Office of ERIC T. SCHNEIDERMAN, Attorney General of State of New York ERIC T. SCHNEIDERMAN, Office of the Attorney General, Division of Appeals & Opinions, STEPHEN MULLKOFF, ESQ., DEMIDCHK LAW FIRM PLLC, BILL & LYNNE BAILEY, DICK BAILEY SERVICE INC., PHILIP O. OHENE, Attorney from PHILLIP O. OHENEESQ.,

Defendants.

X

LASHANN DEARCY HALL, United States District Judge:

On July 15, 2016, plaintiff Xiu Jian Sun, identifying as "the spiritual Adam," filed this pro se action against numerous defendants, most of whom are judges in various state and federal courts. Plaintiff paid the statutory filing fee to commence this action. For the reasons set forth below, the action is dismissed.

### BACKGROUND

Plaintiff does not provide any facts against any of the defendants named herein. Rather, Plaintiff makes the following statements:

Jehovah - the Lord of the host, sent the messenger said to servant: "Woe unto the Pharisees and the lawyers."

Jehovah - the Lord god of host gives the words to servant (Plaintiff) in the temple he made, "Trial with god's law. Apply for jury to prevent insult and unfair behavior."

(Compl. at 16, ECF No. 1). Plaintiff does not state the relief he seeks but requests a Mandarin Chinese court interpreter. (Id) The instant complaint is similar to a prior complaint that Plaintiff filed on March 4, 2016. See Xiu Jin Sun v. Cavallo, et al., No. 16-CV-1083 (ENV) (CLP). By Order dated March 19, 2016, that action was dismissed as frivolous. (Memorandum and Order, No. 16-cv-1083 (ENV) (CLP), ECF No. 39.)

## STANDARD OF REVIEW

A complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007), and "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). At the pleading stage of the proceeding, the Court must assume the truth of "all well-pleaded, nonconclusory factual allegations" in the complaint. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 123 (2d Cir. 2010) (citing *Iqbal*, 556 U.S. at 678). Although all allegations in the complaint are assumed to be true, this tenet is "inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 678. In addition, a prose complaint is "to be liberally construed," *Ahlers v. Rabinowitz*, 684 F.3d 53, 60 (2d Cir. 2012), and interpreted "to raise the strongest arguments that they suggest," *Graham v. Henderson*, 89 F.3d 75, 79 (2d Cir. 1996).

Nonetheless, a district court may dismiss a pro se action sua sponte, even if the plaintiff has paid the Court's filing fee, if it determines that the action is frivolous or that the Court lacks subject matter jurisdiction. See *Fitzgerald v. First East Seventh Street Tenants Corp.*, 221 F.3d 362, 363-64 (2d Cir. 2000) (affirming sua sponte dismissal of frivolous prose complaint where prose plaintiff had paid the required filing fee); Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject matter jurisdiction, the court must dismiss the action."). An action is frivolous when "either (1) the factual contentions are clearly baseless, such as when

allegations are the product of delusion or fantasy; or (2) the claim is based on an indisputably meritless legal theory." *Livingston v. Adirondack Beverage Co.*, 141 F.3d 434, 437 (2d Cir. 1998) (quoting *Nance v. Kelly*, 912 F.2d 605, 606 (2d Cir. 1990) (per curiam)). A finding of frivolousness is appropriate "when the facts alleged rise to the level of the irrational or the wholly incredible, whether or not there are judicially noticeable facts available to contradict them." *Denton v. Hernandez*, 504 U.S. 25, 33 (1992).

### DISCUSSION

In light of the rudimentary nature of Plaintiff's pleadings, the Court would ordinarily afford Plaintiff an opportunity to amend the complaint to provide a statement of claim that would comply with Rule 8 of the Federal Rules of Civil Procedure. However, the Court declines to afford plaintiff such an opportunity given that this is Plaintiff's second action and because nothing in the complaint gives any indication that Plaintiff has a valid claim against any of the numerous Defendants named. It is unclear what harm Plaintiff allegedly suffered, what acts by the Defendants allegedly caused that harm, and what federal rights were allegedly infringed. To the extent Plaintiff complains that any of the Defendants violated some religious tenet, such a claim is not enforceable in federal court. Moreover, to the extent Plaintiff sues state and federal judges for actions taken in their judicial capacity, those claims are dismissed as these judges would be entitled to absolute immunity. See, e.g., *Mireles v. Waco*, 502 U.S. 9, 11 (1991) (per curiam) (stating that "judicial immunity is an immunity from

suit, not just from the ultimate assessment of damages") (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)); *Bliven v. Hunt*, 579 F.3d 204, 209 (2d Cir. 2009) ("It is well settled that judges generally have absolute immunity from suits for money damages for their judicial actions.").

Accordingly, the complaint is dismissed as frivolous, see *Montero v. Travis*, 171 F.3d 757, 761-62 (2d Cir. 1999) (per curiam) and because the judicial officers named herein would be entitled to absolute immunity for any actions related to their judicial duties. *Tapp v. Champagne*, 164 F. App'x 106 (2d Cir. 2006) (summary order) (affirming sua sponte dismissal of claims against judges protected by absolute immunity).

### CONCLUSION

The complaint is dismissed as frivolous. The Court declines to grant leave to amend as it would be futile. Furthermore, this Court will not tolerate abusive, vexatious and frivolous litigation. As this is Plaintiffs second frivolous action, he is hereby cautioned that if he continues to file similar actions, he may be subject to restrictions, upon notice and opportunity to be heard, including but not limited to, the imposition of a leave-to-file requirement and monetary sanctions. See *Hong Mai Sa v. Doe*, 406 F.3d 155, 158 (2d Cir. 2005) (courts may impose sanctions, including restrictions on future access to the judicial system, if a litigant has a history of filing vexatious, harassing, or duplicative lawsuits); *Moates v. Barkley*, 147 F.3d 207, 208 (2d Cir. 1998) (per curiam) (a district court may enjoin parties from filing further lawsuits upon notice and an opportunity to be heard); *MLE Realty Assocs. v.*

D86

Handler, 192 F.3d 259, 261 (2d Cir. 1999) (same); Safir v. US. Lines, Inc., 792 F.2d 19, 24 (2d Cir. 1986) (outlining factors to be considered in imposing filing injunction).

Although Plaintiff has paid the filing fee to commence this action, the Court certifies pursuant to 28 U.S.C. §1915(a)(3) that any appeal from this order would not be taken in good faith and therefore informa pauperis status is denied for the purpose of an appeal. Coppedge v. United States, 369 U.S. 438, 444-45 (1962) (a district court may deny leave to appeal informa pauperis pursuant to 28 U.S.C. §1915(a) if the trial court certifies in writing that the appeal is not taken in good faith). The Clerk of Court is directed to enter judgment dismissing this action.

SO ORDERED

s/ LaShann DeArcy Hall  
LASHANN DEARCY HALL  
United States District Judge

Dated: Brooklyn, New York  
July, 2016

D87

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page86 of 223

Case 1:17-cv-00063-TJM-DJS Document 7-2  
Filed 02/22/17 Page 13 of 27

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page183 of 223

Case 1:17-cv-00063-TJM-DJS Document 21-2  
Filed 05/02/17 Page 18 of 32

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page184 of 223

LexisNexis® Page1

REGINALD. MCFADDEN, Plaintiff, prose, - against-  
NICHOLAS SOLFARO, ANTHONY FARINA,  
WILLIAM CLARK, JOSEPH CONJURA, MA  
YNELLE E. NOWLIN, J.C. LISKA, HUGH TRACY,  
WILLIAM SCHOENLEBER, JOHN BYRON, LOUIS  
LANTON, J. GAROFAL, JOHN STEIN, RICHARD  
MALLIN, CHRISTOPHER FALCO, TODD LAYMAN,  
FRED MALONE, ANDS. FELIX, Defendants.  
REGINALD MCFADDEN, Plaintiff, prose -against-  
PHILIP COOMBE, SR., ROBERT KUHLMAN, W.  
WILHELM, PITT (CAPT.), HEAZY (LT.), HOSKING  
(C.O.), SANOK (C.O.), KLEIN (C.O.), SENFT (C.O.),  
SACCONE (C.O.), BURLINGAME (C.O.),  
FALLER(C.O.), Defendants.

95 Civ 1148 (LBS), 95 Civ 3790 (LBS)  
UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF NEW YORK

D88

1998 U.S. Dist. LEXIS 5765

April 23, 1998, Decided

April 23, 1998, Filed

SUBSEQUENT HISTORY: Related proceeding at McFadden v. Parpan, 16 F. Supp. 2d 246, 1998 U.S. Dist. LEXIS 12922 (E.D.N.Y., 1998)

DISPOSITION: [\*1] All Defendants' Motions for Summary Judgment on all claims granted. Plaintiffs Cross-Motion for Summary Judgment denied.

COUNSEL: REGINALD MCFADDEN, Plaintiff (95 Civ 1148 (LBS)), Prose, Fallsburg, NY.

REGINALD MCFADDEN, Plaintiff (95 Civ 3790 (LBS)), Prose, Fallsburg, NY.

For Defendants (95 Civ 1148 (LBS)): WILLIAM K. KERRIGAN, MacCartney, MacCartney, Kerrigan & MacCartney, Nyack, NY.

For Defendants (95 Civ 3790 (LBS)): Michael Kennedy, DENNIS C. V ACCO, Attorney General of the State of NY, New York, NY.

JUDGES: Leonard B. Sand, U.S.D.J.

OPINION BY: Leonard B. Sand

OPINION

OPINION

April 23, 1998

SAND, District Judge.

Pro se Plaintiff Reginald McFadden ("McFadden")

brings this consolidated civil rights action<sup>1</sup> pursuant to 42 U.S.C. § 1983 against Philip Coombe, Commissioner of the State of New York Department of Correctional Services ("DOCS"), Nicholas Solfaro, Facility Administrator of the Rockland County Correctional Center ("RCCF") in New City, New York and Robert Kuhlmann, Superintendent of Sullivan Correctional Facility in Fallsburg, New York ("Sullivan") and against twenty-five corrections officers at both RCCF and Sullivan as listed in the above caption [\*2] ("Defendants").<sup>2</sup> McFadden's Amended Complaint of March 5, 1996 ("the 95 Civ. 1148 Complaint"), submitted after the consolidation of the two cases, but addressing only the claims of the original action, alleges nineteen causes of action for violations of rights under the First, Sixth, Eighth and Fourteenth Amendments as a result of alleged incidents during McFadden's period of incarceration as a pre-trial detainee at RCCF from October 1994 through April 10, 1995. McFadden's Complaint of April 30, 1995 ("the 95 Civ. 3790 Complaint") contains seven causes of action, also for violation of his constitutional rights, during his immediately subsequent period of pre-trial incarceration at Sullivan from April 10, 1995 through April 30, 1995. McFadden alleges that Defendants at Sullivan conspired to deprive him of his rights in retaliation for his filing of the original 95 Civ. 1148 lawsuit.

1 These two actions (McFadden v. Coombe, et al., 95 Civ. 1148 (LBS) & McFadden v. Solfaro, et al., 95 Civ. 3790 (LBS)), which contain related issues of law and fact, were consolidated for all purposes by order of this Court signed January 17, 1996

pursuant to Fed. R. Civ. P. 42.

[\*3]

2 The actions consolidated here involve two distinct lists of named defendants employed as corrections officers in a state and a county facility and represented by different counsel. For purposes of this consolidated motion for summary Judgment and cross-motion for summary judgment, we treat them as one group, labeled "Defendants." For the sake of clarity, however, we make specific reference to allegations cited in complaints from both actions and distinguish between the Defendants' two motions for summary judgment and other pleadings by original case number.

Plaintiff, currently an inmate at the Sullivan Correctional Facility, seeks declaratory and injunctive relief for practices he describes as abusive and unconstitutional including his placement in administrative segregation without due process of law at RCCF and at Sullivan while he was a pre-trial detainee, the conditions of his confinement at these institutions and his allegedly retaliatory transfer from RCCF to Sullivan in April 1995. He further demands compensatory and punitive damages from each Defendant. Defendants now collectively [\*4] bring two Motions for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Plaintiff, who proceeds here pro se, opposes the Defendants' Motions and has styled his own Cross-Motion as one for Summary Judgment.

In McFadden's Affidavit in Opposition to the Notice of Motion for Summary Judgment in the 95 Civ.

3790 action, he drops Defendants Pitt, Heazy (or Healy as he is sometimes called), Hosking, Sanok, Senft, Saccone, Burlingame, Klein and Faller. (McFadden Aff. in Opp'n at 3 and McFadden EST at 153.) On Plaintiffs consent, therefore, we grant these Defendants' Motion for Summary Judgment and hereby order all claims against them dismissed.

Despite the numerosity of causes of action alleged against the remaining Defendants as contained in the Complaints relevant to this consolidated action, after careful consideration, we find the action to be entirely without merit. For the reasons set forth below, we grant Defendants' Motions for Summary Judgment and deny Plaintiffs Cross-Motion.

#### **BACKGROUND**

On October 7, 1994, McFadden entered RCCF in New City, New York as a pre-trial detainee to await trial on charges of rape, robbery, burglary and kidnaping. [\*5] <sup>3</sup> Previously convicted for murder, he had been paroled after twenty-five years from the Pennsylvania prison system the same year. Early in his incarceration in Rockland County, he was moved to Nassau County Jail where he remained briefly (November 2-December 6) until he was returned to RCCF. On April 10, 1995 he was transferred from RCCF to Sullivan where he is incarcerated in the custody of DOCS at the present time.

3 He was convicted of these crimes perpetrated upon a victim from South Nyack, New York (and on subsequent additional counts of murder, rape and robbery) and sentenced to 37.5 to 75 years in

August 1995 for this incident.

In Plaintiffs two Complaints<sup>4</sup> and pleadings related to these Motions presently before us, McFadden sets forth the following facts.

4 We refer to the Amended Complaint in 95 Civ. 1148 (LBS) and the original Complaint in 95 Civ. 3790 (LBS), both of which are relevant to this consolidated case. Because this Plaintiff proceeds pro se and his Amended Complaint subsequent to the Order of Consolidation of this Court clearly does not cover the incidents alleged in 95 Civ. 3790 (LBS), though both case numbers are referenced in the caption to the Amended Complaint, we consider both pleadings in order that Plaintiff might have all his claims heard and be considered for full and final relief in this action.

[\*6] In the 95 Civ. 1148 Complaint, pertaining to events at RCCF from October 7, 1994 through April 10, 1994, Plaintiff alleges that while still a pre-trial detainee he was unjustly and arbitrarily placed in punitive "lock-in," also known as administrative segregation, separate from the general prison population at Rockland, without the requisite procedural due process. He challenges Defendants' failure to follow "the minimum standards of their own statutory and regulatory mandatory procedures." (Pl.'s 95 Civ. I 148 (LBS) Mem. of Law at 10.) Facility Administrator Solfaro is alleged to have acquiesced in this abuse. Lieutenant Liska is said to have participated in Plaintiffs unfair classification and lock-in. McFadden describes incidents in December

1994 at RCCF when he was allegedly dragged by c.o.s Layman, Stein, Mallone and Schoenleber, shackled and handcuffed, under orders from c.o. Clarke, acting under orders from Captain Anthony Farina, from his cell to the medical facility for weighing on three occasions. (95 Civ. 1148 (LBS) Compl. at 17.) McFadden asserts that the nurse's notation that he was weighed "sitting down," without any further explanation, "made it clear that force was [\*7] used." (95 Civ. 1148 (LBS) Pl.'s Mem. of Law at 22.) Defendants argue, by contrast, that McFadden's willful refusal to walk or to cooperate in any way necessitated the use of force to bring him to the medical facility. While at RCCF, McFadden asserts that he was denied proper medical care, including inattention to injuries suffered while in police custody subsequent to his arrest, and that he was exposed to and not treated for tuberculosis. Lieutenant Clark is alleged to have ordered c.o.s Lanton, Malone, Stein and Garofal to spray the Plaintiff with pepper spray on three occasions in late March of 1995. (Pl.'s EBT at 154, In. 12.) C.O. Christopher Falco is said to have aided in the "daily harassment and dehumanizing treatment" of Plaintiff. (95 Civ. 1148 (LBS) Compl. at 14.) C.o. Felix is accused of "putting human hair in my meals, dehumanizing Plaintiff with abusive names, throw [sic] coffee or juice and water into cell, keep turning on night light." (95 Civ. 1148 (LBS) Compl. at 16) In addition, in his "Third Cause of Action," Plaintiff makes a general allegation of restraint on his freedom of religious practice and belief, claiming that he was denied the right to shave his body, [\*8] a part of his religious practice.<sup>5</sup>

5     Plaintiffs chemical depilatory creme was removed from his cell in order to facilitate a court ordered hair sampling for his criminal trial. McFadden's use of the the hair remover to denude himself of any body hair made it impossible to take a sample. (Honan Aff. at P 12.)

In the 95 Civ. 3790 (LBS) Complaint, relevant to the April 10-30, 1995 stay at Sullivan, McFadden alleges that Defendants, in particular Commissioner Coombe and Superintendent Kuhlmann, unfairly conspired to transfer him on April 10, 1995 from RCCF to Sullivan to retaliate for his filing of the 95 Civ. 1148 (LBS) action and to impede the progress of this suit and limit his access to counsel in his criminal trial. He also blames these Defendants for his assignment to a Special Housing Unit ("SHU"), segregated from the general population, allegedly without due process, on charges of three disciplinary violations. Defendants contend that he was afforded the necessary due process and that the assignment was [\*9] the result of McFadden's obstreperous behavior with which the county prison found itself unable to cope. He lived in a cell in Sullivan where the water to his sink and toilet was twice temporarily cut off (April 13-17, 1995 and April 25-30, 1995) and conditions were cold and smelling of urine and excrement. He attributes the failure to remedy the water situation to Superintendent Kuhlmann and to Deputy Superintendent Wilhelm (as well as to Lieutenants Pitt, Heazy [sic] and c.o. Saccone, who have since been dropped from this suit). He claims that the water shut-off--and not any conduct on his part--gave rise to the flooding for which Plaintiff was written up and

Placed in administrative segregation. McFadden further states, in general terms, that he was denied his religious rights when he was served pork on his meal tray by c.o.s Hosking and Klein, denied permission to speak to a "member of his faith" (presumably a cleric) and prevented from prayer by the odor in his cell. These allegations are not substantiated by any additional details. McFadden also states generally that he was denied access to the law library in violation of his Sixth Amendment rights though he gives no details [\*10] with regard to this claim. Finally, guards harassed him with frequent cell searches and the use of pepper spray, activity sanctioned by Captain Farina and acquiesced in by Superintendent Solfaro. McFadden believes that his abuses suffered in prison were the result of a conspiracy among RCCF and Sullivan, then-candidate for governor, George Pataki, and Pataki's brother, as well as police officers, to frame McFadden and cover up a death caused by police.<sup>6</sup> (McFadden 95 Civ. 1148 Aff. in Opp. S.J. P 3 la.)

6 Sullivan c.o.s Hosking, Senf, Sanok and Klein were alleged during the time period relevant to 95 Civ. 3790 (LBS) to have humiliated and threatened the Plaintiff upon his intake to Sullivan and subsequently. He originally alleged that on April 25 and April 28, 1995, Defendants Saccone, Burlingame and Fuller rigorously searched his cell and took away his pen and messed up his legal papers before Plaintiff withdrew allegations against them. Plaintiff has, however, dropped his suit against these Defendants and therefore any consideration of these facts is irrelevant to the

matter before us.

[\*11] RELEVANT LEGAL STANDARDS

This Court has read pro se Plaintiffs meticulously prepared and voluminous pleadings with care and accorded them greater latitude than it would to those of a litigant represented by professional counsel. *Haines v. Kerner*, 404 U.S. 519, 520, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972), reh'g denied, 405 U.S. 948, 30 L. Ed. 2d 819, 92 S. Ct. 963 (1972); *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994) ("We read [the pro se party's] supporting papers liberally, and will interpret them to raise the strongest arguments that they suggest.") Pro se litigants are entitled to liberal construction of otherwise inartfully drafted pleadings. Though *McFadden* is what is sometimes referred to as a "vexatious litigant," known for the repeated filing of lawsuits, some of which are still sub Judice before this Court, nevertheless we have considered the instant suit with its twenty-eight defendants and twenty-six causes of action carefully, on its own merit, and read and weighed the claims in this case rigorously and with due care, applying the following apposite standards for summary judgment in the matter before us.

Summary judgment may be granted [\*12] where the moving papers and affidavits submitted by the parties "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). The role of the court is

not to resolve disputed facts, but rather to determine whether the record as a whole supports any issues that require a trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Used properly, Rule 56 is a sharp procedural weapon to ward off wasteful trials and "to isolate and dispose of factually unsupported claims," *Celotex* at 323-24 (1986). Without passing on the merits of the claims, the question therefore before us is whether the facts as alleged, if assumed to be [\*13] true, would constitute controverted facts worthy of trial and ripe for adjudication by a rational trier of fact. The central issue to be resolved in the instant motions is whether the parties have, in fact, established that no genuine issue of material fact exists relevant to 42 U.S.C. § 1983 regarding Plaintiffs' allegations of unconstitutional treatment during his incarceration as a pre-trial detainee in RCCF and Sullivan from October 7, 1994 through April 30, 1995.

When Congress enacted 42 U.S.C. § 1983, it created a civil cause of action against any person who, acting pursuant to state government authority or under the color of state law, abridges rights secured by the United States Constitution or by federal law. See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1982). In order to prevail

on a claim under § 1983, a plaintiff must prove that the defendants: (1) acted; (2) under color of state law; and (3) in a manner that deprived the plaintiff of "any rights, privileges, or immunities secured by the Constitution." 42 U.S. C. § 1983. "Section 1983 itself creates no substantive rights; it provides only a procedure for redress for the deprivation [\*14] of rights established elsewhere." *Sykes v. James*, 13 F.3d 515, 519 (2d Cir. 1993).

McFadden's claims of unconstitutional abuses in prison arise in the context of his confinement before he was convicted of those crimes for which he is now incarcerated for the rest of his life. As a result, Plaintiffs case, despite his pleading to the contrary, does not implicate the Eighth Amendment prohibition against "cruel and unusual punishment," because presumed-innocent pre-trial detainees are not subject to punishment.<sup>7</sup> A pre-trial detainee is presumed innocent and therefore cannot be punished. If he or she cannot be punished then the nature of the punishment cannot be either cruel or unusual. Rather, this action invokes an altogether different legal standard which we can apply to all of Plaintiffs claims. We are not writing on a clean slate; this action implicates a line of cases concerning the rights of pre-trial detainees held in the custody of DOCS awaiting trial. *Ingraham v. Wright*, 430 U.S. 651, 671-672 n. 40, 51 L. Ed. 2d 711, 97 S. Ct. 1401 (1977).<sup>8</sup> Generally speaking, the inquiry we undertake will examine whether Plaintiff has been subjected to punishment prior to [\*15] his conviction when, despite his prior criminal record, his innocence was still presumed. At the same time as we consider

whether those conditions amounted to punishment. The scope of this Court's review encompasses consideration of the exigencies of prison administration. There are understandably difficulties which arise from the need to house together two categories of inmates, pre- and post-trial detainees, with different rights. In assessing the conditions of confinement, we must distinguish between the rights of a pre-trial detainee and a convicted prisoner. *Bell v. Wolfish*, 441 U.S. 520, 534-535, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979); *Covino v. Vermont Dep't. of Corrections*, 933 F.2d 128, 129 (2d Cir. 1991); *Lareau v. Manson*, 651 F.2d 96, 102 (2d Cir. 1981). The absence of Eighth Amendment protection does not mean that pre-trial detainees are without recourse to complain of the conditions of their confinement. To the contrary, we review the claims of a pre-trial detainee in a state facility under the Fourteenth Amendment's Due Process clause, rather than under the Eighth Amendment, which affords him protection at least as great, if not more, than that afforded a [\*16] convicted prisoner. *Bell v. Wolfish*, 439 U.S. 816, 99 S. Ct. 76, 58 L. Ed. 2d 107 (1978). To determine whether an event or action should be construed by the courts as despotic and unlawful "punishment" for purposes of due process, the Supreme Court has guided us to ask if the event or action is imposed for the purpose of punishing or is "but an incident of some other legitimate governmental purpose." *Wolfish* at 538; *Lareau v. Manson*, 651 F.2d 96, 103 (2d Cir. 1981). Hence the applicable test here is whether the events McFadden complains of in any way constitute "punishment" in violation of his due process rights. "Not every disability imposed during pretrial

detention amounts to "punishment" in the constitutional sense, however. Once the Government has exercised its conceded authority to detain a person pending trial, it obviously is entitled to employ devices that are calculated to effectuate this detention." *Wolfish* at 537. We find that on the record before us, the conditions detailed by the Plaintiff, while perhaps unpleasant, do not rise to the level of unconstitutional punishment.

7 Pro se Plaintiff cannot be faulted for misapplying the Eighth Amendment to his case. Defendants' attorneys, however, can be.

[\*17]

8 The distinction between the rights of pre- and post-trial convicts is expounded upon in a series of Supreme Court cases, including, *inter alia*: *Bell v. Wolfish*, 441 U.S. 520, 60 L. Ed 2d 447, 99 S. Ct. 1861 (1979); *Hutto v. Finney*, 437 U.S. 678, 57 L. Ed 2d 522, 98 S. Ct. 2565 (1978); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 53 L. Ed 2d 629, 97 S. Ct. 2532 (1977); *Bounds v. Smith*, 430 U.S. 817, 52 L. Ed 2d 72, 97 S. Ct. 1491 (1977); *Meachum v. Fano*, 427 U.S. 215, 49 L. Ed. 2d 451, 96 S. Ct. 2532 (1976).

This Court is obliged to ensure that inmates, such as *McFadden*, despite a notorious criminal past, are not unlawfully subjected to punishment by the corrections system before their conviction in a court of law. Innocent until proven guilty applies with as much force to those who were, on a prior occasion, found guilty and to whom punishment has been meted out and served, as to those with a spotless record. At the same time, the Court recognizes that pre-trial

detainees are often imprisoned without bail because they represent potential security [\*18] threats to society and, similarly, to the orderly and safe administration of prison life. Corrections institutions are well within their bounds -- which the courts invade normally with reluctance and with dispatch when necessary -- in imposing the necessity of incarceration and its attendant unpleasantness on pre-trial detainees. So long as the conditions and incidents of the confinement are not "punitive," (a standard we shall explore below) but reasonably related to the institution's interest in maintaining security, safety and order, then they will be found to be constitutional.<sup>9</sup>

9 The Supreme Court has held that prison officials must be granted broad discretionary authority. "To hold ... that any substantial deprivation imposed by prison authorities triggers the procedural protections of the Due Process Clause would subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts." *Hewitt v. Helms*, 459 U.S. 460, 467, 74 L. Ed 2d 675, 103 S. Ct. 864 (quoting *Meachum v. Fano*, 427 U.S. 215, 225, 49 L. Ed 2d 451, 96 S. Ct. 2532 (1976)).

#### **[\*19] DEFENDANTS NOT PERSONALLY OR DIRECTLY INVOLVED**

At the outset, we must dismiss the action as to those captioned Defendants who, based on the facts

alleged by Plaintiff McFadden, were not personally or directly involved in any way in the actions alleged by McFadden's Complaints. In addition to those Defendants already dismissed on Plaintiff's consent, we clearly must dismiss the Complaint as to Defendants Coombe, Solfaro, Byron, Conjura, Mallin and Tracy. In order to succeed on a claim under § 1983, a plaintiff must allege direct or personal involvement in the alleged constitutional deprivations by each defendant. Such allegations must further be supported with specific factual support, linking the acts of a defendant to the injuries a plaintiff suffers. *Bass v. Jackson*, 790 F.2d 260, 263 (2d Cir. 1986). Where the Plaintiff fails to allege facts demonstrating that a particular Defendant had any direct involvement with, knowledge of, or responsibility for an alleged deprivation of his civil rights, such a claim will be dismissed with regard to such Defendant(s) as it "lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325, 104 L. Ed [\*20] 2d 338, 109 S. Ct. 1827 (1989) (discussing dismissal of frivolous actions which embrace invalid legal conclusions and fanciful factual allegations). Furthermore, with particular reference to Defendants Coombe and Solfaro, liability for damages in a § 1983 action may not be based on the doctrines of respondeat superior or vicarious liability. *Monell v. Dep't. of Social Services*, 436 U.S. 658, 691, 56 L. Ed 2d 611, 98 S. Ct. 2018 (1978); *Morales v. New York State Dep't. of Corrections*, 842 F.2d 27, 30 (2d Cir. 1988) (inmate stated no claim against prison superintendent absent allegation of a connection between inmate's injuries and any acts on the part of superintendent). Plaintiff has made Defendants Coombe and Solfaro party to

this action as a result of their titular status without concrete indications on this record of their actual participation in any of the described events.

None of these six Defendants, though named in the above caption, are alleged in these pleadings to have been directly responsible for any unconstitutional wrongs perpetrated upon the Plaintiff. Where accusations are levelled against them as, for example, against Commissioner Coombe, they are without [\*21] sufficient specificity to create any connection between the Defendant and any unconstitutional action. Sergeant John Byron is only alleged to have failed to act on plaintiff's complaints and to have refused to have given him a haircut. Defendant Joseph Conjura "was not involved in any of the abusive attacks." (95 Civ. 1148 (LBS) Compl. at 10 & 13 .) He, too, is accused only of passive participation and not of active involvement. Sergeant Richard Mallin is alleged not to have perpetrated any wrong on the Plaintiff but to have abused other inmates, which would not give rise to a claim by Plaintiff against him. (95 Civ. 1148 (LBS) Compl. 14.) Lieutenant Hugh Tracy is alleged (without anything more on the record) to have searched Plaintiffs cell, removed property and given orders to use force on the Plaintiff but not directly to have participated in any way in the use of force. (95 Civ. 1148 (LBS) Compl. at 12.) Because§ 1983 requires direct involvement in any unconstitutional actions, no triable claim has been proffered as to Lt. Tracy.

No allegation on these Complaints, no matter how generously construed, can be read to state a claim

against Defendants Coombe, Solfaro, Byron, Conjura, [\*22] Mallin and Tracy and summary judgment is granted as to these six Defendants.

**ASSIGNMENT OF PRE-TRIAL DETAINEE TO  
ADMINISTRATIVE AND DISCIPLINARY  
SEGREGATION**

We examine Plaintiffs assignment to administrative segregation at RCCF and his confinement to disciplinary segregation in an SHU at Sullivan.<sup>10</sup> We treat the two instances together, not only because they are factually somewhat similar incidents in this consolidated action, but because they are reviewed under this same legal standard. In his Complaint, Plaintiff states that "his October 8th, 1994 classification and assignment to administrative segregation was arbitrarily, erracticly [sic], unconstitutionally done in gross violation of state and federal laws, statutes and constitutions." (Pl.'s Mem. of Law at 41.) The Plaintiff complains, first, of placement in administrative segregation at RCCF without a hearing and without opportunity to challenge such a classification. He raises the question of whether the method used in his assignment, when he was still a pre-trial detainee, to administrative segregation involving 23- hour a day lock-in was, in fact, constitutional or constituted a violation of his due process rights. [\*23] (Aff. in Opp. to S.J. in 95 Civ. 1148 at P6.) He implicates primarily Lieutenants Kuhlmann and Liska in this alleged abuse.

10 The Second Circuit has previously characterized confinement in the SHU as a form of solitary

confinement. Prisoners are separated from the general population and face a loss of other benefits in addition to being restricted in their right to visitors and commissary privileges. *Walker v. Bates*, 23 F.3d 652, 655 (2d Cir. 1994), cert. denied, 515 U.S. 1157, 115 S. Ct. 2608, 132 L. Ed. 2d 852 (1995) (citing *Patterson v. Coughlin*, 761 F.2d 886, 893 (2d Cir. 1985), cert. denied, 474 U.S. /JOO, 88 L. Ed. 2d 916, 106 S. Ct. 879 (1986)); see also *McCann v. Coughlin*, 698 F.2d 112, 121-22 (2d Cir. 1982) ("An inmate who is or may be sentenced to a term of confinement in a Special Housing Unit has a right to the procedural protections of the Due Process Clause.").

Secondly, McFadden objects to his placement in disciplinary segregation in an SHU almost immediately after his arrival [\*24] at Sullivan. This separation from the general population was the result of disciplinary violations at the prison which Plaintiff believes were concocted to place him unlawfully in segregation, also robbing him of due process in retaliation for the suit filed against Rockland County officials. As a result of alleged disciplinary infractions on April 12, 1995 (unhygienic acts), on April 13 (unhygienic acts and threats) and April 25 (unhygienic acts), <sup>11</sup> McFadden was confined to a Special Housing Unit continuously through November 29, 1995. According to Defendants, in each instance, prison disciplinary officers held a hearing on the matter which McFadden refused to attend.

11 The Rules of Prohibited Prisoner Behavior in New York prohibit the throwing of feces or urine. N.Y. Comp. Codes R. & Regs. tit. 7, § 270.2

McFadden asserts that the ongoing confinement to segregation, either as a result of classification as maximum security or as a result of disciplinary action, was unconstitutional per se because of [\*25] the lack of due process, the deprivation of adequate access to his lawyer, an issue we shall address in turn, and the hardship created for him in resolving affairs outside of prison prior to his trial. (Pl.'s 95 Civ. 3790 at 4.) Defendants argue that Plaintiffs placement in pre-trial detention did not violate his constitutional rights. Under New York Correctional Law, the Commissioner of DOCS "shall provide for such measures as he may deem necessary or appropriate for the safety, security and control of correctional facilities and the maintenance of order therein." N. Y. Correction Law § 137 (2). The Commissioner has "broad discretion in the formulation and implementation of policies relating to security and the disciplining of inmates." *Arteaga v. State*, 72 N.Y.2d 212, 527 N.E.2d 1194, 1197, 532 N.Y.S.2d 57 (N. Y. 1988) Inmates may be placed in administrative segregation when their presence in the general population would jeopardize security and where there is "some evidence" on the record to support the classification. *Superintendent v. Hill*, 472 U.S. 445, 86 L. Ed. 2d 356, 105 S. Ct. 2768 (1985). Defendants further challenge Plaintiffs claim by pointing to the lack of specificity [\*26] in identifying the source of the constitutional deprivation. His classification as a maximum security risk and assignment to segregation and the continuation of that status during his stay in Rockland, Defendants contend, comported with his past criminal and prison record and present behavior. His placement in a Special Housing Unit at Sullivan,

claim, was not arbitrary but directly and rationally related to disciplinary purposes -- the need to impress upon him the rigors of prison discipline and to protect staff and other inmates from McFadden's spreading of bodily fluids, in particular, feces and urine -- subsequent to McFadden's "unhygienic acts" and threats described in Defendants appended exhibits. (95 Civ. 3790 (LBS) Defs.' Mem. of Law at 13.)

Plaintiffs pleadings suffer, on this claim, from a paucity of details describing the specific individuals responsible for the allegedly unconstitutionality. Technically, we need not even reach the question of the existence of disputed material fact surrounding McFadden's claims with regard to his segregation. He does not tell the Court how his assignment to administrative segregation upon intake into RCCF constituted any abuse of [\*27] discretion. (95 Civ. 1148 (LBS) Defs.' Mem. of Law at 4.) Furthermore he failed to respond to Defendants' presentation of prison disciplinary hearing reports from Sullivan, finding him guilty of infractions of prison rules and therefore subject to segregation pursuant to 7 N.Y. Comp. Codes R. & Regs. Tit. 9, § 300 (1997). In order to state a colorable claim under 42 US.C. § 1983 a litigant must establish the personal involvement of particular defendants in a deprivation of rights. *Morales v. New York State Dep't. of Corrections*, 842 F.2d 27, 30 (2d Cir. 1988); *McKinnon v. Patterson*, 568 F.2d 930, 934 (2d Cir. 1977). Given the opacity to incarcerated inmates of prison administrative measures, the courts may inquire into such matters when raised by a pro se litigant. Nevertheless, we find that Plaintiff still fails

to state a claim for deprivation of due process, either on the basis of his assignment at RCCF or Sullivan.

The Supreme Court held in *Bell v. Wolfish*, 441 US. 520, 535-37, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) that the conditions of pre-trial detention are constitutional under the Due Process Clause as long as they do not amount to punishment of the detainee. *El-Shabazz v. Wangenstein*, [\*28] 1995 US. Dist. LEXIS 11639, 1995 WL 489686 (S.D.N. Y. 1995). Our initial inquiry is, therefore, whether the placement of Reginald McFadden in pre-trial administrative segregation, away from the general prison population was punitive. This inquiry has two parts: (1) was he deprived of due process under the Constitution; and (2) following the Court of Appeals lead in *Covino*, we next inquire whether state law, by statute or regulation, gave rise to a liberty interest in remaining in the general population by prescribing mandatory procedures to government placement in administrative segregation.<sup>12</sup> *Covino v. Vermont Dep't. of Corrections*, 933 F.2d 128 (2d Cir. 1991).

12 The Supreme Court in *Sandin* moved away from this rule, holding that due process liberty interests created by prison regulations will be generally limited to freedom from restraint which, while not exceeding sentence in such unexpected manner as to give rise to protection by due process clause of its own force, "nonetheless imposes atypical and significant hardship on inmate in relation to ordinary incidents of prison life," *Sandin* focused only the rights of convicted prisoners and not of pre-trial detainees. *Sandin v. Conner*, 515 US. 472,

483, 132 L. Ed. 2d 418, 115 S. Ct. 2293 (1995).

[\*29] The contentious issue at hand is therefore whether prison officials' confinement of Plaintiff to segregation based on his security classification and continued detention there for six months as well as his "sentence" to SHU after hearings which Plaintiff did not attend constituted sufficient due process. On the Due Process prong, we find that at both RCCF and Sullivan, the assignment to segregated housing was not punitive. The Supreme Court has held that legitimate operational concerns of prisons in this country often necessitate "administrative measures that go beyond those that are, strictly speaking, necessary to ensure that the detainee shows up at trial," including the maintenance of security and order. *Wolfish* at 5. Defendants append documentary evidence of Plaintiffs initial classification as a maximum security, high escape risk candidate for administrative segregation. (Honan Aff. Ex. C.) They also include copies of Plaintiffs signed acknowledgment of his classification status and copies of bimonthly classification review letters. It would appear from the record in this case that Defendant was considered for a change of classification after two months in administrative [\*30] segregation at Rockland. Officials decided, however, to delay the change in status. It was at this point in mid-December, that Plaintiffs disciplinary infractions and noncooperative behavior at RCCF began in earnest, thereby prolonging his confinement to administrative segregation (and prompting the recommendation for transfer which put an end to his stay in administrative segregation at RCCF). (Honan Aff. Ex. D.)

On the second prong of our inquiry, the creation of any liberty interests by state statute or regulation, we can find nowhere on the record before us, any suggestion that the hearing provided for by DOCS regulations is not designed to afford an inmate the opportunity to challenge his removal from the general population. Nor is there evidence that DOC's regulations were not complied with. The record in this case indicates that Plaintiff received notice at RCCF of his placement in administrative segregation in RCCF as a result of his "present criminal charges, past criminal history, present classification and recommendations from Supervisory Personnel." (Honan Aff. C.) The record contains regular letters of review of Plaintiffs status and extensive evidence of his disciplinary [\*31] problems at the RCCF. On these facts, Plaintiffs administrative segregation was a reasonable response to concerns for institutional safety, order and morale, serving the goals of prison administration to which this Court must grant wide-ranging deference. Though McFadden alleges that his hearings did not comply with DOC regulations, there is no indication of such beyond his conclusory statements to that effect. The Rockland County Jail's Inmate Rules and Regulations on Disciplinary Procedures PP 15, 16, in accordance with 9 N.Y. Comp. Codes R. & Regs. tit. 9, § 7006.8 (1997), specifically allow for a prisoner's non-attendance or even exclusion from his or her prisoner's hearing. (Pl.'s Ex. B.) Disciplinary infractions constitute a basis for assignment to an SHU.

State Defendants at Sullivan have provided ample

documentary evidence that McFadden's segregation from the general population was not unwarranted, but tied to the legitimate objective of maintaining order and impressing the need for discipline. The record indicates that Plaintiff had contravened prison regulations on three occasions, committing so-called unhygienic acts and threatening guards, for which he was written up [\*32] and granted three hearings for prison disciplinary violations. He was informed of the charges against him and invited to participate in these hearings but chose not to attend and was "sentenced" in absentia to two terms of ninety and one term of forty-five days in SHU as well as a loss of other privileges (commissary, walkman, phone). This modicum of due process afforded him the opportunity to be heard in an "informal, non-adversary review of the information supporting respondent's administrative confinement. . .," though he did not avail himself of it. *Hewitt v. Helms*, 459 U.S. 460, 474, 74 1. Ed. 2d 675, 103 S. Ct. 864 (1983); *El-Shabazz* at 4.

#### ACCESS TO COUNSEL

Plaintiff additionally alleges that his incarceration in segregation as a pre-trial detainee and his transfer from RCCF to Sullivan (see *infra*) both interfered with the successful defense of his criminal case in violation of his Sixth Amendment rights. In order to make a valid § 1983 claim on this ground, the Plaintiff must allege facts showing that the alleged interference actually impeded his access to the courts or prejudiced an existing action. A claim of inadequate access to the courts must be made [\*33] on a showing of actual injury. A mere statement, as

Plaintiff makes in his pleadings, that a prison law library is inadequate does not state a claim for constitutional redress. *lewis v. Casey*, 518 U.S. 343, 116 S. Ct. 2174, 2176, 135 L. Ed 2d 606 (1996); *Jermosen v. Coughlin*, 877 F. Supp. 864, 871 (S.D.N. Y. 1995).

A prison transfer is unconstitutional under the Sixth Amendment only if it moves a prisoner to a facility so distant as to impair his access to his legal counsel. *Covino v. Vermont Dep't. of Corrections*, 933 F.2d 128 (2d Cir. 1991) (per curiam). Beyond the naked claim that the segregation and transfer abrogated his right of access to counsel and courts, Plaintiff offers no specific facts to support his claim. He does not inform us how and on what occasion he was denied access to his counsel or legal relief to which he was entitled. He details no contested actual events where Defendants maliciously or otherwise prevented his representation or prejudiced his existing legal actions.

The only name mentioned (and not subsequently dismissed from this suit) in connection with the restriction of access to courts or counsel was that of c.o. Wilhelm at Sullivan (Pl.'s [\*34] Dep. at 184). This reference, however, lacks the requisite specificity for us to find there to be any triable issue of fact on this claim. There is nothing on the record to indicate that Plaintiff was in any way prejudiced in his legal representation. McFadden's prodigious litigation and extensive pleadings before this Court, even without counsel, evidence Plaintiffs ability to navigate the complex pathways of the judicial system.

#### **PRISON TRANSFER**

McFadden alleges that his transfer on April 10, 1995 from RCCF to Sullivan violated his First, Fourth, Sixth and Fourteenth Amendment rights because it was done solely in retaliation for his filing of the 95 Civ. 1148 (LBS) action and intended to interfere with his litigation of this case and his pending criminal trial on charges of kidnaping, rape and robbery. He deems this transfer to have been "arbitrary, capricious, retaliatory, and in violation of the procedural and the substantive due process of both state and federal laws and constitutions." (Pl.'s Mem. of Law at 51)

The only remaining Defendant implicated by McFadden in the unlawful prison transfer claim is Captain Farina, who signed the transfer request. At the outset therefore [\*35] we dismiss this claim with regard to any other Defendants. This Defendant asserts that he is immune from suit because the Eleventh Amendment bars prosecution of all actions in federal court against state officials sued in their official capacities where the state is the real party in interest. (State Defs.' Mem. of Law at 8) There is no evidence from Plaintiff's papers that this should be construed as a suit against the state. Obligated to construe Plaintiff's pleadings liberally, we reject this defense as inapposite in a case such as this one where Defendant is alleged to have acted wantonly and capriciously, exceeding the scope of his official duties. Plaintiff has provided no facts, however, to demonstrate how Defendant Farina was personally involved in any deprivation of Plaintiff's rights. Even had he made such a showing, however, there is no evidence here of any constitutional misdeeds.

It is true that prison transfer solely in retaliation for the exercise of constitutional rights is unlawful. *Meriwether v. Coughlin*, 879 F.2d 1037, 1047 (2d Cir. 1989); see also *Matiyn v. Henderson*, 841 F.2d 31, 34 (2d. Cir. 1988), cert. denied, 487 U.S. 1220 (1988). Due process does [\*36] not protect against transfer. There is no constitutional right to process before or after a prison transfer. Absent a constitutionally impermissible motive, such as to interfere with a prisoner's litigation, he may be transferred in compliance with state law and regulations without any hearing. Prisoners also possess no right to be placed in a particular facility. The Department of Corrections has broad leeway in deciding where to house the inmates under its protective care, be it state or county jail. Furthermore, the Supreme Court has held that, absent state law or practice conditioning such transfers on proof of serious misconduct or occurrence of other events, the due process clause of the Constitution does not even entitle a state prisoner to a hearing when he is transferred to a prison, the conditions of which are substantially less favorable. *Meachum v. Fano*, 427 U.S. 215, 49 L. Ed. 2d 451, 96 S. Ct. 2532 (1976).

In assessing the adequacy of Plaintiff's claim, we must inquire whether he was constitutionally deprived as a result of the transfer. "Liberty interests protected by the Fourteenth Amendment may arise from two sources -the Due Process Clause itself and the laws [\*37] of the states." *El-Shabazz v. Wangenstein*, 1995 U.S. Dist. LEXIS 11639, 1995 WL 489686 \*3 (S.D.N.Y.) (quoting *Hewitt v. Helms*, 459 U.S. 460, 466, 74 L. Ed. 2d 675, 103 S. Ct. 864 (1983)).

As a matter of Due Process, a pre-trial detainee has a right not to be subjected to conditions which amount to punishment of the detainee. *Bell v. Wolfish*, 441 U.S. 520, 536, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979); *Butler v. New York State Correctional Dep't.*, 1996 U.S. Dist. LEXIS 11057, 1996 WL 438128, \*4 (S.D.N.Y.). The Second Circuit has held that the mere transfer of a pretrial detainee "to less amenable and more restrictive quarters for nonpunitive reasons" does not amount to punishment per se. *Covino v. Vermont Dep't. of Corrections*, 933 F.2d 128, 129 (2d Cir. 1991). Despite Plaintiff's allegations, there is no factual evidence on the record to show that the transfer was in any way punitive and therefore violative of his Due Process. He was not deprived of access to counsel nor was he denied any notice due to him as a result of the transfer. The record, instead, indicates that McFadden, due to his misconduct, caused a strain on resources at the RCCF which permitted a transfer to another correctional facility.

We must next inquire [\*38] whether McFadden's transfer contravened any state law. Here the Court must determine whether any state "statute or regulation prescribes mandatory procedures that ... create a liberty interest." *Covino v. Vermont Dep't. of Corrections*, 933 F.2d 128, 129 (2d Cir. 1991), citing *Hewitt v. Helms*, 459 U.S. 460, 74 L. Ed. 2d 675, 103 S. Ct. 864 (1983). The mere existence of a regulation does not, by itself, create an expectation on the prisoner's part that he would not be transferred absent misbehavior. *Butler v. New York State Correctional Dep't.*, 1996 U.S. Dist. LEXIS 11057, 1996 WL 438128, \*5 (S.D.N.Y. 1996) (quoting *Cofone*

v. Manson, 594 F.2d 934, 938 (2d Cir. 1979)). New York Corrections Law provides for the transfer of detainees, whether pre-trial or post-conviction, from one facility to another "when, due to extraordinary circumstances, the facility administrator determines that the public interest and facility security would be served by the transfer of an inmate or group of inmates to another suitable place or facility." N.Y. Comp. Codes R. & Regs. tit. 9, § 7300.5 (1997) ("Substitute Jail Order"); see McKinney's Correction Law § 504 ("Designation of Substitute Jail").

We find Plaintiff's [\*39] claim based on prison transfer, or the procedures used to effect the transfer in his case, to be without merit in light of the fact that, according to Plaintiff himself, he asked Judge Kelly of Rockland County to be transferred out of RCCF. (Pl.'s EBT at 155-56.) His transfer was then requested by Captain Farina of RCCF as a result of McFadden's disciplinary problems.<sup>13</sup> (Honan Aff., Ex. F.) McFadden's was dissatisfied with his treatment there and filed an Order to Show Cause requesting to be transferred out of RCCF. (Pl.'s EBT at 156.) We find nothing improper or unconstitutional with regard to McFadden's transfer from RCCF to Sullivan.

13 Capt. Anthony Farina writes in a letter of April 10, 1995 to the Undersheriff of Rockland County that, "McFadden has become increasingly hostile and has been involved in assaults on inmates and staff. His conduct has escalated and required a number of officers to be present each time he is taken out of his cell. This involves a substantial drain on the resources of the jail which is

overcrowded. This, in turn, effects our ability to ensure the safety of other inmates and staff." (Honan Aff. Ex. F.)

**[\*40] FIRST AMENDMENT CLAIM**

Plaintiff, despite his initial invocation of the First Amendment, fails to state a claim that his prison transfer or any other conduct alleged in the instant case infringed upon his First Amendment right of free expression. There is absolutely no evidence before us to indicate that McFadden's free speech had been curtailed. In addition, even assuming that there was some speech or expression at issue here, a prisoner's right to free speech must always be assessed in the institutional context of necessary and legitimate penological interests. "The proper standard for determining the validity of a prison regulation claimed to infringe on an inmate's constitutional rights is to ask whether the regulation is 'reasonably related to legitimate penological interests' ... This is true even when the constitutional right claimed to have been infringed is fundamental." *Washington v. Walter Harper*, 494 US. 210, 223, 108 L. Ed. 2d 178, 110 S. Ct. 1028 (1990) (citing *Turner v. Safley*, 482 US. 78, 89, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987)). The transfer of a prisoner or his confinement to administrative segregation with extensive monitoring, searches and [\*41] other controls, subject to periodic review, can be attendant necessities of safe and secure prison life without violating the inmate's constitutional rights. McFadden's segregation, as well as his transfer, have been shown to have been neither exaggerated nor unreasonable responses on the part of prison officials.

**CONDITIONS OF CONFINEMENT**

Plaintiffs Complaints allege that the conditions of his confinement and the treatment he received at the hands of his jailers violated his constitutional rights. He catalogues a variety of unpleasant conditions. He states that he was kept in an "unsanitary cell." (95 Civ. 1148 Compl. at 4.) Additionally, Plaintiff complains that various Defendants denied him hot showers, confined him to a small cell, exposed him to cold air and unbearable noise and caused him to witness the beating of other in-mates. (95 Civ. 1148 Compl. at 9.) More specifically, he alleges that Defendant Sergeant William Schoenleber refused Plaintiff the right to clean his cell. (95 Civ. 1148 Compl. at 12.) "Only when [the] condition became too unbearable for him and his guards ... did [Schoenleber] finally allow Plaintiff to clean [the] cell." (95 Civ. 1148 (LBS) [\*42] Compl. at 12.) Plaintiff alleges that Defendant correctional officer S. Felix deliberately placed human hairs in Plaintiffs meals and was wont to throw coffee, juice and water into the cell. (95 Civ. 1148 (LBS) Compl. at 16.) Plaintiff also objects to the shut-off of water to his cell in Sullivan over two periods of three days each in April 1995. Finally, Plaintiff further charges that, while at RCCF, Defendants knowingly exposed him to tuberculosis. (95 Civ. 1148 (LBS) Compl. at 2.) He claims that Defendants Lieutenants J.C. Liska and M.E. Nowlin detained Plaintiff over an extended period in a cell usually reserved for "in-take," where new inmates are temporarily held until a cell becomes available in the general population. (95 Civ. 1148 (LBS) Comp I. at 11, 16.) Plaintiff alleges that inmates with tuberculosis resided in "in-take" previously and that his detention there exposed him to the disease which

he claims to have contracted. (Pl.'s Mem. of Law at 58.) However, Defendants assert that "there is no proof whatsoever that plaintiff presently has or previously contracted tuberculosis." (Def.'s Mem. of Law at 6.)

First, with regard to the nature of Plaintiffs cell, we find that [\*43] his confinement to a small cell did not violate his due process. The Supreme Court has held that confinement of two pre-trial inmates to a cell designed for single occupancy did not deny due process. *Bell v. Wolfish*, 441 US. 520, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979). Plaintiffs complaint, therefore, that his cell, which he inhabited by himself, was small does not create a cause of action. Furthermore we find that, even for a pre-trial detainee, the presence of unpleasant odors, while unfortunate, also does not constitute punishment where, as in the instant case, the condition was temporary.

Secondly, Plaintiffs claim that he was injured by virtue of witnessing the abuse of another prisoner does not state a cause of action. Plaintiff cannot demonstrate how his rights were deprived nor does he state with sufficient specificity any supporting facts to bolster such a claim.

Third, Plaintiffs complaints of excessive noise are unsupported by any additional evidence or specific allegations. By themselves, these accusations are merely conclusory and describe a de minimis infraction, if any.

Fourth, the allegation that on at least one occasion, hair was placed in his food [\*44] tray, is a non-material

fact. One or two instances of finding a hair in one's food is not only not a punitive and unconstitutional violation of rights but a frequent occurrence, even for non-incarcerated diners in better restaurants. Officials are not charged here with any interference with McFadden's essential nutritional requirements, such as starving him or serving inadequate and generally unsanitary food. The offense complained of and the facts alleged are de minimis and therefore do not give rise to any triable issues on this point. Cf. *Robles v. Coughlin*, 725 F.2d 12 (2d Cir. 1983) (Court of Appeals found allegation that prison officials served food contaminated with glass, dust and human waste for twelve days, three of which were consecutive, over a fifty-three day period, thereby starving prisoners, withstood sua sponte dismissal).

Fifth, Plaintiffs claim that the shut-off of his water for two three-day stints violated his constitutional rights is without merit. Given the temporary nature and limited consequence of this water problem, again the unpleasant condition did not trigger a constitutional controversy. On an Eighth Amendment inquiry, a court has found that [\*45] an inoperable sink for nine days did not constitute a constitutional violation. *Johnson v. Commissioner of Correctional Services*, 699 F. Supp. 1071 (S.D.N. Y. 1988). Defendants claim that the water shut-off was not retaliatory, but necessary to stop overflowing of the Plaintiffs sink and toilet. It is thoroughly disingenuous for Plaintiff, who harassed his keepers by throwing feces and urine at them, to now attempt to recover on a constitutional claim for a situation which he precipitated. Furthermore it is not disputed

that the Plaintiff received drinks with his meals at this time and therefore suffered no dehydration. Finally, not only is the claim not cognizable on these facts, but it is not actually alleged against any Defendants still remaining in this suit. We therefore dismiss this claim altogether.

Finally, on the question of tuberculosis contamination we must inquire whether prison officials here acted or failed to act with "deliberate indifference to serious medical needs of prisoners" in such a way, in this case, as to have punished the Plaintiff unconstitutionally. *Estelle v. Gamble*, 429 U.S. 97, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976) (indifference to serious [\*46] medical needs constitutes violation of Eighth Amendment rights). There is no evidence on this record that Defendants caused Plaintiff to be infected with tuberculosis or failed to treat such an illness. In fact, there is no evidence at all that Plaintiff at any time had or continues to have tuberculosis. Defendants append Plaintiffs RCCF medical reports from the duration of his stay at that institution. (Honan Aff. Ex. E.) Nowhere is there any indication that Plaintiff had or contracted tuberculosis at Rockland. Furthermore there is ample documentation indicating regular medical examination and treatment. We therefore dismiss his claim for redress based on tuberculosis infection for which there is no supporting evidence beyond unsupported allegations. "Mere negligence in the treatment of a prisoner's physical condition, or claims based on differences of opinion over matters of medical judgment, fail to rise to the level of a § 1983 violation." *Sloan v. Zelker*, 362 F. Supp.

83, 84 (S.D.N. Y. 1973) (quoting *Corby v. Conboy*, 457 F.2d 251, 254 (2d Cir. 1972)). Furthermore Plaintiff alleges no facts relating to his medical condition which shows that specific Defendants here were [\*47] indifferent to his medical needs.

### **OTHER ABUSES**

We dismiss Plaintiffs allegations of verbal abuse and harassment. Mere words cannot create a cognizable injury under§ 1983. *Zeno v. Cropper*, 650 F. Supp. 138 (S.D.N. Y. 1986) (the alleged use of vile and abusive language against pre-trial detainees does not provide a basis for a civil rights action).

We also dismiss Plaintiffs allegations of unconstitutional violation of his religious rights. There is no evidence on this record that he was in any meaningful way deprived of the exercise of his faith. His claim that the odor in his cell and his inability to shave his body inhibited his religious practice does not state a claim which rises to the level of a constitutional violation. McFadden does not explain what religious belief purportedly requires him to shave the entirety of his body. Defendants' exhibits of prison logs show that McFadden received special Ramadam meals during the relevant period, served to him especially early to comply with his religious needs. (Honan Aff. Ex. C.)

Also Plaintiff describes the use on him of pepper spray on three occasions. Unfortunately, the use of pepper spray is sometimes a required [\*48] incident of prison discipline to maintain order and safety under difficult conditions. There is no indication that the use

of the spray was punitive or inflicted on Plaintiff except on three discrete and necessary occasions with no injury or lasting harm suffered. On these uncontroverted facts, we can find no action in violation of 42 U.S.C. § 1983.

Plaintiffs Complaint charges that in December 1994, while incarcerated at RCCF, he was dragged forcibly and shackled from his cell to the prison medical facility for weighing. 1• McFadden, as a protest, stopped eating while in prison and a state court ordered that he be weighed to ensure his safety. (Compl. at 17.) McFadden describes that, when the guards dragged him down the concrete corridor and steps, his head banged against the stairs and he became partially paralyzed in his left hand due to the pressure from the metal shackles on his wrists. Whereas many of Plaintiffs other allegations have been without merit as a matter of law, we find that this allegation presents a much closer call, especially as Plaintiff details the incident with specificity and reference to particular responsible Defendants, namely c.o. Stein, c.o. Layman [\*49] and c.o. Malone, acting under orders from Lt. Clark. Controverted charges that corrections officers dragged a prisoner, allegedly indifferent to his safety and the possible infliction of bodily harm, would normally survive a motion for summary judgment and constitute the kind of material fact requiring trial. However, we have a unique situation before us. It appears from Plaintiffs, as well as Defendants', papers that this deplorable-sounding treatment was not unprovoked but made regrettably necessary by Plaintiffs own conduct.

14 Captain Farina is alleged to have ordered the guards to "drag plaintiff to the prison hospital, while both his hands and legs were cuffed, on the floor, with his head knocking violently against the hard floor and down the concrete steps -- at the prison hospital, plaintiff was disgraceful [sic] hung up by the chains linking the two wrists and two ankels [sic], while plaintiff bottom sat on scale to be weigh like a piece of meat while the female looks on." (95 Civ. 1148 (LBS) Compl. at 8.)

[\*50] McFadden admits, that, when the appointed time arrived to go to the hospital for weighing, he refused, despite the court order, to be weighed. In fact, he refused to walk or to move, leaving prison officials with no choice but to move him in some forcible way. They had already had experience with McFadden's refusal to cooperate with a court order, such as when he threatened to "kick in the head" of the doctor sent to take a pubic hair sample. As the path from his cell to medical required the traversing of a flight of stairs, Defendants allegedly opted against the use of a wheelchair to transport McFadden and chose, instead, to drag him. The question we must answer is whether it was permissible on three occasions for prison officials to drag a pre-trial detainee against his will to and from the prison hospital down concrete steps for the purpose of fulfilling a court order. We inquire, cognizant of the Plaintiffs due process rights and also against "the backdrop of prior decisions recognizing that courts are ill-equipped to substitute their judgments on matters of prison administration for those of prison authorities." *Jolly v. Coughlin*, 76 F.3d 468, 476 (2d Cir. 1996).

Prison [\*51] officials have the authority and discretion to use reasonable physical force upon an inmate to compel compliance with necessary orders, maintain prison safety and the requisite order vital to security in a correctional facility. We find on the uncontroverted facts that prison officials, faced with an extremely difficult situation, applied reasonable force in good faith to further legitimate penological interests.

In this unique and narrow instance, where there is no dispute that Plaintiff was difficult, uncooperative and, historically, a troublemaker, Defendants choice to drag him, though perhaps unwise, does not rise to the level of a constitutional violation. Plaintiffs allegations of egregious abuses are unsupported by any evidence that he suffered lasting injury as a result of this incident.

We find based on the record before us that there remains no outstanding issue of material fact necessitating trial. For the reasons set forth above we grant all Defendants' Motions for Summary Judgment on all claims.

SO ORDERED.  
Dated: April 23, 1998  
New York, NY  
Leonard B. Sand  
U.S.D.J.

D126

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page 98 of 223

Case 1:17-cv-00063-TJM-DJS Document 7-2  
Filed 02/22/17 Page 25 of 27

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page 195 of 223

Case 1:17-cv-00063-TJM-DJS Document 21-2  
Filed 05/02/17 Page 30 of 32

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Page 1

3 of 100 DOCUMENTS

IN RE UNITED STATES OF AMERICA EX REL  
CURTIS VAN STUYVESANT, Petitioner, -against-  
ERIC HOLDER, UNITED STATES ATTORNEY  
GENERAL, JOHN ASHCROFT, ALBERTO  
GONZALES, AND MICHAEL B. MUKASEY,  
FORMER UNITED STATES ATTORNEY GENERAL,  
JANET NAPOLITANO, SECRETARY UNITED  
STATES DEPARTMENT OF HOME LAND  
SECURITY, MICHAEL CHERTOFF, FORMER SEC  
UNITED STATES DEPARTMENT OF HOME LAND  
SECURITY, ROBERT MUELLER, III DIRECTOR  
FEDERAL BUREAU OF INVESTIGATION,  
VALERIE CAPRONI, GENERAL COUNSEL  
FEDERAL BUREAU OF INVESTIGATION, JAMES  
DUFF DIRECTOR, AND WILLIAM BURCHILL,  
ASSISTANT DIRECTOR/COUNSEL,  
ADMINISTRATIVE OFFICE OF THE UNITED ST  
ATES COURT; MARY JO WHITE, AND MICHAEL

D127

GARCIA FORMER UNITED STATES ATTORNEY SDNY, TERRENCE FLYNN, FORMER UNITED STATES ATTORNEY WDNY, JOHN DOE, ASSISTANT DIRECTOR OF FBI NEW YORK CITY FIELD OFFICES, JOHN DOE, DISTRICT ICE NEW YORK CITY DISTRICT OFFICE, DISTRICT COUNSEL ICE NEW YORK CITY DISTRICT OFFICE, DENNISE JACOBS, JUDGE, ROBERT KATZMAN, JUDGE, ROBERT SACK, JUDGE, BARRINGTON PARKER, JR., JUDGE, ROSEMARY POOLER, JUDGE, JOHN WALKER JUDGE, REENA RAGGI, JUDGE, RICHARD WESLEY, JUDGE, CATHERINE O'HAGAN, CLERK, ROSEANN MACKECHNIE, FORMER CLERK, UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, LEWIS KAPLAN, USDJ SDNY, DEBRA FREEMAN, USMJ SDNY, DAVID LARIMER, USDJ WDNY, NATLIE SOBCHAK, SDNY PRO-SE CLERK, CHARLES CARRA, PRO SE CLERK WDNY, LAURI CARRA, LORI REID, RAYNE BENZ, DAVID P. CHAPUS, LAW CLERKS, WDNY, Respondents.

10 Civ. 1581 (LAP)

UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF NEW YORK

2010 U.S. Dist. LEXIS 145998

September 23, 2010, Decided  
September 23, 2010, Filed

COUNSEL: [\*1] Curtis Van Stuyvesant, Petitioner,  
Pro se, Attica, NY.

JUDGES: LORETTA A. PRESKA, Chief United States District Judge.

OPINION BY: LORETTA A. PRESKA  
OPINION

ORDER OF DISMISSAL  
LORETTA A. PRESKA, Chief United States District Judge:

Petitioner, appearing pro se, brings this mandamus action under 28 U.S. C. § 1651 against federal officials, federal prosecutors, federal judges, and employees of the federal judiciary. He originally filed the petition in the Southern District of Ohio on February 19, 2010. See *Van Stuwesant v. Holder*, No. 10 Civ. 0111 (TSB) (S.D. Ohio Feb. 19, 2010). That court determined that the Southern District of New York was the proper venue. The case was then transferred to this Court on March 3, 2010. Petitioner's request to proceed in forma pauperis is granted. For the reasons set forth below, the action is dismissed.

## 1. DISCUSSION

### Mandamus

A writ of mandamus is an extraordinary judicial remedy. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 101 S. Ct. 188, 66 L. Ed. 2d 193 (1980) (per curiam) (remedy of mandamus is a drastic one, to be invoked only in extraordinary situations). "Generally speaking before the writ of mandamus may properly issue three

elements must co-exist: (1) a clear right in the petitioner to the relief sought; [\*2] (2) a plainly defined and peremptory duty on the part of the defendant to do the act in question; and (3) no other adequate remedy is available." *Lovallo v. Froehlke*, 468 F.2d 340, 343 (2d Cir. 1972); see also *In re Int'l Business Machines Corp.*, 45 F.3d 641, 643 (2d Cir. 1995) (right to remedy of mandamus must be "clear and indisputable") (citations omitted); *New York v. Heckler*, 742 F.2d 729, 739 (2d Cir. 1984), *affd sub nom.*, *Bowen v. New York*, 476 U.S. 467, 106 S. Ct. 2022, 90 L. Ed. 2d 462 (1986).

Petitioner seeks (1) a jury trial in his "Jonah Cancer and Blood Treatment et al litigation;" (2) adjudication of his "Dime Bank Corporation et al and Robert M[orgenthau et al ... Civil Complaint. .. in any Federal Court in the nation with the exception of these Courts in New York;" (3) "[t]he granting of United States citizenship by naturalization to be made retroactive to[ ] 1990 the year JCE started;" (4) "release of all exculpatory or material evidence under the control of ICE, DITS, FBI, U.S. Attorney office SONY, and D.O.J.;" and (5) unspecified relief concerning the Prison Litigation Reform Act's ("PLRA") three-strikes provision. (Pet. 8.) This Court does not have the jurisdiction to order any of the defendants [\*3] to perform these acts. Rather, petitioner must seek relief in the appropriate fora for each of his claims: the district courts presiding over his litigation or the appellate courts having jurisdiction over his appeals, the Department of Homeland Security's Citizenship Immigration Services, and the individual federal

agencies allegedly in control of evidence he seeks. As for his demand concerning the three-strikes provision of the PLRA, this Court has no jurisdiction over another court's decision to apply this provision to petitioner based on his litigation history. As such, petitioner's request for mandamus relief is denied.

### Immunity

Moreover, to the extent petitioner seeks monetary or injunctive relief from the named defendants, they are all immune from this suit.

Most of the defendants are Article III judges of the United States, law clerks or court clerks. These defendants all enjoy absolute immunity from suit. Judges enjoy absolute immunity from suit for judicial acts performed in their judicial capacities. *Mireles v. Waco*, 502 U.S. 9, 11, 112 S. Ct. 286, 116 L. Ed. 2d 9 (1991) (per curiam) ("judicial immunity is an immunity from suit, not just from the ultimate assessment of damages."); see also *Stump v. Sparkman*, 435 U.S. 349, 356, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978); [\*4] *Pierson v. Ray*, 386 U.S. 547, 553-55, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967). "Without insulation from liability, judges would be subject to harassment and intimidation and would thus 'lose that independence without which no judiciary can either be respectable or useful.'" *Young v. Se/sky*, 41 F.3d 47, 51 (2d Cir. 1994). Thus, a judge enjoys immunity even if bad faith or malice is alleged. See *Mireles*, 502 U.S. at 1 J; *Stump*, 435 U.S. at 356; *Root v. Liston*, 444 F.3d 127, 132 (2d Cir. 2006). Because "the scope of the judge's jurisdiction must be construed broadly where the

issue is the immunity of the judge," *Stump*, 435 U.S. at 356, the only two exceptions to judicial immunity are "non-judicial" acts (i.e., acts not normally performed in a judicial capacity) and actions taken by a judge in the complete absence of jurisdiction. *Mireles*, 502 U.S. at 1 J; see *Huminski v. Corsones*, 396 F.3d 53, 75 (2d Cir. 2005).

Such immunity has been extended to judges' law clerks "who perform functions closely associated with the judicial process" when they are performing discretionary acts of a judicial nature. *Cleavinger v. Saxner*, 474 U.S. 193, 200, 106 S. Ct. 496, 88 L. Ed. 2d 507 (1985); *Gollomp v. Spitzer*, 568 F.3d 355, 365 (2d Cir. 2009) (law clerks are entitled [\*5] to the protection of judicial immunity); *Oliva v. Heller*, 839 F.2d 37, 39 (2d Cir. 1988) (same); *Reisner v. Stoller*, 51 F. Supp. 2d 430 (S.D.N. Y. 1999) ("Thus, judicial immunity has been extended to law clerks and court clerks when they are assisting judges in the performance of their judicial functions.").

This same reasoning applies to court clerks and "others who perform functions closely associated with the judicial process" when they are performing discretionary acts of a judicial nature which are essential to the judicial process, especially the filing of court documents and managing a court's calendar. *Cleavinger*, 474 U.S. at 200; see *Rodriguez v. Weprin*, 116 F.3d 62, 66 (2d Cir. 1997) (extending judicial immunity to state court clerks who were ordered by Appellate Division judges not to provide a litigant with additional transcripts and not to expand the record on appeal); *Pikulin v. Gonzales*, No. 07 Civ.

0412 (CBA), 2007 U.S. Dist. LEXIS 25551, 2007 WL 1063353, at \*2 (E.D.N. Y Apr. 5, 2007) (extending judicial immunity to the federal court clerk with respect to claims arising out of the filing and docketing of legal documents).

To the extent petitioner alleges some sort of misconduct in the judicial defendants' [\*6] discharge of their official duties as well as acts performed by law clerks and court clerks, the doctrine of judicial immunity requires dismissal of the complaint as to these defendants. See 28 U.S.C. § 1915(e)(2)(B)(ii).

To the extent petitioner attempts to allege some sort of misconduct by the federal prosecutor defendants in the discharge of their official duties as prosecutors, the complaint must be dismissed pursuant to the doctrine of prosecutorial immunity. Prosecutors are immune from civil suits for acts committed within the scope of their official duties where the challenged activities are not investigative in nature but rather are "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 430, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976); see *Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993); *Burns v. Reed*, 500 U.S. 478, 111 S. Ct. 1934, 114 L. Ed. 2d 547 (1991); *Dory v. Ryan*, 25 F.3d 81 (2d Cir. 1994). In addition, prosecutors are absolutely immune from suit for acts which may be administrative obligations but are "directly connected with the conduct of a trial." *Van de Kamp v. Goldstein*, 555 U.S. 335, 129 S. Ct. 855, 862, 172 L. Ed. 2d 706 (2009). To the extent that the allegations of wrongdoing are clearly "intimately

associated with [\*7] the judicial phase of the criminal process," the actions of these defendants are thus entitled to absolute prosecutorial immunity. *Imbler*, 424 U.S. at 430. For this reason, the complaint must be dismissed as to the federal prosecutor defendants. 28 U.S.C. § 1915(e)(2)(B)(ii).

Finally, all claims brought against the federal officials are dismissed because the doctrine of sovereign immunity bars federal courts from hearing suits for monetary damages against the government, including its agencies and employees acting in their official capacities, except where sovereign immunity has been waived. See *United States v. Mitchell*, 445 U.S. 535, 538, 100 S. Ct. 1349, 63 L. Ed 2d 607 (1980) (quoting *United States v. Sherwood*, 312 U.S. 584, 586, 61 S. Ct. 767, 85 L. Ed 1058 (1941)); *Dotson v. Griesa*, 398 F.3d 156, 177 (2d Cir. 2005); *Makarova v. United States*, 201 F.3d 1 JO, 113 (2d Cir. 2000); *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 510 (2d Cir. 1994) ("Because an action against a federal agency or federal officers in their official capacities is essentially a suit against the United States, such suits are also barred under the doctrine of sovereign immunity, unless such immunity is waived.").

## II. CONCLUSION

Accordingly, this mandamus action, [\*8] filed in forma pauperis under 28 U.S.C. § 1915(a)(J), is dismissed because petitioner is not entitled to mandamus relief under 28 U.S.C. § 1361 and because he fails to state a claim upon which relief may be granted. See 28 U.S.C. § 1915(e)(2)(B)(ii). All motions filed in this action are denied as moot. The Court

certifies, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal from this order would not be taken in good faith. See *Coppedge v. United States*, 369 U.S. 438, 444-45, 82 S. Ct. 917, 8 L. Ed 2d 21 (1962).

SO ORDERED.

/s/ Loretta A. Preska

LORETTA A. PRESKA

Chief United States District Judge

Dated: SEP 23 2010

New York, New York

CIVIL JUDGMENT

Pursuant to the order issued SEP 23 2010 by the Honorable Loretta A. Preska, Chief United States District Judge, dismissing petitioner's mandamus action, it is,

ORDERED, ADJUDGED AND DECREED: That the mandamus action is hereby dismissed. The Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal from this order would not be taken in good faith. See *Coppedge v. United States*, 369 U.S. 438, 444-45, 82 S. Ct. 917, 8 L. Ed. 2d 21 (1962).

/s/ Loretta A. Preska

LORETTA A. PRESKA

Chief United States District Judge

Dated: SEP 23 2010

New York, New York

D135

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page 101 of 223

Case 1:17-cv-00063-TJM-DJS Document 8  
Filed 02/23/17 Page 1 of 1

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK**

**LAWRENCE K. BAERMAN** Clerk  
**JOHN M. DOMURAD** Chief Deputy  
**DAN MCALLISTER** Chief Deputy  
James T. Foley Courthouse  
445 Broadway, Room 509  
Albany, New York 12207  
(518) 257-1800

**NOTICE** February 23, 2017

Re: Sun v. Asiello, et al  
Case No: 1:17-CV-63[TJM/DJS]

Mr. Sun:

On February 22, 2017, the defendants' moved to dismiss this action. **Your response to this motion is due by 3/24/17.**

Per the Local and Federal Rules of Civil Procedure, expect service of the defendants' motion within the next few days.

Please file your response to this motion in writing and in accordance with the Local and Federal Rules of Civil Procedure. You may file your response by mailing it to:

James M. Hanley Federal Building  
P.O. Box 7367, 100 S. Clinton St.  
Syracuse, NY 13261

D136

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page 102 of 223  
Case 1:17-cv-00063-T JM-DJS Document 9  
Filed 03/07/17 Page 1 of 1

UNITED STATES DISTRICT COURT NORTHERN  
DISTRICT OF NEW YORK

\_\_\_\_\_  
X  
XIU JIAN SUN,  
Plaintiff,                      **DECLARATION**  
-against                      **OF SERVICE**  
JOHN P. ASIELLO; JONATHAN  
LIPPMANN; JANET DIFIORE;                      17-CV-0063  
EUGENE F. PIGOTT JR.; JAMES                      TJM/DJS  
A. COSTELLO,  
Defendants.

\_\_\_\_\_  
X  
I, ELIZABETH M. MINK, declare pursuant to 28  
USC§ 1746, that on February 23, 2017, I served the  
Notice of Motion to Dismiss and Memorandum of Law,  
filed herein electronically upon the following  
individual, by depositing a true copy thereof, properly  
enclosed in a sealed, postpaid wrapper, in a post office  
box in the City of Albany, a depository under the  
exclusive care and custody of the United States Postal  
Service, directed to the individual(s) at the address,  
designated for that purpose, as follows:

Xiu Jian Sun  
54-25 153rd St., 2nd Floor, Flushing, NY 11355  
Dated: February 23, 2017

Albany, New York

Elizabeth M. Mink   Elizabeth M. Mink  
Elizabeth M. Mink

D137

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page 103 of 223

Case 1:17-cv-00063-TJM-DJS Document 10 Filed  
03/20/17 Page 1 of 3

UNITED STATES DISTRICT COURT NORTHERN  
DISTRICT OF NEW YORK

\_\_\_\_\_x

The Church of Jesus Christ of Latter-  
day saints Servant: Case No: 1:17-CV-63  
Xiu Jian Sun, the spiritual Adam (TJM/DJS]  
Plaintiff

Vs.

**Response to Motion**

Pharisees:  
JOHN P. ASIELLO JONATHAN  
LIPPMAN JANET DIFIORE  
EUGENE F. PIGOTT, JAMES  
A. COSTELLO

Defendants

\_\_\_\_\_x

TO UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

On the date of February 27, 2017, when the  
notification from United States District Court of New  
York is received, Jehovah, -the Lord god of host sent  
the messenger speaks to spiritual Adam, -plaintiff  
through angel, says: "Outside is washed, but did not

D138

wash inside". (外面洗了,里面却没洗)

Dated: Queens New York  
March, 9 201 7

The Church of Jesus Christ of Latter-day saints  
Servant: Xiu Jian Sun, the spiritual Adam  
Xiu Jian Sun, the spiritual Adam  
54-25 153rd St 2FL  
Flushing, NY 11355  
646-675-0308  
Plaintiff

CC: John P. Asiello; Jonathan Lippman;  
Eugene F. Pigott, JR; James A. Costello;  
Janet DiFiore.  
(Pharisees)

20 Eagle St  
Albany, NY 12207  
(518) 455-7700  
Defendants

U.S. DISTRICT.N.D. OF N.Y.  
FILED  
MAR 20 2017  
AT—O'CLOCK—  
Lawrence K. Baerman. Clerk. Syracuse

D139

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page 120 of 223

Case 1:17-cv-00063-TJM-DJS Document 12  
Filed 04/05/17 Page 1 of 4

UNITED STATES DISTRICT COURT NORTHERN  
DISTRICT OF NEW YORK

x

The Church of Jesus Christ of Latter-  
day saints, Servant: Case No: 1:17-cv-63  
Xiu Jian Sun, the spiritual Adam [TJM-DJS]  
Plaintiff

Vs. U.S. DISTRICT.N.D. OF N.Y.  
Pharisees: FILED  
JOHN P. ASIELLO APR - 5 2017  
JONATHAN LIPPMAN AT—O'CLOCK—  
JANET DIFIORE Lawrence K. Baerman.  
EUGENE F. PIGOTT, JR Clerk. Syracuse  
JAMES A. COSTELLO  
ADDITIONAL PARTIES: COMPLAINT  
ERIC T. SCHNEIDERMAN Secret gang organization  
ATTORNEY GENERAL OF  
THE STATE OF NEW YORK TAKE HIM TO THE  
BRUCE J. BOIVIN LAW TO CONFRONT IT  
ASSISTANT ATTORNEY JURY TRIAL  
GENERAL, OF COUNSEL DEMANDED  
Defendants

x

TO UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

The complaint of the plaintiff, -god's servant, Xiu Jian Sun, the spiritual Adam respectfully shows and alleges as follows

1. At all times hereinafter mentioned, plaintiff, Xiu Jian Sun, the spiritual Adam, is a resident of the State of New York, living at 54-25 153rd St., 2FL Flushing NY 11355.
2. Pharisees:
  - 2-1. At all times hereinafter mentioned, defendant, John P. Asiello, located at 20 Eagle St., Albany, NY 12207; (518) 455-7700, (Docket No. 2015-00029, Index No. 9436-2014, STATE OF NEW YORK DEPARTMENT OF MOTOR VEHICLES; File No: 4932-2014, Docket No. 2014-08945, Defendants William Yeung and Law Office of Yeung & Wang PLLC; Docket No. 2014-00693, Index Number: 2728-2013, Wu Hua Jing M.D. PHD & Dustin T. Nguyen M.D; Betty Law & Wan J. Law Docket No. 2015-06399, Index Number: 13994-2014; Dick Bailey Service INC, Bill & Lynne Bailey Docket No. 2016-00379, Index Number: 11709-2015) .
  - 2-2. At all times hereinafter mentioned, defendant, Jonathan Lippman, located at 20 Eagle St., Albany, NY 12207; (Docket No. 2015-00029; Index No. 9436-2014, STATE OF NEW YORK DEPARTMENT OF MOTOR VEHICLES) .
  - 2-3. At all times hereinafter mentioned, defendant, Eugene F. Pigott, JR, located at 20 Eagle St., Albany, NY 12207; (File No: 4932-2014, Docket

No.2014-08945, Defendants William Yeung and Law Office of Yeung & Wang PLLC) .

2-4. At all times hereinafter mentioned, defendant, James A. Costello, located at 20 Eagle St., Albany, NY 12207; ( File No: 4932-2014, Docket No.2014-08945, Defendants William Yeung and Law Office of Yeung & Wang PLLC) .

2-5. At all times hereinafter mentioned, defendant, Janet DiFiore, located at 20 Eagle St., Albany, NY 12207; (Docket No. 2014-00693, Index Number: 2728-2013, Wu Hua Jing M.D. PHD & Dustin T. Nguyen M.D; Betty Law & Wan J. Law Docket No. 2015-06399, Index Number: 13994-2014; Dick Bailey Service INC, Bill & Lynne Bailey Docket No. 2016-00379, Index Number: 11709-2015)

3-1. At all times hereinafter mentioned, defendant, Eric T. Schneiderman, Attorney General of the State of New York, located at The Capitol, Albany, New York 12224-0341; 518-776-2300; (Case No: 17-CV-0063 Attorneys for Defendants).

3-2. At all times hereinafter mentioned, defendant, Bruce J. Boivin, Assistant Attorney General of Counsel, located at The Capitol, Albany, New York 12224-0341; 518-776-2590; (Case No: 17-CV-0063 Attorneys for Defendants).

3-3. Lord god of host sent the messenger through angel said to spiritual Adam: "take him to the law to confront it." (把他帶到法律面前去)

4. In the nights between March 7th and 8th, 2016, the Lord god of host Jehovah sent the messenger said to servant (Plaintiff) through the angel, "Secret gang organization." (秘密帮派组织)
5. The Lord god of hosts sent messenger through the angel said to servant: 'Pharisees don't even open the door'. (Words given on the date of October 5th, 2015, on the way home from the court. (法利赛人连门都不开))
6. Jehovah, the Lord god of host, sent the son of god, (the revived Messiah) from God's temple gave words to servant, said: 'Pharisees not even move a finger of his.' (法利赛人一个手指头都不动)
7. Jehovah,- the Lord god of host gives the words to servant (Plaintiff) in the temple he made, "Trial with god's law. Apply for jury to prevent insult and unfair behavior."
8. I (servant) would like to request a Mandarin Chinese court interpreter for my appeal court day.

Dated: Queens New York  
April 3, 2017

The Church of Jesus Christ of Latter-day saints  
Servant: Xiu Jian Sun, the spiritual Adam  
Xiu Jian Sun, the spiritual Adam  
54-25 153rd St 2FL  
Flushing, NY 11355  
646-675-0308  
Plaintiff

D143

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page125 of 223

Case 1:17-cv-00063- TJM-DJS Document 13  
Field 04/07/17 Page 1 of 2

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page151 of 223

Case 1:17-cv-00063-TJM-DJS Document 20  
Filed 04/17/17 Page 2 of 4

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page127 of 223

Case 1:17-cv-00063- TJM-DJS Document 13-1  
Field 04/07/17 Page 1 of 2

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page147 of 223

Case 1:17-cv-00063-TJM-DJS Document 19  
Filed 04/17/17 Page 2 of 4

AO 440 (Rev. 12/09) Summons in a Civil Action

**UNITED STATES DISTRICT COURT  
for the Northern District of New York**

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Xiu Jian Sun  
Plaimiff

Civil Action No.  
1:17-CV-63(TJM/DJS)

v.  
John P. Asiello, et al  
Defendant

---

**SUMMONS IN A CIVIL ACTION**

To: (Defendant's name and address)

D144

Eric T. Schneiderman  
Attorney General of the State of New York  
The Capitol  
Albany, New York 12224-0341

Bruce J. Boivin  
Assistant Attorney General of Counsel  
The Capitol  
Albany, New York 12224-0341

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it)- or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3)-you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Xiu Jian Sun  
54-25 153rd Street, 2nd Floor.  
Flushing, NY 11355

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Date: 04/07/2017

CLERK OF COURT

s/ Helen M. Reese

Signature of Clerk or Deputy Clerk

D145

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page 129 of 223  
Case 1:17-cv-00063- TJM-DJS Document 14  
Filed 04/07/17 Page 1 of 2

**STATE OF NEW YORK  
OFFICE OF THE ATTORNEY GENERAL**

ERIC T. SCHNEIDERMAN  
ATTORNEY GENERAL

DIVISION OF STATE COUNSEL  
LITIGATION BUREAU

Writer Direct: (518) 776-2590 April 7, 2017

Honorable Thomas J. McAvoy  
Federal Building and U.S. Courthouse  
15 Henry Street, Binghamton, NY 13901

Re: Jian Sun v. Asiello et al  
Northern District of New York  
17-CV-0063 (TJM)(DJS)

Dear Judge McAvoy:

Defendants respectfully request that the Court stay their time to respond to the amended complaint, Dkt. No. 12, and that the Court sua sponte conduct a review of both the complaint and amended complaint for legal sufficiency.

Plaintiff commenced this action pro se on January 23, 2017 and paid the filing fee. Dkt. No. 1. On December 22, 2017, defendants moved to dismiss the complaint on the grounds that it failed to state a cause of action and that the defendants are immune from suit by absolute judicial immunity. Dkt. No. 7.

Plaintiff responded on March 20, 2017. Dkt. No. 10.

On April 5, 2017, plaintiff filed an amended complaint. Dkt. No. 12. The amended complaint is essentially identical to the original complaint, except that plaintiff added the New York State Attorney General and the undersigned as defendants. Neither the original nor amended complaints assert the jurisdictional basis of the complaint, do not allege that any of the defendants was acting under color of law, or deprived him of any federal right. Indeed, the body of the complaints does not mention any defendant and asserts no facts about any defendant. Furthermore, the complaint fails to assert what federal right was violated and does not seek any relief.

It is generally a common practice in this District for a court to review a complaint brought pro se for legal sufficiency, even where the plaintiff pays the filing fee. See e.g., *Engle v. Bergman et ano.*, Dkt. No 06-cv-11. (Copy of decision attached).

While defendants acknowledge that a party may amend a complaint as of right within 21 days after receiving a response to the complaint under the provisions of Fed. R. Civ. P 15 (a)(1)(B), we respectfully urge that a sua sponte review of the pleadings in this case will further the interests of judicial economy. The defendants intend to file a motion to dismiss the amended complaint on the same grounds as asserted in the original complaint, with the additional argument that the Attorney General and the undersigned Assistant Attorney General are entitled to absolute immunity. *Barrett v. United States*, 798 F.2d 565, 573

D147

(2d Cir. 1986). Because plaintiff added the undersigned as a defendant, this file will be reassigned within the office for the filing of that motion. Based upon plaintiff's action of amending the complaint to add the undersigned, apparently merely because I represent the defendants, we anticipate that plaintiff will respond to the renewed motion to dismiss by amending the complaint to add whichever AAG files the motion. This process can go on ad infinitum.

Accordingly, defendants respectfully request that the Court conduct a sua sponte review of the pleadings and stay defendant's time to respond to the amended complaint until such time as that review has been completed.

Thank you for your consideration of this matter.

Pursuant to 28 U.S.C. § 1746 I declare that, on this date, I caused the plaintiff to be served with a copy of this letter request by First-Class United States Mail at the address listed below

Respectfully yours,  
s/ Bruce J. Boivin  
Bruce J. Boivin  
Assistant Attorney General  
Bar Roll No. 507894  
Bruce.Boivin@ag.ny.gov

Enclosure

cc: Xiu Jian Sun

54-25 153rd St., 2d Floor, Flushing, NY 11355

THE CAPITOL, ALBANY, NY 12224-0341 • (518)  
776-2300 • FAX (518) 915-7738 • NOT FOR SERVICE  
OF PAPERS, WWW.AG.NY.GOV

D148

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page131 of 223

Case 1:17-cv-00063- TJM-DJS Document 14-1  
Field 04/07/17 Page 1 Of 9

UNITED STATES DISTRICT COURT NORTHERN  
DISTRICT OF NEW YORK

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GERALDINE ENGEL,  
Plaintiff, 1: 06-CV-11  
vs. (DNH)(RFT)  
MICHAEL F. BERGEN, ESQ, and  
HON. CATHRYN M. DOYLE, Surrogate,  
Defendants.

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APPEARANCES:  
GERALDINE ENGEL Plaintiff, pro se

DAVID N. HURD United States District Judge

**DECISION and ORDER**

**I. Background.**

The Clerk has sent to the Court a civil rights complaint submitted for filing by Plaintiff Geraldine Engel. Dkt. No. 1. Plaintiff has paid the statutory filing fee.

Because the pleading filed by Plaintiff fails to satisfy the basic pleading requirements established by the Federal Rules of Civil Procedure as is more fully

discussed below, the Court orders Plaintiff to file an amended complaint should she wish to avoid the dismissal of this action.

## **II. Discussion.**

### **A. Rules governing pleading requirements.**

Rule 8 of the Federal Rules of Civil Procedure provides that a pleading which sets forth a claim for relief shall contain, inter alia, "a short and plain statement of the claim showing that the pleader is entitled to relief." See Fed. R. Civ. P. 8(a)(2). The purpose of this Rule "is to give fair notice of the claim being asserted so as to permit the adverse party the opportunity to file a responsive answer, prepare an adequate defense and determine whether the doctrine of res judicata is applicable." *Hudson v. Artuz*, 1998 WL 832708, \*1 (S.D.N.Y. Nov. 30, 1998) (quoting *Powell v. Marine Midland Bank*, 162 F.R.D. 15, 16 (N.D.N.Y.1995) (McAvoy, C.J.) (other citations omitted)).

Moreover, Rule 10 of the Federal Rules of Civil Procedure provides, in part:

**(b) Paragraphs; Separate Statements.** All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a

separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

The purpose of Rule 10 is to "provide an easy mode of identification for referring to a particular paragraph in a prior pleading .... " *Sandler v. Capanna*, No. 92-4838, 1992 WL 392597, \*3 (E.D.Pa. Dec. 17, 1992) (citing 5 C. Wright & A. Miller, *Federal Practice and Procedure*, § 1323 at 735 (1990)).

A complaint that fails to comply with these Rules "presents far too a heavy burden in terms of defendants' duty to shape a comprehensive defense and provides no meaningful basis for the Court to assess the sufficiency of a plaintiff's claims, and may properly be dismissed by the Court. *Gonzales v. Wing*, 167 F.R.D. 352, 355 (N.D.N.Y. 1996) (McAvoy, C.J.). As the Second Circuit has stated, "[w]hen a complaint does not comply with the requirement that it be short and plain, the Court has the power to, on its own initiative, ... dismiss the complaint." *Salahuddin v. Cuomo*, 861 F.2d 40, 42 (2d Cir. 1988). "Dismissal, however, is usually reserved for those cases in which the complaint is so confused, ambiguous, vague, or otherwise unintelligible that its true substance, if any, is well disguised." *Hudson*, 1998 WL 832708, \*2 (citation omitted). In those cases in which the court dismisses a prose complaint for failure to comply with these Rules, it should afford the plaintiff leave to amend the complaint to state a claim that is on its face nonfrivolous. See *Simmons II v. Abruzzo*, 49 F.3d 83, 86-87 (2d Cir. 1995).

**B. Allegations contained in the complaint.**

A review of the complaint reveals that such pleading clearly fails to satisfy the requirements of the above-mentioned Federal Rules.

In her prose complaint, Plaintiff alleges that she was forced to continue serving as executrix of her father's estate for a period of sixteen years because the attorney for the estate -- Defendant Bergan - did not file a final accounting, and Defendant Doyle, a New York State Surrogate Court Judge, failed to order a prompt final accounting. See Dkt. No. 1.

**1. Federal Rules of Civil Procedure**

Plaintiff's complaint fails to comply with the pleading requirements of Rules 8 and 10. Rather than providing a **short and plain** statement of her claims as called for by Rule 8, Plaintiff's complaint is twenty-one, typed, single-spaced pages long. Moreover, the complaint does not contain **sequentially numbered paragraphs containing only one act of wrongdoing per paragraph** as required by FED. R. Civ. P. 10. Rather, the complaint consists of one paragraph which spans twenty-one pages. See Dkt. No. 1. Plaintiff's complaint is not susceptible to a responsive pleading. Moreover, while Plaintiff seems to be claiming that her constitutional rights have been violated by the Defendants, she does not set forth sufficient facts upon which this Court may rely in determining whether such a constitutional violation has occurred.

**2. Color of law**

Plaintiff commenced this action pursuant to 42

U.S.C. § 1983, which establishes a cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws' of the United States." *German v. Fed. Home Loan Mortgage Corp.*, 885 F. Supp. 537, 573 (S.D.N.Y. 1995) (quotation and footnote omitted); see also *Myers v. Wollowitz*, No. 95-CV-0272, 1995 WL 236245, \*2 (N.D.N.Y. Apr. 10, 1995) (holding that § 1983 "is the vehicle by which individuals may seek redress for alleged violations of their constitutional rights." (citation omitted)). Parties may not be held liable under § 1983 unless the plaintiff can establish that they acted under the color of state law. See, e.g., *Rounseville v. Zahl*, 13 F.3d 625, 628 (2d Cir. 1994) (noting state action requirement under § 1983); *Wise v. Battistoni*, 92 Civ. 4288, 1992 WL 380914, \*1 (S.D.N.Y. Dec. 10, 1992) (same) (citations omitted); *Gentile v. Republic Tobacco Co.*, No. 95-CV-1500, 1995 WL 743719, \*2 (N.D.N.Y. Dec. 6, 1995) (noting that "[s]tate action is an essential element of any § 1983 claim." (citation omitted)).

Parties may not be held liable under Section 1983 unless it can be established that they have acted under the color of state law. See, e.g., *Rounseville v. Zahl*, 13 F.3d 625, 628 (2d Cir. 1994) (noting state action requirement under § 1983); *Wise v. Battistoni*, No. 92-Civ-4288, 1992 U.S. Dist. LEXIS 18864, \*2-3 (S.D.N.Y. Dec. 10, 1992) (same) (citations omitted).

Defendant Bergen -- a private attorney -- is not a state actor for purposes of § 1983, see *Myers v. Wollowitz*, No. 95-CV-0272, 1995 WL 236245, \*2

(N.D.N.Y. April 10, 1995) (defendant attorney's representation of a party to a court proceeding does not satisfy the Section 1983 requirement the defendant acted under color of state law). Plaintiff has failed to state a claim against Defendant Bergan under Section 1983.

### **3. Immunity**

The law in this Circuit clearly provides that "[j]udges enjoy absolute immunity from personal liability for 'acts committed within their judicial jurisdiction.'" Young v. Se/sky, 41 F.3d 47, 51 (2d Cir. 1994) (emphasis added) (quoting Pierson v. Ray, 386 U.S. 547 (1967)). "The absolute immunity of a judge applies however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff." Young, 41 F.3d at 51 (internal quotations omitted).

It is clear that Defendant Doyle was acting within the scope of her judicial jurisdiction while presiding over Plaintiffs father's estate in Surrogate Court. Thus, Defendant Doyle is absolutely immune from liability under Section 1983 and is dismissed from this action.

### **4. Statute of limitations**

This action was filed on January 4, 2006. Dkt. No. 1. Because the applicable statute of limitations for Section 1983 actions arising in New York requires claims to be brought within three years, Pinaud v. County of Suffolk, 52 F.3d 1139, 1156 (2d Cir. 1995), Plaintiffs claims against the Defendants that occurred

prior to January 4, 2003 -- are barred by this statute of limitations.

### **5. Conclusion**

Since the only Defendants in this action are either completely immune from liability or did not act under color of state law, Plaintiff has failed to state a claim and the Court must dismiss her complaint.<sup>1</sup> Should Plaintiff claim that her action should not be dismissed, Plaintiff should file an amended complaint **within thirty (30) days** of the filing date of this Order. Any amended complaint must allege claims of misconduct or wrongdoing against the Defendants which Plaintiff has a legal right to pursue and over which this Court has jurisdiction.<sup>2</sup> The amended complaint may not contain allegations against any Defendant who has been found to be immune from liability under Section 1983.

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<sup>1</sup> A district court has the power to dismiss a complaint sua sponte for failure to state a claim so long as the plaintiff is given "notice and an opportunity to be heard." *Wachtler v. County of Herkimer*, 35 F.3d 77, 82 (2d Cir. 1994) (citing *Thomas v. Scully*, 943 F.2d 259, 260 (2d Cir. 1991)) (per curiam); see also *Czernicki v. Iskra*, No. 02Civ.3816, 2003 WL 22047862, at \*1 (S.D.N.Y. Aug. 29, 2003).

<sup>2</sup> If Plaintiff chooses to file an amended complaint, the pleading must only contain claims **which occurred no more than three years prior to January 4, 2006.**

Any such amended complaint, which shall supersede and replace in its entirety the previous complaint filed by Plaintiff, must contain a caption that clearly identifies, by name, each individual and/or entity that Plaintiff is suing in the present lawsuit. The body of Plaintiffs complaint must contain sequentially numbered paragraphs containing only one act of misconduct per paragraph. Thus, if Plaintiff claims that her civil and/or constitutional rights were violated by more than one Defendant, or on more than one occasion, she shall include a corresponding number of paragraphs in her amended complaint for each such allegation, with each paragraph specifying (1) the alleged act of misconduct; (2) the date on which such misconduct occurred; (3) the names of each and every individual who participated in such misconduct; (4) where appropriate, the location where the alleged misconduct occurred; and, (5) the nexus between such misconduct and Plaintiff's civil and/or constitutional rights. Plaintiff must only allege the facts necessary to set out her claim; not every interaction she has had with the Defendants herein.

While Plaintiff may attach exhibits to her amended complaint, she shall not incorporate them by reference as a means of providing the factual basis for her claims. Thus, Plaintiff must name the individuals whom she seeks to include as Defendants herein in both the caption and the body of her amended complaint; she may not rely on the fact that individuals are named in the exhibits attached to her amended complaint as a means of including such persons as Defendants to this lawsuit.

Plaintiff's amended complaint shall also assert claims against each and every Defendant named in such complaint, and shall be filed with the Court within thirty (30) days from the date of the filing of this Order. Any Defendants not named in such pleading shall not be Defendants in the instant action. Plaintiff is further cautioned that no portion of any prior complaint shall be incorporated into her amended complaint by reference. Plaintiff shall submit only one amended complaint in accordance with the terms of this Order. Therefore, Plaintiff shall state in the single amended complaint filed in accordance with the terms of this Order all claims that she wishes this Court to consider as a basis for awarding Plaintiff relief herein; her failure to file such a pleading will result in dismissal of this action without further Order of the Court.

WHEREFORE, it is hereby

ORDERED, that Hon. Cathryn M. Doyle is dismissed as a Defendant to this action for the reasons stated above, and it is further

ORDERED, that this action is dismissed for failure to state a claim upon which relief may be granted. The Clerk of the Court is directed to retain this file as open for a period of **thirty (30) days** from the filing date of this Order, and it is further

ORDERED, that should Plaintiff believe that she can cure the defects in her complaint, she may file an amended complaint **within thirty (30) days** from the filing date of this Order as detailed above, and it is further

D157

ORDERED, that if Plaintiff fails to file such an amended complaint **within thirty (30) days** from the date of the filing of this Order, the Clerk enter judgment dismissing this action without further order of this Court due to Plaintiff's failure to comply with the terms of this Order and requirements of the above-mentioned Federal Rules, and it is further

ORDERED, that if Plaintiff fails to allege specific acts of misconduct as to any of the individuals named in any amended complaint filed herein, the instant action be dismissed with respect to the individuals against whom the Plaintiff has failed to allege specific acts of misconduct, and it is further

ORDERED, that upon the filing of any amended complaint, the file in this matter be returned to the Court for further review, and it is further

ORDERED, that Plaintiff is directed to immediately serve a copy of this Order upon any Defendant that she has already served with process in this action; and it is further

ORDERED, that the Clerk serve a copy of this Order on the Plaintiff.

IT IS SO ORDERED.

Dated: January 30, 2006  
Utica, New York.

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United States District Judge

D158

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page 140 of 223  
Case 1:17-cv-00063-T JM-DJS Document 15  
Filed 04/10/17 Page 1 of 2

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page 142 of 223  
Case 1:17-cv-00063-TJM-DJS Document 16  
Filed 04/10/17 Page 1 of 2

I hereby certify under penalty of perjury that on  
this 3rd day of April, 2017, I caused to be placed in the  
United States mail (first-class postage paid), copies of  
a "NOTICE OF APPEARANCE" address as follows:

Plaintiff:  
Xiu Jian Sun  
54-25 153rd Street, 2nd Fl., Flushing, N.Y. 11355

Defendant:  
Lawrence K. Bareman  
U.S. District Court Northern District of New York  
James M. Hanley Federal Building  
100 S. Clinton St., P.O.Box 7367, Syracuse, NY 13261

U.S. DISTRICT COURT - N.D. OF N.Y.  
FILED  
APR 10 2017  
AT O'CLOCK \_\_\_\_  
Lawrence K. Baerman, clerk- Syracuse

Simon Chen  
169-51 25th Ave., Whitestone, N.Y. 11357  
917-907-0807

D159

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page 144 of 223

Case 1:17-cv-00063-TJM-DJS Document 18  
Filed 04/17/17 Page 1 of 2

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK**

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XIU JIAN SUN, Servant: The  
Church of Jesus Christ of Latter-  
day Saints, a/kla the Spiritual Adam,  
Plaintiff,

v.

1 :17-cv-63

JOHN P. ASIELLO, JOHANTHAN  
LIPPMAN, JANET DIFIORE,  
EUGENE F. PIGOTT, JR., JAMES A.  
COSETLLO, ERIC T. SCHNEIDERMAN,  
Attorney General of the State of New York,  
And BRUCE J. BOIVIN, Assitant Attorney  
General of Counsel,

Defendants.

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Thomas J. McAvoy, S.U.S.D.J.

**ORDER**

Before the Court is Defendants' motion to dismiss  
the instant Complaint pursuant to Federal Rule of  
Civil Procedure 12(b)(6). See dkt. # 7. After the

D160

Defendants filed their motion and Plaintiff responded, Plaintiff filed an Amended Complaint. See dkt. # 12. A motion to dismiss under Rule 12(b) is not a responsive pleading and a party may amend as of right pursuant to Federal Rule of Civil Procedure 15 after a party files such a motion. Barbara v. New York Stock Exch., 99 F.3d 49, 56, (2d Cir. 1996). As such, Defendants' motion to dismiss will be denied as moot.

**IT IS SO ORDERED**

Thomas J. McAvoy  
Thomas J. McAvoy  
Senior, U.S. istrict Judge

**DATED:** April 17, 2017

D161

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page 146 of 223

Case 1:17-cv-00063-TJM-DJS Document 19  
Filed 04/17/17 Page 1 of 4

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page 127 of 223

Case 1:17-cv-00063- TJM-DJS Document 13-1  
Field 04/07/17 Page 1 of 2

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page 150 of 223

Case 1:17-cv-00063-TJM-DJS Document 20  
Filed 04/17/17 Page 1 of 4

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page 125 of 223

Case 1:17-cv-00063- TJM-DJS Document 13  
Field 04/07/17 Page 1 of 2

AO 440 (Rev. 06/12) Summons in a Civil Action (Page  
2)

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Civil Action No. 1:17-cv-63-(TJM/DJS)

**PROOF OF SERVICE**

(This section should not be filed with the court unless  
required by Fed. R. Civ. P. 4 (I))

This summons for (name of individual and title, if any)  
Bruce J. Boivin, Eric T. Schneidderman was received  
by me on (date) 04-03-2017.

   I personally served the summons on the individual  
at (place) \_\_\_\_\_ on (date) \_\_\_\_\_; or

D162

\_\_ I left the summons at the individual's residence or usual place of abode with (name) \_\_\_\_\_, a person of suitable age and discretion who resides there, on (date)\_\_\_\_\_, and mailed a copy to the individual's last known address; or

\_\_ I served the summons on (name of individual) \_\_\_\_\_, who is designated by law to accept service of process on behalf of (name of organization\_\_\_\_ on (date) \_\_\_\_; or

\_\_ I returned the summons unexecuted because \_\_\_\_; or  
\_\_ Other (specify):

My fees are \$ 10.00 for travel and \$ \_\_\_\_  
for services, for a total of \$ 10.00

I declare under penalty of perjury that this information is true.

Date: 04/03/2017

Simon Chen

Server's signature

Simon Chen

Printed name and title

169-51th Ave., Whitestone, NY 11357

U.S. DISTRICT COURT.N.D. OF N.Y.

**FILED**

APR-17 2017

AT \_ O'CLOCK\_

Lawrence K. Baerman Clerk-Syracuse

Additional information regarding attempted service,  
etc:

D163

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page 154 of 223  
Case 1:17-cv-00063-TJM-DJS Document 21  
Filed 05/02/17 Page 1 of 2

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK**

---

XIU JIAN SUN,  
Plaintiff, NOTICE OF MOTION  
-against- TO DISMISS  
JOHN P. ASIELLO; JONATHAN 17-CV-0063  
LIPPMANN; JANET DIFIORE; TJM/DJS  
EUGENE F. PIGOTT JR.; JAMES  
A. COSTELLO, ERIC T.  
SCHNEIDERMAN, and BRUCE J. BOIVIN,  
Defendants.

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PLEASE TAKE NOTICE that upon the complaint, the accompanying memorandum of law; and upon all prior proceedings, defendants Asiello, Lippman, DiFiore, Pigott, and Costello <sup>1</sup>, on June 12, 2017 at 10:00 a.m., or as soon thereafter as counsel can be heard, will make a motion at the United States District Court, Northern District of New York, Albany, New York, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for an order dismissing the complaint in its entirety with prejudice, together with such other or further relief as may be just.

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<sup>1</sup> Although named as defendants in the amended complaint, defendants Schneiderman and Boivin have not been served and do not yet appear.

D164

PLEASE TAKE FURTHER NOTICE, that pursuant to Rule 7.1(c) of the Local Rules of Practice of the United States District Court for the Northern District of New York, any papers to be submitted in opposition to the within motion must be filed with Clerk and served upon counsel for the defendants no later than seventeen (17) days before the return date of the motion, exclusive of that day.

PLEASE BE FURTHER ADVISED that if you do not respond in opposition to the motion, the motion to dismiss, if appropriate, will be granted and judgment will be entered against you. If the motion to dismiss is granted, your case will be dismissed and there will not be any trial concerning any of the issues asserted in your complaint.

Dated: Albany, New York  
May 2, 2017

ERIC T. SCHNEIDERMAN  
Attorney General of the State of New York  
Attorney for Defendants Asiello, Lippman,  
DiFiore, Pigott, and Costello  
The Capitol, Albany, New York 12224-0341

By: s/ Bruce J. Boivin  
Bruce J. Boivin  
Assistant Attorney General, of Counsel  
Bar Roll No. 507894  
Telephone: (518) 776-2590  
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To: Xiu Jian Sun  
54-25 153rd St., 2d Floor, Flushing, NY 11355

D165

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page 156 of 223  
Case 1:17-cv-00063-TJM-DJS Document 21-1  
Filed 05/02/17 Page 1 of 10

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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XIU JIAN SUN,

Plaintiff,

17-CV-0063

-against-

TJM/DJS

JOHN P. ASIELLO; JONATHAN  
LIPPMANN; JANET DIFIORE;  
EUGENE F. PIGOTT JR.; JAMES  
A. COSTELLO, ERIC T. SCHNEIDERMAN,  
and BRUCE J. BOIVIN  
Defendants.

---

MEMORANDUM OF LAW  
IN SUPPORT OF DEFENDANTS' MOTION TO  
DISMISS  
THE AMENDED COMPLAINT

ERIC T. SCHNEIDERMAN  
Attorney General of the State of New York  
Attorney for Defendants Asiello, Lippman,  
DiFiore, Pigott, and Costello  
The Capitol, Albany, New York 12224-0341

Bruce J. Boivin  
Assistant Attorney General, of Counsel  
Bar Roll No. 507894  
Telephone: (518) 776-2590

Date: May 2, 2017

D166

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page157 of 223

Case 1:17-cv-00063-TJM-DJS Document 21-1  
Filed 05/02/17 Page 2 of 10

**Table of Contents**

|                                                                                           |         |
|-------------------------------------------------------------------------------------------|---------|
| Preliminary Statement .....                                                               | 1, D167 |
| Statement of Facts .....                                                                  | 2, D169 |
| ARGUMENT .....                                                                            | 4, D171 |
| POINT I .....                                                                             | 4, D171 |
| THE COMPLAINT FAILS TO STATE A<br>CLAIM FOR WHICH RELIEF CAN BE<br>GRANTED .....          | 4, D171 |
| POINT 11 .....                                                                            | 5, D173 |
| ALL OF THE DEFENDANTS ARE<br>PROTECTED FROM LIABILITY<br>BY ABSOLUTE JUDICIAL IMMUNITY .. | 5, D173 |
| POINT III .....                                                                           | 8, D176 |
| PLAINTIFF SHOULD NOT BE<br>GRANTED LEAVE TO AMEND<br>HIS COMPLAINT .....                  | 8, D176 |
| Conclusion .....                                                                          | 8, D176 |

D167

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page158 of 223

Case 1:17-cv-00063-TJM-DJS Document 21-1  
Filed 05/02/17 Page 3 of 10

### **Preliminary Statement**

Plaintiff filed an amended complaint on April 5, 2017<sup>1</sup> (Dkt. No. 12) in response to a motion to dismiss the original complaint (Dkt. No. 7), filed by defendants on February 22, 2017. The two complaints are virtually identical, except for the addition of two "additional parties" in the amended complaint. Both complaints name as defendants John P. Asiello, Chief Clerk and Legal Counsel to the New York State Court of Appeals, Jonathan Lippman, Former Chief Judge of the New York State Court of Appeals, Janet DiFiore, Chief Judge of the New York State Court of Appeals, Eugene F. Pigott, Jr, former Associate Judge of the New York State Court of Appeals, and James A. Costello, former Assistant Deputy Clerk to the New York State Court of Appeals, all of whom are identified in the complaint as "Pharisees," rather than by their judicial titles. Dkt. No. 7, 2. The amended complaint adds as "additional parties" Eric T. Schneiderman, Attorney General of the State of New York and Bruce J. Boivin, Assistant Attorney General. Dkt. No 7, 3-1

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<sup>1</sup> Although the amended complaint is not captioned as such, it will be referred to as the amended complaint in this memorandum. Defendants also respectfully note that the amended complaint bears the court number 17-cv-6, not 1 7-cv-63, which appears to be a typographical error.

and 3-2. Neither AG Schneiderman nor AAG Boivin have been served. Although the docket contains entries captioned "proof of service" (Dkt. Nos. 19 and 20), a review of those documents reveals that the method of service is not completed on either form. More important, the proof of service affidavits indicate that the summonses were received by the signer on "04/03/2017" which is an impossibility since the summons were not issued until 04/07/2017. See Dkt. No. 13, 19, and 20. Accordingly, only the original defendants/ "Pharisees" appear at this time.

As with the original complaint, the amended complaint does not assert the purported basis of this Court's jurisdiction to entertain the amended complaint, alleges no wrongful conduct by any defendant for which plaintiff seeks relief, asserts no facts describing any conduct by any defendant, asserts no causes of action, and does not seek any relief other than the appointment of a "Mandarin court interpreter for my appeal court day." See generally, Dkt. No. 12.

Defendants now move to dismiss the complaint on the grounds that the amended complaint fails to assert a cause of action for which relief can be granted, and that the defendants are protected from liability on the grounds of absolute judicial immunity.<sup>2</sup>

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<sup>2</sup> We respectfully note that had they been served, AG Schneiderman and AAG Boivin would be similarly protected by absolute immunity. It is well-settled that government attorneys whose sole role in a legal proceeding is presenting their client's case to the Court are entitled to absolute immunity. See, *Barrett v.*

United States, 798 F.2d 565, 572-573 (2d Cir. 1986),  
Yaselli v. Goff, 12 F.2d 396, 402 (2d Cir. 1926), *affd.*,  
275 US. 503, 72 L. Ed. 395, 48 S. Ct. 155 (1927).

### **Statement of Facts**

In his amended complaint, plaintiff describes himself as the "spiritual Adam" of the Church of Jesus Christ of Latter Day Saints. Dkt. No 12, Caption and if 1. He refers to the defendants as Pharisees who are located at 20 Eagle St, Albany, NY. Id. if. The Court is respectfully requested to take judicial notice of the fact that the New York State Court of Appeals is located at 20 Eagle St., Albany, New York. Each defendant is a current or former Judge or clerk on the New York State Court of Appeals

The amended complaint contains no factual allegations which assert any wrongdoing by any of the defendants, asserts no cognizable cause of action, and does not seek any damages or other relief. Rather, plaintiff asserts, partly in English and partly in, presumably, Mandarin Chinese, that "the Lord god of host Jehovah" sent a messenger, at various times an "angel" or "the son of god," and declared: "take him to the law to confront it"; "Secret gang organization"; "Pharisees don't even open the door"; "Pharisees not even move a finger of his" (sic); and "Trial with god's law. Apply for jury to prevent insult and unfair behavior." Id. iii! 3-7. The only request of the Court is for the appointment of a Mandarin Chinese court interpreter for his appeal court day. Id. 8.

The amended complaint makes an oblique

reference to several court cases:

[Xiu Jian Sun] v. State of New York Department of Motor Vehicles, Docket No. 2015-00029, Index No 9436-2014;

[Xiu Jian Sun] v. William Yeung and Law Office of Yeung & Wang PLLC, Docket No. 4932-2014, Index No. 2014-08945;

[Xiu Jian Sun] v. Wu Hua Jing, MD. PHD & Dustin T Nguyen MD, Docket No 2014-00693; Index No 2738-2013;

[Xiu Jian Sun] v. Betty Law & Wan J. Law, Docket No. 2015-06399, Index Number 13994-2014; and

[Xiu Jian Sun] v. Dick Baily Services, Inc, Docket No. 2016-00379, Index No. 11709-2015.

Id. 2.

The New York State Court of Appeals, in fact, issued decisions<sup>3</sup> dismissing the following cases, sua sponte, on the grounds that "no substantial constitutional question is directly involved":

Xiu Jian Sun v. State of New York Department of Motor Vehicles, 26 N.Y. 3d 981 (2015)

Xiu Jian Sun v. William Yeung et al., 26 N.Y.

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<sup>3</sup> Copies of these decisions are appended hereto for the convenience of the Court.

D171

3d 1084 (2016)

Xiu Jian Sun v. Wuhua Jing, etc., et al., 27 N. Y 3d 989; (2016)

Xiu Jian Sun v. Lam, et al, 28 N.Y. 3d 1114 (2016)

Xiu Jian Sun, etc., v. Dick Bailey Service, Inc., et al., 28 N. Y. 3d 1113 (2016)

Reading the amended complaint liberally, and drawing all inferences in plaintiff's favor, it appears that the instant amended complaint was filed because plaintiff takes issue with the dismissal of these cases. In addition to the instant amended complaint, plaintiff filed two similar complaints in the Eastern District of New York, Sun v. Cavallo, et al. (16-cv-1083) and Sun v. Katzmann, et al, 16-cv-3937, both of which were dismissed as frivolous <sup>4</sup>.

## ARGUMENT

### POINT I

#### THE AMENDED COMPLAINT FAILS TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED

Under Rule 12(b)(6), to survive a motion to dismiss, a complaint must allege facts sufficient "to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A claim is plausible "when the plaintiff pleads factual content

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<sup>4</sup> Copies of these decision is appended hereto in conformance with L.R. 7.1 (a) 1.

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 (2009).

"In order to state a cause of action under 42 U.S.C. § 1983, a plaintiff must allege that some person acting under color of state law deprived him of a federal right." *Washington v. James*, 782 F.2d 1134, 1138 (2d Cir. 1986). "Because vicarious liability is inapplicable to ... § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Ashcroft*, 556 U.S. at 676; see *Farid v. Ellen*, 593 F.3d 233, 249 (2d Cir. 2010). "Such allegations must further be supported with specific factual support, linking the acts of a defendant to the injuries a plaintiff suffers." *McFadden v. So/faro*, Nos. 95-CV-1148, 95-CV-3790, 1998 U.S. Dist. LEXIS 5765, at \*19 (S.D.N.Y. Apr. 23, 1998).<sup>5</sup> "A plaintiff must thus allege a tangible connection between the acts of a defendant and the injuries suffered." *Bass v. Jackson*, 790 F.2d 260, 263 (2d Cir. 1986).

The instant amended complaint falls woefully short of this standard. The body of the amended complaint fails to assert the jurisdictional basis of the amended complaint, fails to allege that any of the defendants was acting under color of law, or deprived him of any federal right. Indeed, the body of the amended complaint does not mention any defendant

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<sup>5</sup> A copy of the decision is appended hereto in conformance with L.R. 7.1 (a) 1.

D173

except to identify them as defendants, and asserts no facts about the conduct of any defendant. Furthermore, the amended complaint fails to assert what federal right was violated and does not seek any relief.

Accordingly, the amended complaint must be dismissed in its entirety.

**POINT II**  
**ALL OF THE DEFENDANTS ARE PROTECTED**  
**FROM LIABILITY BY ABSOLUTE JUDICIAL**  
**IMMUNITY**

Chief Judge DiFiore, former Chief Judge Lippman, and former Associate Judge Pigott are immune from suit by the doctrine of absolute judicial immunity. That immunity extends to Chief Court Clerk Asiello and former Assistant Deputy Clerk Costello, both judicial employees, who perform functions closely associated with the judicial process.

While it is unclear what, if any, relief plaintiff seeks, the amended complaint is barred, whether plaintiff seeks money damages or injunctive relief, by the doctrine of absolute judicial immunity.

It is well-settled that judges enjoy absolute immunity from personal liability for acts committed within their judicial jurisdiction. *Young v. Se/sky*, 41 F. 3d 47, 51 (2d Cir 1994). Indeed:

Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within

their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in *Bradley v. Fisher*, 13 Wall. 335 (1872).

*Pierson v. Ray*, 386 U.S. 547, 553-554 (1967).

"Since the seventeenth century, the common law has immunized judges from damage claims arising out of their judicial acts. See, e.g., *Floyd v. Barker*, 77 Eng. Rep. 1305 (Star Chamber 1607) judges of courts of record)." *Tucker v. Outwater*, 118 F. 3d 930, 932 (2d Cir. 1997). "Without insulation from liability, judges would be subject to harassment and intimidation and would thus lose that independence without which no judiciary can either be respectable or useful." *Young*, 41 F. 3d at 51 (internal quotations and citations omitted). The Supreme Court has repeatedly reaffirmed the principles of absolute judicial immunity, *Tucker*, 118 F. 3d at 932-933 (collecting cases). It "has also specifically applied the doctrine of judicial immunity to actions brought pursuant to 42 U.S.C. § 1983." *Id.*

The doctrine of absolute judicial immunity is so comprehensive in its scope that "absolute immunity of a judge applies however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff." *Se/sky*, 41 F. 3d at 51 (internal quotations and citations omitted).

While the amended complaint is not a model of clarity, a fair conclusion to be drawn from a liberal reading of it is that plaintiff takes issue with the decisions of the judges to dismiss several of his cases. As the issuance of decisions is clearly within the

jurisdiction of the judicial defendants, they are entitled to absolute immunity.

Such immunity has been extended to judges' law clerks "who perform functions closely associated with the judicial process" when they are performing discretionary acts of a judicial nature. *Cleavinger v. Saxner*, 474 U.S. 193, 200. Indeed, "[t]his same reasoning applies to court clerks and 'others who perform functions closely associated with the judicial process' when they are performing discretionary acts of a judicial nature which are essential to the judicial process, especially the filing of court documents and managing a court's calendar. (collecting cases)." *United States ex rel. Stuyvesant v. Holder*, 2010 U.S. Dist. LEXIS 145998\*5 (S.D.N.Y. September 23, 2010)<sup>6</sup>.

While it is unclear from the amended complaint what acts defendants Asiello and Costello, the judicial clerk defendants, performed to which plaintiff takes exception, a fair reading of the complaint leads to the conclusion that they were responsible for either filing the decisions of the judicial defendants or transmitting those decisions to plaintiff. As such, their role is closely associated with a judicial function and they are entitled to absolute immunity.

To the extent the amended complaint is seeking some form of injunctive relief, the complaint is similarly barred by the doctrine of absolute judicial immunity. "[A]s amended in 1996, § 1983 provides

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<sup>6</sup> A copy of the decision is appended hereto in conformance with L.R. 7.1 (a) 1.

that 'in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.' 42 U.S.C. § 1983." *Bliven v. Hunt*, 579 F.3d 204, 209-210 (2nd Cir. 2009). Plaintiff has not alleged that a declaratory decree has been violated or that declaratory relief was unavailable.

Accordingly, the defendants enjoy absolute immunity from suit and the complaint must be dismissed.

**POINT III**  
**PLAINTIFF SHOULD NOT BE GRANTED LEAVE TO AMEND HIS COMPLAINT**

Defendants respectfully submit that the complaint is so void of facts and allegations that no effort to flesh-out the threadbare recitals will result in a complaint which states a cause of action. Additionally, as all of the defendants are entitled to absolute immunity, amendment would be futile. See *Sun v. Cavallo, et al.* (16-cv-1083) (EDNY 2016); *Sun v. Katzmman, et al.*, 16-cv-3937 (EDNY 2016). Furthermore, plaintiff has already amended the complaint. That amendment provides no more clarity than the original complaint. Accordingly, we respectfully request that the Court not grant leave to amend the complaint.

**Conclusion**

For the reasons cited above, the complaint should be dismissed in its entirety with prejudice.

D177

Dated: Albany, New York  
May 2, 2017

ERIC T. SCHNEIDERMAN  
Attorney General of the State of New York  
Attorney for Defendants Asiello, Lippman,  
DiFiore, Pigott, and Costello  
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D178

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page 166 of 223  
Case 1:17-cv-00063-TJM-DJS Document 21-2  
Filed 05/02/17 Page 1 of 32

APPENDIX  
APPENDIX

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page 167 of 223  
Case 1:17-cv-00063-TJM-DJS Document 21-2  
Filed 05/02/17 Page 2 of 32

LexisNexis® Page 1  
Xiu Jian Sun, Appellant, v State of New York  
Department of Motor Vehicles, Respondent.  
[NO NUMBER IN ORIGINAL]

COURT OF APPEALS OF NEW YORK

26 N. Y.3d 981; 40 N.E.3d 571; 18 N.Y.S.3d 593; 2015  
N.Y. LEXIS 3254; 2015 NY Slip Op 87417

October 15, 2015, Decided

NOTICE: DECISION WITHOUT PUBLISHED  
OPINION

PRIOR HISTORY: Reported below, 2015 NY Slip  
Op 79526(U).

OPINION

[\*I] Appeal dismissed, without costs, by the Court of  
Appeals, sua sponte, upon the ground that no  
substantial constitutional question is directly involved

D179

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page 168 of 223

Case 1:17-cv-00063-TJM-DJS Document 21-2  
Filed 05/02/17 Page 3 of 32

LexisNexis®

Page 1

Xiu Jian Sun, Appellant, v William Yeung et al.,  
Respondents.

[NO NUMBER IN ORIGINAL]

COURT OF APPEALS OF NEW YORK

26 N. Y.3d 1084; 44 N.E.3d 238; 23 N.Y.S.3d 161; 2016  
N.Y. LEXIS 16; 2016 NY Slip Op 60091

January 5, 2016, Decided

NOTICE: DECISION WITHOUT PUBLISHED  
OPINION

PRIOR HISTORY: Reported below,  
Xiu Jian Sun v Yeung, J 32 AD3d 756, I 7 NYS3d 660,  
2015 NY. App. Div. LEXIS 7552 (2015)

OPINION

[\*I] Appeal dismissed, without costs, by the Court of  
Appeals, sua sponte, upon the ground that no  
substantial constitutional question is directly involved.

D180

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page 169 of 223

Case 1:17-cv-00063-TJM-DJS Document 21-2  
Filed 05/02/17 Page 4 of 32

LexisNexis® Page 1

Xiu Jian Sun, Appellant, v Wuhua Jing, etc., et al.,  
Respondents.

[NO NUMBER IN ORIGINAL)

COURT OF APPEALS OF NEW YORK

27 N. Y.3d 989; 52 N.E.3d 239; 32 N. Y.S.3d 575; 2016  
N. Y. LEXIS 834; 2016 NY Slip Op 71817

April 28, 2016, Decided

NOTICE: DECISION WITHOUT PUBLISHED  
OPINION

PRIOR HISTORY: Xiu Jian Sun v. Wuhua Jing, 136  
A.D.3d 613, 24 N. Y.S.3d 395, 2016 N. Y. App. Div.  
LEXIS 638 (2016)

OPINION

[\*990] Appeal dismissed without costs, by the Court  
sua sponte, upon the ground that no appeal lies as of  
right from the unanimous order of the Appellate  
Division absent the direct involvement of a substantial  
constitutional question (CPLR 5601 [\*\*1]).

D181

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page 170 of 223

Case 1:17-cv-00063-TJM-DJS Document 21-2  
Filed 05/02/17 Page 5 of 32

LexisNexis® Page 1

Xiu Jian Sun, Appellant, v Betty Lam, et al.,  
Respondents.

[NO NUMBER IN ORIGINAL]

COURT OF APPEALS OF NEW YORK

28 N. Y.3d 1114; 2016 N. Y. LEXIS 3793; 2016 NY  
Slip Op 94323

December 15, 2016, Decided

NOTICE: DECISION WITHOUT PUBLISHED  
OPINION

PRIOR HISTORY: Xiu Jian Sun v. lam, 143 A.D.3d  
891, 38 N.Y.S.3d 921, 2016 NY. App. Div. LEXIS 6735  
(2016)

OPINION

[\*I] Appeal dismissed without costs, by the Court sua  
sponte, upon the ground that no substantial  
constitutional question is directly involved.

D182

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page 171 of 223

Case 1:17-cv-00063-TJM-DJS Document 21-2  
Filed 05/02/17 Page 6 of 32

LexisNexis® Page 1

Xiu Jian Sun, Appellant, v Dick Bailey Service, Inc., et  
al., Respondents.

[NO NUMBER IN ORIGINAL]

COURT OF APPEALS OF NEW YORK

28 N. Y.3d I 113; 2016 N. Y. LEXIS 3794; 2016 NY Slip  
Op 94322

December 15, 2016, Decided

NOTICE: DECISION WITHOUT PUBLISHED  
OPINION

PRIOR HISTORY: Xiu Jian Sun v. Dick Bailey Serv.,  
Inc., 143 A.D.3d 891, 38 N. Y.S.3d 921, 2016 N. Y. App.  
Div. LEXIS 6731, 2016 NY Slip Op 6822 (2016)

OPINION

[\* 1] Appeal dismissed without costs, by the Court sua  
sponte, upon the ground that no substantial  
constitutional question is directly involved.

D183

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page 198 of 223  
Case 1:17-cv-00063-TJM-DJS Document 22  
Filed 05/02/17 Page 1 of 1

UNITED STATES DISTRICT COURT NORTHERN  
DISTRICT OF NEW YORK

|                                                                                                                                                              |                                                            |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------|
| XIU JIAN SUN,<br>Plaintiff,<br>-against-<br>JOHN P. ASIELLO; JONATHAN<br>LIPPMANN; JANET DIFIORE; EUGENE<br>F. PIGOTT JR.; JAMES A. COSTELLO,<br>Defendants. | <b>DECLARATION<br/>OF SERVICE</b><br>17-CV-0063<br>TJM/DJS |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------|

I, BETH VANDERHEYDEN, declare pursuant to 28 USC§ 1746, that on May 2, 2017, I served the **Notice of Motion to Dismiss and Memorandum of Law in Support of Defendants' Motion to Dismiss the Amended Complaint with Appendix A**, filed herein electronically upon the following individual, by depositing a true copy thereof, properly enclosed in a sealed, postpaid wrapper, in a post office box in the City of Albany, a depository under the exclusive care and custody of the United States Postal Service, directed to the individual at the address, designated for that purpose, as follows:

Xiu Jian Sun  
54-25 153rd St., 2d floor, Flushing, NY 11355  
Dated: May 2, 2017  
Albany, New York

s/ Beth Vanderheyden  
Beth Vanderheyden

D184

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page 199 of 223  
Case 1:17-cv-00063-TJM-DJS Document 23  
Filed 05/04/17 Page 1 of 1

UNITED STATES DISTRICT COURT NORTHERN  
DISTRICT OF NEW YORK

LAWRENCE K. BAERMAN Clerk  
JOHN M. DOMURAD Chief Deputy  
DAN MCALLISTER Chief Deputy  
James T. Foley Courthouse  
445 Broadway, Room 509  
Albany, New York 12207  
(518) 257-1800  
May 4, 2017

**NOTICE**

RE: Sun v. Asiello, et al  
Case No.: 1:17-CV-63 [TJM/DJS]  
Mr. Sun:

On May 2, 2017, the defendant's moved to dismiss this action. **Your response to this motion is due by 5/26/17.**

Per the Local and Federal Rules of Civil Procedure expect service of the defendants' motion within the next few days.

Please file your response to this motion in writing and in accordance with the Local and Federal Rules of Civil Procedure. You may file your response by mailing it to:

James M. Hanley Federal Building  
P.O. Box 7367, 100 S. Clinton St.  
Syracuse, NY 13261

D185

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page 200 of 223  
Case 1:17-cv-00063-T JM-DJS Document 24  
Filed 05/22/17 Page 1 of 5

UNITED STATES DISTRICT COURT NORTHERN  
DISTRICT OF NEW YORK

x

The Church of Jesus Christ of Latter-  
day saints, Servant: Case No: 1:17-CV-0063  
Xiu Jian Sun, the spiritual Adam [TJM/DJS]  
Plaintiff

Vs.

Response to Motion

Pharisees:

JOHN P. ASIELLO; JONATHAN  
LIPPMAN, JANET DIFIORE;  
EUGENE F. PIGOTT, JR,  
JAMES A. COSTELLO,  
ERIC T. SCHNEIDERMAN,  
ATTORNEY GENERAL OF  
THE STATE OF NEW YORK,  
BRUCE J. BOIVIN, ASSISTANT  
ATTORNEY GENERAL,  
OF COUNSEL

U.S. DISTRICT  
COURT.N.D.  
OF N.Y.  
**FILED**  
MAY-22 2017  
AT \_ O'CLOCK\_  
Lawrence K.  
Baerman Clerk-  
Syracuse

Defendants

x

TO UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

Jehovah, -the Lord god of host gives the words to  
servant (Plaintiff) in the temple he made, "In contempt  
of words from Israel family's angel." (蔑视以色列家使者的  
言语)

D186

On the date of February 27, 2017, when the notification from United States District Court of New York is received, Jehovah, -the Lord god of host sent the messenger speaks to spiritual Adam, -plaintiff through angel, says: "Outside is washed, but did not wash inside". (外面洗了, 里面却没洗)

Dated: Queens New York  
May, 16 2017

The Church of Jesus Christ of Latter-day saints  
Servant: Xiu Jian Sun, the spiritual Adam  
Xiu Jian Sun, the spiritual Adam  
54-25 153rd St 2FL  
Flushing, NY 11355  
646-675-0308  
Plaintiff

CC: John P. Asiello;  
Jonathan Lippman;  
Eugene F. Pigott, JR;  
James A. Costello;  
Janet DiFiore.  
20 Eagle St., Albany, NY 12207  
(518) 455-7700  
(Pharisees)  
Eric T. Schneiderman  
Attorney General of the State of New York  
The Capitol, Albany, New York 12224-0341  
(518)-776-2300  
Bruce J. Boivin  
Assistant Attorney General, of Counsel  
The Capitol, Albany, New York 12224-0341  
(518)-776-2590;  
Defendants

D187

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page 202 of 223

Case 1:17-cv-00063-TJM-DJS Document 3  
Filed 01/23/17 Page 6 of 14

Case 1:17-cv-00063-T JM-DJS Document 11  
Filed 04/05/17 Page 6 of 14

Case 1:17-cv-00063-T JM-DJS Document 24  
Filed 05/22/17 Page 3 of 5

**5) PROPOSED DATE FOR THE COMMENCEMENT OF TRIAL:** The action will be ready to proceed to trial on or before the 25 day of April, 2017. It is anticipated that the trial will take approximately     days to complete. The parties request that the trial be held in Albany, N.Y. (The proposed date for the commencement of trial must be within 18 months of the filing date).

**6) HAVE THE PARTIES FILED A JURY DEMAND:**  
YES (YES) /     (NO).

**7) DOES THE COURT HAVE SUBJECT MATTER JURISDICTION? ARE THE PARTIES SUBJECT TO THE COURT'S JURISDICTION? HAVE ALL PARTIES BEEN SERVED?**

The federal department should have jurisdiction over the place. All parties had been served.

**8) WHAT ARE THE FACTUAL AND LEGAL**

**BASES FOR PLAINTIFF'S CLAIMS AND  
DEFENDANT'S DEFENSES ( I N C L U D E  
COUNTERCLAIMS & CROSSCLAIMS, IF  
APPLICABLE)?**

In the nights between March 7<sup>th</sup> and 8<sup>th</sup>, 2016, the  
Lord god of host Jehovah sent the messenger said to  
servant (Plaintiff though the angel, "Secret gang  
organization". (秘密帮派组织).

**9) WHAT FACTUAL AND LEGAL ISSUES ARE  
GENUINELY IN DISPUTE?**

---

**10) CAN THE ISSUES IN LITIGATION BE  
NARROWED BY AGREEMENT OR BY MOTIONS?  
ARE THERE DISPOSITIVE OR PARTIALLY  
DISPOSITIVE ISSUES APPROPRIATE FOR  
DECISION ON MOTION?**

Can not be done by motion or agreement.

**11) WHAT SPECIFIC RELIEF DO THE PARTIES  
SEEK? WHAT ARE THE DAMAGES SOUGHT?**

荣耀 Glory

D189

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page 203 of 223

Case 1:17-cv-00063-T JM-DJS Document 24  
Filed 05/22/17 Page 4 of 5

**CERTIFICATE OF SERVICE**

I hereby certify under penalty of perjury that on this 17th day of May, 2017, I caused to be placed in the United States mail (first-class postage paid), copies of a "Response to Motion" address as follows:

Eric T. Schneiderman  
Attorney General of the State of New York  
The Capitol,  
Albany, New York 12224-0341;

Bruce J. Boivin  
Assistant Attorney General, of Counsel  
The Capitol,  
Albany, New York 12224-0341

Dated: May, 17 2017  
Queens New York

Xingcan Li

D190

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page 205 of 223

Case 1:17-cv-00063-TJM-DJS Document 25  
Filed 05/23/17 Page 1 of 1

STATE OF NEW YORK  
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN  
ATTORNEY GENERAL

Writer Direct: (518) 776-2590  
DIVISION OF STATE COUNSEL  
LITIGATION BUREAU

May 23, 2017

Honorable Thomas J. McAvoy  
Federal Building and U.S. Courthouse  
15 Henry Street Binghamton, NY 13901

Re: Jian Sun v. Asiello et al  
Northern District of New York  
17-CV-0063 (TJM)(DJS)

Dear Judge McAvoy:

Defendants are in receipt of plaintiff response to defendants' motion to dismiss the complaint. Dkt. No. 24. As plaintiff's response does not address any issues raised in our motion, we have determined that no reply is necessary. Accordingly, the Court may consider this motion fully submitted.

D191

Pursuant to 28 U.S.C. §1746 I declare that, on this date, I caused the plaintiff to be served with a copy of this letter request by First-Class United States Mail at the address listed below

Respectfully yours,  
s/ Bruce J. Boivin  
Bruce J. Boivin  
Assistant Attorney General  
Bar Roll No. 507894  
Bruce.Boivin@ag.ny.gov

cc: Xiu Jian Sun  
54-25 153rd St., 2d Floor  
Flushing, NY 11355

THE CAPITOL, ALBANY, NY 12224-0341 • (518)776-  
2300 • FAX (518) 915-7738 \*NOT FOR SERVICE OF  
PAPERS WWW.AG.NY.GOV

D192

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page 211 of 223

Case 1:17-cv-00063-TJM-DJS Document 27  
Filed 07/26/17 Page 1 of 9

Case 17-2314, Document 1-2, 07/27/2017, 2088915,  
Page 1 of 13

UNITED STATES DISTRICT COURT NORTHERN  
DISTRICT OF NEW YORK

U.S. DISTRICT COURT N.D. OF N.Y.

**FILED**

JUL-26 2017

AT \_ O'CLOCK \_

Lawrence K. Baerman Clerk-Syracuse

\_\_\_\_\_x  
The Church of Jesus Christ of Latter-  
day saints, Servant: Docket No:  
Xiu Jian Sun, the spiritual Adam 1:17-CV-0063  
Plaintiff [TJM/DJS]

Vs.

Pharisees:  
JOHN P. ASIELLO, JONATHAN  
LIPPMAN, JANET DIFIORE,  
EUGENE F. PIGOTT, JR.,  
JAMES A. COSTELLO, ERIC T.  
SCHNEIDERMAN, ATTORNEY  
GENERAL OF THE STATE OF  
NEW YORK, BRUCE J. BOIVIN,  
ASSISTANT ATTORNEY

**Notice of Appeal**

D193

GENERAL, OF COUNSEL  
Defendants

x

Notice is hereby given that Xiu Jian Sun, the spiritual Adam (plaintiff) in the above named case, \* hereby appeal to the United States Court of Appeals for the 2ND CIR, (from the final judgment) (from the order (describing it)) entered in this action on the 17 day of July, 2017.

Dated: July 20, 2017

The Church of Jesus Christ of Latter-day saints

Servant: Xiu Jian Sun, the spiritual Adam  
Xiu Jian Sun, the spiritual Adam  
54-25 153rd St 2FL  
Flushing, NY 11355  
646-675-0308  
Plaintiff

D194

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page 217 of 223

Case 1:17-cv-00063-TJM-DJS Document 27  
Filed 07/26/17 Page 7 of 9

**CERTIFICATE OF SERVICE**

I hereby certify under penalty of perjury that on this 21th day of July, 2017, I caused to be placed in the United States mail (first-class postage paid), copies of a "Notice of Appeal" address as follows:

Eric T. Schneiderman  
Attorney General of the State of New York  
The Capitol,  
Albany, New York 12224-0341;

Bruce J. Boivin  
Assistant Attorney General, of Counsel  
The Capitol,  
Albany, New York 12224-0341

Dated: July 21, 2017  
Queens New York

Simon Chen  
Simon Chen

D195

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page 220 of 223

Case 1:17-cv-00063-TJM-DJS Document 28  
Filed 07/27/17 Page 1 of 1

Case 17-2314, Document 4-2, 07/27/2017, 2088931,  
Page1 of 5

UNITED STATES DISTRICT COURT NORTHERN  
DISTRICT OF NEW YORK

ELECTRONIC NOTICE OF CIVIL OR PRISONER  
APPEAL & CLERK'S CERTIFICATION

Dear Clerk of the Court,

Please take notice that on July 26, 2017 the court received a notice of appeal. This notice serves to inform you of the pending appeal and provides you with the information needed to process the appeal.

I, LAWRENCE K. BAERMAN, CLERK, U.S. District Court for the Northern District of New York, DO, HEREBY CERTIFY that the foregoing docket entries, with the exception of the documents listed below, are maintained electronically on the court's CM/ECF system and constitute the Record on Appeal in the below listed action.

The following documents are not available electronically. Please notify the Albany Clerk's Office

D196

if you need any of the following documents:

Docket No.(s): N/A

IN TESTIMONY WHEREOF, I have hereunto set  
my hand and caused the Seal of said Court to be  
hereto affixed at the City of Albany, New York, this  
27th day of July, 2017.

Lawrence K. Baerman, Clerk  
U.S. District Court

By: s/ Sue Potter  
Deputy Clerk

**Case Information**

Case Name & Case No. Xiu Jian Sun v. John P. Asiello,  
et al 1:17-CV-63

Docket No. of Appeal: 27

Document Appealed: 26

Fee Status: Paid X Due    Waived (IFP/CJA)   

IFP revoked    Application Attached   

IFP pending before USDJ   

Counsel: Retained    Pro Se X

Time Status: Timely X Untimely   

Motion for Extension of Time: Granted    Denied   

Certificate of Appealability: Granted    Denied   

N/A   

State Court Papers are being sent by UPS as of:

---

D197

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page 221 of 223

Case 1:17-cv-00063-TJM-DJS Document 29  
Filed 08/11/17 Page 1 of 2

**UNITED STATES DISTRICT COURT NORTHERN  
DISTRICT OF NEW YORK**

**JUDGMENT IN A CIVIL CASE**

XIU JIAN SUN

Plaintiff(s)

CASE NUMBER:

vs.

1: 17-CV-63 (T JM/DJS)

JOHN P. ASIELLO, et al

Defendant(s)

**Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Plaintiff's amended complaint is dismissed with prejudice in accordance with the Honorable Senior District Judge Thomas J. McAvoy's Decision & Order filed on July 17, 2017 [see dkt. ## [12] and [26] ].

DATED: August 11, 2017

Clerk of Court  
s/ C. M. Ligas  
Deputy Clerk

D198

Case 17-2314, Document 26, 10/16/2017, 2149166,  
Page 222 of 223

Case 1:17-cv-00063-TJM-DJS Document 29  
Filed 08/11/17 Page 2 of 2

**Federal Rules of Appellate Procedure Rule 4.  
Appeal as of Right**

**(a) Appeal in a Civil Case.**

1. (1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

(B) The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:

- (i) the United States;
- (ii) a United States agency;
- (iii) a United States officer or employee sued in an official capacity; or
- (iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf-including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.

(C) An appeal from an order granting or denying an

application for a writ of error coram nobis is an appeal in a civil case for purposes of Rule 4(a).

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order-but before the entry of the judgment or order-is treated as filed on the date of and after the entry.

(3) Multiple Appeals. If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

- (i) for judgment under Rule 50(b);
- (ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;
- (iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;
- (iv) to alter or amend the judgment under Rule 59;
- (v) for a new trial under Rule 59; or
- (vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court

announces or enters a judgment-but before it disposes of any motion listed in Rule 4(a)(4)(A)-the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal, in compliance with Rule 3(c)-within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

- (i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and
- (ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the

date when the order granting the motion is entered, whichever is later.

(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77 (d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77 (d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

(7) Entry Defined.

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58 (a) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79 (a); or

(ii) if Federal Rule of Civil Procedure 58 (a) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

D202

- the judgment or order is set forth on a separate document, or

- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79 (a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58 (a) does not affect the validity of an appeal from that judgment or order.

E1

**APPENDIX E**

Case 17-2314, Document 33-1, 11/02/2017, 2163306,  
Page 1 of 1

**STATE OF NEW YORK OFFICE OF THE  
ATTORNEY GENERAL**

ERIC T. SCHNEIDERMAN  
ATTORNEY GENERAL

BARBARA D. UNDERWOOD  
SOLICITOR GENERAL

Catherine O'Hagan Wolfe                      November 2, 2017  
Clerk  
U.S. Court of Appeals for the Second Circuit  
40 Foley Square New York, NY 10007

Re: Sun v. Asiello, No. 17-2314

Dear Ms. Wolfe:

The defendants-appellees hereby request that their brief be due January 15, 2018. This date is ninety-one days after October 16, 2017, the date appellant's brief and appendix were filed.

Respectfully submitted,  
/s/ Oren L. Zeve  
Oren L. Zeve  
Managing Assistant Solicitor General

cc: Xiu Jian Sun  
54-25 153rd Street, 2nd Flr. Flushing, NY 11355

120 BROADWAY, NEW YORK N.Y. 10271-0332 •  
PHONE (212) 416-8020 • FAX (212) 416-8962 \*NOT  
FOR SERVICE OF PAPERS <http://www.ag.ny.gov>

E2

Case 17-2314, Document 33-2, 11/02/2017, 2163306,  
Page1 of 1

**CERTIFICATE OF SERVICE**

I hereby certify that, on the 2nd of November 2017,  
I served or caused to be served one copy of the  
appellees' scheduling request by United States Postal  
Service first class/priority mail upon the following  
named person(s):

Xiu Jian Sun  
2nd Flr.  
54-25 153rd Street  
Flushing, NY 11355

/s/ Oren L. Zeve

E3

Case 17-2314, Document 36, 11/03/2017, 2163812,  
Page 1 of 1

UNITED STATES COURT OF APPEALS  
for the  
SECOND CIRCUIT

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At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 3rd day of November, two thousand and seventeen,

---

Xiu Jian Sun, Servant: The Church  
of Jesus Christ of Latter-day saints,  
AKA the spiritual Adam,

Plaintiff - Appellant,

**ORDER**

v.

Docket No: 17-2314

John P. Asiello, Jonathan Lippman,  
Janet DiFiore, Eugene F. Pigott, Jr.,  
James A. Costello, Eric T.  
Schneiderman, Attorney General of  
the State of New York, Bruce J. Boivin,  
Assistant General of Counsel,  
Defendants - Appellees.

---

Counsel for APPELLEES has filed a scheduling notification pursuant to the Court's Local Rule 31.2,

E4

setting January 15, 2018 as the brief filing date.

It is HEREBY ORDERED that Appellees' brief must be filed on or before January 15, 2018. If the brief is not filed by that date, the appeal will proceed to a merits panel for determination forthwith, and Appellees will be required to file a motion for permission to file a brief and appear at oral argument. A motion to extend the time to file the brief or to seek other relief will not toll the filing date. See Local Rule 27.1(f)(1); cf. RLI Insurance Co. v. JDJ Marine, Inc., 716 F.3d 41, 43-45 (2d Cir. 2013).

For The Court:  
Catherine O'Hagan Wolfe,  
Clerk of Court

Catherine O'Hagan Wolfe,

E5

Case 17-2314, Document 37-1, 12/26/2017, 2201326,  
Page1 of 1

UNITED STATES COURT OF APPEALS FOR THE  
SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse  
40 Foley Square, New York, NY 10007  
Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 17-2314 Caption [use short title]  
Motion for: summary affirmance or dismissal as  
frivolous

Sun v. Asiello

Set forth below precise, complete statement of relief  
sought:

Appellees moves to dismiss appeal as frivolous or,  
in the alternative, for summary affirmance, because (1)  
the complaint and appeal are frivolous; (2) the district  
court correctly concluded that plaintiff failed to state a  
claims and (3) the court lacks personal jurisdiction  
over defendants Schneiderman and Boivin

MOVING PARTY: appellees

OPPOSING PARTY: Xiu Jian Sun, Plaintiff-Appellant

\_\_ Plaintiff

\_\_ Defendant

\_\_ Appellant/Petitioner

\_\_ Appellee/Respondent

MOVING ATTORNEY: Oren L. Zeve

E6

OPPOSING ATTORNEY: [pro se]

[name of attorney, with firm, address, phone number  
and e-mail]

NY Attorney General,

120 Broadway, NY, NY

212-416-8882, oren.zeve@ag.ny.gov

54-25 153rd Street, 2d Floor, Flushing, New York

11355, (646) 675-0308

Court-Judge/Agency appealed from: U.S. District  
Court, Northern District of NY; McAvoy, USDJ

Please check appropriate boxes:

Has movant notified opposing counsel (required by  
Local Rule 27.1):

☐ Yes ☐ No (explain): [opponent is pro se]

Opposing counsel's position on motion:

☐ Unopposed ☐ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:

☐ Yes ☐ No ☐ Don't Know

**FOR EMERGENCY MOTIONS, MOTIONS FOR  
STAYS AND INJUNCTIONS PENDING APPEAL:**

Has request for relief been made below?

☐ Yes ☐ No

Has this relief been previously sought in this Court?

☐ Yes ☐ No

Requested return date and explanation of emergency:

\_\_\_\_\_

E7

Is oral argument on motion requested?

☐ Yes ☒ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set?

☐ Yes ☒ No If yes, enter date: \_\_\_\_\_

Signature of Moving Attorney: Oren L. Zeve

Date: 12/26/17 Service by: ☐ CM/ECF

☒ Other [Attach proof of service]

Form T-1080 (rev. 12-13)

E8

Case 17-2314, Document 37-2, 12/26/2017, 2201326,  
Page1 of 11

UNITED STATES COURT OF APPEALS FOR THE  
SECOND CIRCUIT

---

XIU JIAN SUN,  
Plaintiff-Appellant,  
v.  
JOHN ASIELLO, et al.,  
Defendants-Appellees.

---

No. 17-2314

MEMORANDUM OF LAW IN SUPPORT OF  
MOTION TO DISMISS OR, IN THE ALTERNATIVE,  
FOR SUMMARY AFFIRMANCE

ERIC T. SCHNEIDERMAN  
Attorney General  
State of New York  
Attorney for Appellee  
120 Broadway New York, NY 10271  
(212) 416-8882

OREN L. ZEVE  
Managing Assistant Solicitor  
General of Counsel

Dated: December 26, 2017

**PRELIMINARY STATEMENT**

Pro se plaintiff-appellant Xiu Jian Sun, who designates himself “the spiritual Adam,” appeals from a judgment of the United States District Court for the Northern District of New York (McAvoy, J.) that dismissed this action against (1) current or former judges and clerks at the New York State Court of Appeals, and (2) the New York State Attorney General Eric T. Schneiderman and the assistant attorney general representing the defendants before the district court. As the district court concluded, “The [Amended] Complaint is simply unintelligible. Plaintiff has not stated a claim, much less a claim upon which relief could be granted.” (Decision & Order at 4, dated July 17, 2017, ECF No. 26.) Sun’s brief before this Court makes no arguments to the contrary. Accordingly, the Court should dismiss this appeal as frivolous or summarily affirm the district court’s judgment dismissing the action.<sup>1</sup>

On December 13, 2017, this Court sanctioned Sun for his history of frivolous litigation. See Order, Sun v.

---

<sup>1</sup> The Court has dismissed appeals in two other Sun cases following the federal defendants’ motions for summary affirmance. See Order, Sun v. Pollak, No. 17-1217 (2d Cir. Nov. 29, 2017), ECF No. 51; Order, Sun v. Katzmann, No. 16-3103 (2d Cir. May 4, 2017), ECF No. 96.

Dillon, No. 16-3557 (2d Cir.), ECF No. 95; see also Order, Sun v. Katzmman, No. 16-3103 (May 4, 2017), ECF No. 96 (granting motion for summary affirmance filed by United States Attorney's Office and warning Sun about sanctionable conduct). That order bars Sun from filing further appeals or other filings in this Court without leave of the Court. For relevant purposes, the present lawsuit and the Dillon and Katzmman actions are indistinguishable: in all three actions, Sun sued judges, court clerks, and attorneys for their review and handling of Sun's lawsuits.

### **BACKGROUND**

On January 23, 2017, Sun filed a three-page pro se complaint against John P. Asiello, clerk of the New York Court of Appeals; Jonathan Lippman, former chief judge of the Court of Appeals; Janet DiFiore, current chief judge of the Court; Eugene F. Pigott, Jr., an associate judge (now retired) of the Court; and James A. Costello, former deputy clerk. (See Compl., ECF No. 1.) Next to each defendant's name, Sun listed court docket numbers from some of his many state court actions: at some point the Court of Appeals reviewed each case and then either dismissed the appeal as jurisdictionally improper or denied permission to appeal. The complaint mentioned a "secret gang organization," but contained no allegations about any defendant. Because Sun paid

the filing fee, the district court issued a summons and the defendants were served. (ECF No. 2.)

In February 2017, the defendants moved to dismiss the complaint on the grounds that it failed to state a claim and that, in any event, they were entitled to absolute judicial immunity. (ECF No. 7.) Sun filed an opposition that did not respond to any of the defendants' arguments. (ECF No. 10.)

While the motion was pending, Sun filed an amended complaint that added the State Attorney General, Eric T. Schneiderman, and Bruce Boivin, the assistant attorney general who represented the defendants and filed the motion to dismiss. As with the original defendants, the amended complaint asserted no allegations against either person. In response to the amended complaint, the defendants filed a new motion to dismiss and Sun again filed an unresponsive document.

In a decision filed July 17, 2017, the district court dismissed the complaint, concluding that it was "unintelligible" because it asserted no injury in relation to the listed state court cases and identified no causes of action. (Decision & Order at 3-4, ECF No. 26.) Sun filed a notice of appeal on July 26 (ECF No. 27), and the court entered judgment on August 11, 2017 (ECF No. 29.)

#### **ARGUMENT**

**A. Because Sun's Appeal Is Frivolous the Court Should Dismiss the Appeal.**

Where—as here—an appeal lacks an arguable basis in law or fact, this Court may dismiss the appeal or summarily affirm the lower court's judgment. See, e.g., *United States v. Bonilla*, 618 F.3d 102, 110-12 (2d Cir. 2010) (granting motion for summary affirmance upon concluding that appellant's argument "is totally unsupported by relevant law and therefore must be classified as frivolous"); *United States v. Davis*, 598 F.3d 10, 13-14 (2d Cir. 2010); see also *Neitzke v. Williams*, 490 U.S. 319, 325 (1989) ("[A]n appeal on a matter of law is frivolous where '[none] of the legal points [are] arguable on their merits.'").

Sun's brief before this Court neither sets forth a discernible legal argument nor articulates the basis for his appeal. "Although [the Court] accords filings from pro se litigants a high degree of solicitude, even a litigant representing himself is obliged to set out 'identifiable arguments' in his principal brief." *Terry v. Incorporated Vill. of Patchogue*, 826 F.3d 631, 632-33 (2d Cir. 2016).

Sun's brief consists almost exclusively of selected provisions from the Doctrine and Covenants of the Church of Jesus Christ of Latter Day Saints, biblical quotations, and a variety of statements about Jehovah, the Lord of hosts, or the "spiritual Adam." Nothing in

the brief challenges the district court's order dismissing the action. Accordingly, this Court may dismiss on the grounds that the appeal is frivolous. See *Neitzke*, 490 U.S. at 325; *Bonilla*, 618 F.3d at 110-12.

**B. In the Alternative, the Court Should Summarily Affirm the District Court's Judgment Because the Action Is Frivolous.**

Separate from the fact that Sun's appeal is itself meritless, this Court may summarily affirm because the district court was correct to grant judgment to the defendants. Sun's complaint here—like his numerous other complaints in New York's federal and state courts (and in the District of Columbia federal courts<sup>2</sup>)—is frivolous. See *Davis*, 598 F.3d at 13. In his federal actions, Sun repeatedly has sued federal

---

<sup>2</sup> In mid-September, Sun filed an action in the United States District Court for the District of Columbia against the "Secret gang organization": "Obama Barack-Dog," the trial and circuit judges who presided over his Court of Claims action and appeal; staff at the Court of Claims, Federal Circuit, and Supreme Court; and the Department of Justice and the department's attorneys. Compl., *Sun v. United States*, No. 17-cv-1861 (D.D.C. Sept. 12, 2017), ECF No. 1. Attached is a list of his federal actions from the Pacer system.

and state court judges and staff on no discernible basis other than their handling of his federal and state cases and appeals.

Presuming for argument's sake that Sun has attempted to file a 42 U.S.C. § 1983 action, then as the defendants argued before the district court, Sun's complaint lacks sufficient factual matter that, if accepted as true, "state[s] a claim to relief that is plausible on its face," *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007). The allegations in the complaint about the actions or words of Jehovah or "pharisees" do not describe any conduct by the defendants. (See Am. Compl. at 1-2, ECF No. 12.)

To the extent that Sun purports to challenge the disposition of his appeals by Judges Lippman, DiFiore, and Pigott of the New York Court of Appeals, those defendants are entitled to absolute judicial immunity.<sup>3</sup> See *Mireles v. Waco*, 502 U.S. 9 (1991) (*per curiam*); *Young v. Selsky*, 41 F.3d 47, 51 (2d Cir 1994).

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<sup>3</sup> The district court did not address this issue; it considered the defense of absolute immunity speculative because the amended complaint did not explain the relationship between the listed state court docket numbers and the defendants. (Decision & Order at 4, ECF No. 26.) This Court may affirm on grounds not reached by the district court. See *McElwee v. County of Orange*, 700 F.3d 635, 640 (2d Cir. 2012).

And that immunity extends to defendants Asiello and Costello, who processed Sun's paperwork in their capacities as Clerk and Deputy Clerk of the New York Court of Appeals. See *Rodriguez v. Weprin*, 116 F.3d 62, 66-67 (2d Cir. 1997) (judicial immunity extended to allegations against two court clerks made by pro se plaintiff-appellant); see also *Sindram v. Suda*, 986 F.2d 1459, 1461 (D.C. Cir. 1993) ("[I]mmunity applies to all acts of auxiliary court personnel that are basic and integral part[s] of the judicial function, unless those acts are done in the clear absence of all jurisdiction." (quotation marks omitted)).

With respect to the Attorney General and Bruce Boivin, the assistant attorney general who represented the defendants: first, they were never served and, thus, the courts lack jurisdiction over them. See *Encarnacion v. Goord*, 669 F. App'x 61, 61 n.1 (2d Cir. 2016) ("The defendants were never served and, therefore, are not parties to this appeal."). The relevant proofs of service state that each defendant received a summons on April 3, 2017, which is prior to issuance of the summonses on April 7, 2017, and neither specifies the method of purported service. (ECF Nos. 13, 19, 20.) Second, these two defendants would be protected by absolute immunity because their only involvement with Sun is their conduct representing the state defendants. See *Barrett v. United States*, 798 F.2d 565, 573 (2d Cir. 1986) (absolute immunity applies where defendant's "sole

involvement was at all times as Assistant Attorney General of the State of New York representing that state as its attorney in the action"). Finally, as noted earlier, the complaint does not allege any putatively unlawful conduct by these two defendants.

Accordingly, even if Sun's appeal were not frivolous, this Court should summarily affirm because action is frivolous. See *Neitzke*, 490 U.S. at 325; *Bonilla*, 618 F.3d at 110-12; *Davis*, 598 F.3d at 13-14.

#### CONCLUSION

For the foregoing reasons, this Court should grant the motion to dismiss or, in the alternative, for summary affirmance.

Dated: New York, NY

December 26, 2017

Respectfully submitted,  
ERIC T. SCHNEIDERMAN  
Attorney General State of New York

By: /s/ Oren L. Zeve  
OREN L. ZEVE  
Managing Assistant Solicitor General

Office of the Attorney General  
120 Broadway New York, NY 10271

E17

Case 17-2314, Document 37-2, 12/26/2017, 2201326,  
Page11 of 11

| Party Name    | Case Number    | Case Title                 | Court                            | Data Flied  | Date Closed |
|---------------|----------------|----------------------------|----------------------------------|-------------|-------------|
| SUN, XIU JIAN | 1:2016cv 00252 | SUN v. USA                 | U.S. Court Of Federal Claims     | 02/23 /2016 | 03/14/ 2016 |
| SUN, XIU JIAN | 1:2017 af07004 | IN RE: SUN                 | U.S. Court Of Federal Claims     | 02/22 /2017 |             |
| SUN, XIU JIAN | 1:2017 cv01787 | CHURCH OF JESUS CHRIST...  | District Of Columbia District... | 09/01 /2017 | 12/13 /2017 |
| SUN, XIU JIAN | 1:2017 cv01861 | SUN v. OBAMA BARACK -DO... | District Of Columbia District... | 09/12 /2017 |             |
| Sun, Xiu Jian | 1:2016 cv01083 | Sun v. Cavallo et al       | New York Eastern District Co...  | 03/04 /2016 | 03/23 /2016 |
| Sun, Xiu      | 1:2016 cv03937 | Sun et al v.               | New York                         | 07/15 /2016 | 08/03 /2016 |

E18

|                     |                   |                                                 |                                             |                |                |
|---------------------|-------------------|-------------------------------------------------|---------------------------------------------|----------------|----------------|
| Jian                |                   | Katzmann<br>et al                               | Eastern<br>District<br>Co...                |                |                |
| Sun,<br>Xiu<br>Jian | 1:2016<br>cv05734 | Sun<br>v.<br>Cheung                             | New<br>York<br>Eastern<br>District<br>Co... | 10/14<br>/2016 | 04/17<br>/2017 |
| Sun,<br>Xiu<br>Jian | 1:2017<br>cv01570 | Sun<br>v.<br>Pollak                             | New<br>York<br>Eastern<br>District<br>Co... | 03/20<br>/2017 | 04/11<br>/2017 |
| Sun,<br>Xiu<br>Jian | 1:2017<br>cv05063 | Sun<br>v.<br>Supreme<br>Court<br>of the...      | New<br>York<br>Eastern<br>District<br>Co... | 08/28<br>/2017 | 09/26<br>/2017 |
| Sun,<br>Xiu<br>Jian | 1:2017<br>cv05000 | Sun<br>v.<br>Chow<br>et al                      | New<br>York<br>Eastern<br>District<br>Co... | 08/28<br>/2017 | 09/26<br>/2017 |
| Sun,<br>Xiu<br>Jian | 1:2017<br>cv05916 | Sun<br>et al<br>v.<br>State<br>of New<br>Yor... | New<br>York<br>Eastern<br>District<br>Co... | 10/10<br>/2017 | 10/23<br>/2017 |

E19

|                     |                   |                                           |                                             |                |                |
|---------------------|-------------------|-------------------------------------------|---------------------------------------------|----------------|----------------|
| Sun,<br>Xiu<br>Jian | 1:2017<br>cv00063 | Sun<br>v.<br>Asiello<br>et al             | New<br>York<br>Northern<br>District C...    | 01/23<br>/2017 | 08/11<br>/2017 |
| Sun,<br>Xiu<br>Jian | 3:2017<br>cv02066 | Church<br>of Jesus<br>Christ<br>of Lat... | Connecticut<br>District<br>Court            | 12/11<br>/2017 |                |
| Sun,<br>Xiu<br>Jian | 1:2016<br>cv05276 | Sun<br>v.<br>Dillon<br>et al              | New<br>York<br>Eastern<br>District<br>Co... | 09/22<br>/2016 | 10/13<br>/2016 |

E20

Case 17-2314, Document 37-3, 12/26/2017, 2201326,  
Page1 of 1

**CERTIFICATE OF SERVICE**

I hereby certify that, on the 26th day of December, 2017, I served or caused to be served one copy of the accompanying motion by United States Postal Service first class/priority mail upon the following named person(s):

Xiu Jian Sun  
2nd Flr.  
54-25 153rd Street  
Flushing, NY 11355

/s/ Oren L. Zeve

E21

Case 17-2314, Document 46, 01/03/2018, 2205470,  
Page1 of 2

United States Court of Appeals for the Second Circuit  
Thurgood Marshall U.S. Courthouse  
40 Foley Square, New York, NY 10007

ROBERT A. KATZMANN  
CHIEF JUDGE

Date: January 03, 2018

Docket #: 17-2314cv

Short Title: Sun v. Asiello

CATHERINE O'HAGAN WOLFE  
CLERK OF COURT

DC Docket #: 17-cv-63

DC Court: NDNY (SYRACUSE)

DC Judge: McAvoy

DC Judge: Stewart

#### NOTICE OF DEFECTIVE FILING

On 1/2/2018 the RESPONSE TO MOTION to dismiss, on behalf of Appellant Xiu Jian Sun, was submitted in the above referenced case. The document does not comply with the FRAP or the Court's Local Rules for the following reason(s):

- \_\_\_ Failure to submit acknowledgment and notice of appearance (Local Rule 12.3)
- \_\_\_ Failure to file the Record on Appeal (FRAP 10, FRAP 11)
- \_\_\_ Missing motion information statement (T-1080 -

Local Rule 27.1)

- ☐ Missing supporting papers for motion (e.g, affidavit/affirmation/declaration) (FRAP 27)
- ☐ Insufficient number of copies (Local Rules: 21.1, 27.1, 30.1, 31.1)
- ☐ Improper proof of service (FRAP 25)
  - ☐ Missing proof of service
  - ☐ Served to an incorrect address
  - ☐ Incomplete service (Anders v. California 386 U.S. 738 (1967))
- ☐ Failure to submit document in digital format (Local Rule 25.1)
- ☐ Not Text-Searchable (Local Rule 25.1, Local Rules 25.2), click [here](#) for instructions on how to make PDFs text searchable
- ☐ Failure to file appendix on CD-ROM (Local Rule 25.1, Local Rules 25.2)
- ☐ Failure to file special appendix (Local Rule 32.1)
- ☐ Defective cover (FRAP 32)
  - ☐ Incorrect caption (FRAP 32)
  - ☐ Wrong color cover (FRAP 32)
  - ☐ Docket number font too small (Local Rule 32.1)
- ☐ Incorrect pagination, click [here](#) for instructions on how to paginate PDFs (Local Rule 32.1)
- ☐ Incorrect Filing Event
- ☒ **Other: Please see Sanction Order filed 12/13/2017 in appeal 16-3557. Appellant must seek leave of this Court before filing any appeals or other documents. Please file a**

E23

**motion to file “Response to Motion”.**

Please cure the defect(s) and resubmit the document, with the required copies if necessary, no later than 1/24/2018. The resubmitted documents, if compliant with FRAP and the Local Rules, will be deemed timely filed.

Failure to cure the defect(s) by the date set forth above will result in the document being stricken. An appellant's failure to cure a defective filing may result in the dismissal of the appeal.

Inquiries regarding this case may be directed to 212-857-8563.

E24

Case 17-2314, Document 54-1, 02/07/2018, 2230871,  
Page 1 of 1

UNITED STATES COURT OF APPEALS FOR THE  
SECOND CIRCUIT

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At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 7th day of February, two thousand and eighteen,

---

Xiu Jian Sun, Servant: The Church  
of Jesus Christ of Latter-day saints,  
AKA the spiritual Adam,

Plaintiff - Appellant, ORDER

v. Docket No. 17-2314

John P. Asiello, Jonathan Lippman,  
Janet DiFiore, Eugene F. Pigott, Jr.,  
James A. Costello, Eric T. Schneiderman,  
Attorney General of the State of New  
York, Bruce J. Boivin, Assistant  
Attorney General of Counsel,  
Defendants - Appellees.

---

Appellant's Xiu Jian Sun submission of a response  
to a motion does not comply with the Court's

E25

prescribed filing requirements. Despite due notice,  
the defect has not been cured.

IT IS HEREBY ORDERED that the said response  
is stricken from the docket.

For The Court:  
Catherine O'Hagan  
Wolfe, Clerk of Court

Wolfe, Clerk of Court

**UNITED STATES COURT OF APPEALS FOR THE  
SECOND CIRCUIT**

---

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 7th day of February, two thousand and eighteen,

---

Xiu Jian Sun, Servant: The Church  
of Jesus Christ of Latter-day saints,  
AKA the spiritual Adam,

Plaintiff - Appellant, **ORDER**

v. Docket No. 17-2314

John P. Asiello, Jonathan Lippman,  
Janet DiFiore, Eugene F. Pigott, Jr.,  
James A. Costello, Eric T. Schneiderman,  
Attorney General of the State of New  
York, Bruce J. Boivin, Assistant  
Attorney General of Counsel,  
Defendants - Appellees.

---

Appellant's Xiu Jian Sun submission of a response  
to a motion does not comply with the Court's

E27

prescribed filing requirements. Despite due notice, the defect has not been cured.

IT IS HEREBY ORDERED that the said [EDIT document] is stricken from the docket.

For The Court:  
Catherine O'Hagan Wolfe,  
Clerk of Court

Catherine O'Hagan Wolfe

UNITED STATES COURT OF APPEALS FOR THE  
SECOND CIRCUIT

---

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 7th day of February, two thousand and eighteen,

---

Xiu Jian Sun, Servant: The Church of  
Jesus Christ of Latter-day saints, **ORDER**  
AKA the spiritual Adam, Docket No. 17-2314  
Plaintiff-Appellant,

v.

John P. Asiello, Jonathan Lippman,  
Janet DiFiore, Eugene F. Pigott, Jr.,  
James A. Costello, Eric T.  
Schneiderman, Attorney General of  
the State of New York, Bruce J. Boivin,  
Assistant Attorney General of Counsel,  
Defendants-Appellees.

---

Appellant's Xiu Jian Sun submission of a response to a motion does not comply with the Court's prescribed filing requirements. Despite due notice, the

E29

defect has not been cured.

IT IS HEREBY ORDERED that the said response  
is stricken from the docket.

For The Court:  
Catherine O'Hagan Wolfe,  
Clerk of Court

Catherine O'Hagan Wolfe,

E30

Case 17-2314, Document 56, 02/15/2018, 2240287,  
Page2 of 4

UNITED STATES DISTRICT COURT EASTERN  
DISTRICT OF NEW YORK

\_\_\_\_\_x  
THE CHURCH OF JESUS  
CHRIST OF LATTER-DAY                      Civil Action No.  
SAINTS, SERVANT: XIU JIAN              18-MC-375(AMD)  
SUN, THE SPIRITUAL ADAM              Apply for jury to  
5425 153<sup>rd</sup> St., 2FL, Flushing,              prevent insult  
NY 11355,                                      and unfair behavior  
646-675-0308.

Plaintiffs

v.  
Livestock:  
OREN L. ZEVE, (Managing  
Assistant Solicitor General)

**RECEIVED**  
18 FEB 15 PM 3:24  
U.S. COURT OF  
APPEALS  
SECOND CIRCUIT

State of New York Office of  
The Attorney General  
120 Broadway, 25th Floor,  
New York, NY 10271-0332  
Phone: 212-416-8882, 212-416-8020,  
Fax: 212-416-8962 [http:](http://www.ag.ny.gov)  
[//www.ag.ny.gov](http://www.ag.ny.gov), [oren.zeve@ag.ny.gov](mailto:oren.zeve@ag.ny.gov).

**RECEIVED**  
FEB 06 2018  
PRO SE OFFICE

Defendants

\_\_\_\_\_x

COMPLAINT

TO UNITED STATES DISTRICT COURT EASTERN

DISTRICT OF NEW YORK

The complaint of the plaintiffs, -god's servant, Xiu Jian Sun, the spiritual Adam respectfully shows and alleges as follows.

1. On the date of December 29, 2017, when looking at the letter sent by the defendant's lawyer, -Oren L. Zeve, the Lord god of host Jehovah makes sound from the God's temple and says: "Livestock." (牲畜), (Docket #: 17-2314)
2. Jehovah, -the Lord god of host gives the words to servant (Plaintiff) in the temple he made, "Trial with god's law. Apply for jury to prevent insult and unfair behavior."
- 3.
83. And thus ye shall do in all cases which shall come before you.
84. And if a man or woman shall rob, he or she shall be delivered up unto the law of the land.
85. And if he or she shall steal, he or she shall be delivered up unto the law of the land.
86. And if he or she shall lie, he or she shall be delivered up unto the law of the land.
87. And if he or she do any manner of iniquity, he or she shall be delivered up unto the law, even that of God.
88. And if thy brother or sister offend thee, thou shalt take him or her between him or her and thee alone;

- and if he or she confess thou shalt be reconciled.
89. And if he or she confess not thou shalt deliver him or her up unto the church, not to the members, but to the elders. And it shall be done in a meeting, and that not before the world.
90. And if thy brother or sister offend many, he or she shall be chastened before many.
- 4.
91. And if any one offend openly, he or she shall be rebuked openly, that he or she may be ashamed. And if he or she confess not, he or she shall be delivered up unto the law of God.
92. If any shall offend in secret, he or she shall be rebuked in secret, that he or she may have opportunity to confess in secret to him or her whom he or she has offended, and to God, that the church may not speak reproachfully of him or her.
93. And thus shall ye conduct in all things.
5. I (servant) would like to request a Mandarin Chinese court interpreter for my court day.

Dated: Queens, New York

January 06, 2018

The Church of Jesus Christ of Latter-day saints

Servant: Xiu Jian Sun, the spiritual Adam

54-25 153rd St., 2FL

Flushing, NY 11355

646-675-0308

Plaintiffs

E33

Case 17-2314, Document 58, 02/23/2018, 2242773,  
Page1 of 1

United States Court of Appeals for the Second Circuit  
Thurgood Marshall U.S. Courthouse  
40 Foley Square, New York, NY 10007

**ROBERT A. KATZMANN CHIEF JUDGE**

Date: February 23, 2018

Docket #: 17-2314cv

Short Title: Sun v. Asiello

**CATHERINE O'HAGAN WOLFE**

CLERK OF COURT

DC Docket #: 17-cv-63

DC Court: NDNY (SYRACUSE)

DC Judge: McAvoy

DC Judge: Stewart

**NOTICE OF CASE MANAGER CHANGE**

The case manager assigned to this matter has been changed.

Inquiries regarding this case may be directed to 212-857-8522.

E34

Case 17-2314, Document 59, 02/23/2018, 2242782,  
Page1 of 1

N.D.N.Y. 17-cv-63 McAvoy, J.  
United States Court of Appeals  
FOR THE SECOND CIRCUIT

---

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 23rd day of February, two thousand eighteen.

Present: Amalya L. Kearse, Guido Calabresi,  
Denny Chin,  
Circuit Judges.

---

Xiu Jian Sun, Servant: The Church  
of Jesus Christ of Latter-day saints,  
AKA the spiritual Adam,  
Plaintiff-Appellant, 17-2314  
v.  
John P. Asiello, et al.,  
Defendants-Appellees.

---

Appellees move to dismiss the appeal as frivolous. Upon due consideration, it is hereby ORDERED that the motion is GRANTED. See *Pillay v. I.N.S.*, 45 F.3d 14, 17 (2d Cir. 1995).

FOR THE COURT:  
Catherine O'Hagan Wolfe, Clerk of Court  
Catherine O'Hagan Wolfe,