

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

United States District Court  
Southern District of Texas  
FILED

DEC 26 2017

W. J. Bradley, Clerk of Court

No. 17-20119  
Summary Calendar

United States Court of Appeals  
Fifth Circuit

FILED  
November 22, 2017

Lyle W. Cayce  
Clerk

COLLINS O. NYABWA,

Plaintiff-Appellant

v.

CORRECTIONS CORPORATION OF AMERICA,

Defendant-Appellee

Appeals from the United States District Court  
for the Southern District of Texas  
USDC No. 4:16-CV-1644

Before DENNIS, SOUTHWICK, and HIGGINSON, Circuit Judges.

PER CURIAM:\*

Collins O. Nyabwa has moved for leave to proceed in forma pauperis (IFP). He seeks to appeal the district court's dismissal of his *Bivens*<sup>1</sup> complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. In that complaint, Nyabwa claimed that the Corrections Corporation of America (CCA) violated his constitutional rights by

\* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

<sup>1</sup> *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

APPENDIX A

falsely imprisoning him at a federal immigration detention center pending deportation proceedings that were based on his three Texas convictions for improper photography. After his deportation proceedings were terminated and he was released from detention, the Texas Court of Criminal Appeals held in an unrelated case that the improper photography statute was unconstitutional. See *Ex parte Thompson*, 442 S.W.3d 325, 351 (Tex. Crim. App. 2014). In this case, the district court determined that (1) Nyabwa failed to state a claim against CCA because *Bivens* did not extend to a damages claim against a private entity; and (2) Nyabwa failed to state a false imprisonment claim under Texas state law. It also denied his motions for a declaration of actual innocence, summary judgment, leave to amend his complaint, recusal, and a hearing regarding his recusal motion. The district court denied Nyabwa leave to proceed IFP because it certified that his appeal was not taken in good faith.

By moving for leave to proceed IFP on appeal, Nyabwa challenges the district court's certification that his appeal is not taken in good faith. See *Baugh v. Taylor*, 117 F.3d 197, 202 (5th Cir. 1997). Our inquiry into his good faith "is limited to whether the appeal involves legal points arguable on their merits (and therefore not frivolous)." *Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983) (internal quotation marks and citation omitted). Nyabwa's first motion for leave to file a supplemental appeal brief is GRANTED. His second motion for leave to file a supplemental appeal brief is DENIED.

We review de novo a dismissal for failure to state a claim under Rule 12(b)(6). See *Legate v. Livingston*, 822 F.3d 207, 209-10 (5th Cir.), cert. denied sub nom. *Legate v. Collier*, 137 S. Ct. 289 (2016). A complaint fails to state a claim upon which relief may be granted when it does not contain "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on

its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citation omitted).

We review the district court’s denial of Nyabwa’s motion to amend his complaint for abuse of discretion. See *Foman v. Davis*, 371 U.S. 178, 182 (1962). Because Nyabwa had sufficient opportunity to plead his best case and the information Nyabwa sought to include in his complaint would not have prevented the complaint’s dismissal, the district court did not abuse its discretion by denying his motion to amend based on futility. See *Avatar Exploration, Inc. v. Chevron, U.S.A., Inc.*, 933 F.2d 314, 321 (5th Cir. 1991).

The district court properly determined that Nyabwa’s complaint failed to state a claim upon which relief can be granted. Pursuant to *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 63 (2001), a federal prisoner cannot use *Bivens* “to allow recovery against a private corporation operating a halfway house under contract with the Bureau of Prisons.” Nyabwa fails to provide any relevant explanation supporting his argument that *Malesko* is not applicable here because he claims to be actually innocent. Moreover, he has not shown how his citation to the actual-innocence prong of the test set forth in *Reyes-Requena v. United States*, 243 F.3d 893, 900-04 (5th Cir. 2001), is relevant in this context. Nyabwa’s reliance on 28 U.S.C. §§ 1495 and 2513 is misplaced because those statutes “come into play only after a defendant has succeeded in overturning his federal conviction and is seeking damages for wrongful conviction,” and, as such, have no relevance here. *Freeman v. Johnson*, 79 F. App’x 3, 3 (5th Cir. 2003). One recent opinion on which relies does not directly support his argument because that case did not involve a claim of false imprisonment. See *Nelson v. Colorado*, 137 S. Ct. 1249 (2017).

The district court’s determination, under supplemental jurisdiction, that Nyabwa failed to state a claim of false imprisonment under Texas state law is

supported by relevant law. See *Wal-Mart Stores, Inc v. Resendez*, 962 S.W.2d 539, 540 (Tex. 1998); *Pete v. Metcalfe*, 8 F.3d 214, 218-19 (5th Cir. 1993); *James v. Brown*, 637 S.W.2d 914, 918 (Tex. 1982). Because Nyabwa failed to state a claim and was not entitled to judgment as a matter of law, the district court properly denied his motion for summary judgment. See FED. R. CIV. P. 56(a). Due to the lack of an actual controversy, the district court also properly denied Nyabwa's request for declaratory relief. See *Earnest v. Lowentritt*, 690 F.2d 1198, 1203 (5th Cir. 1982). Because Nyabwa's conclusory arguments for recusal were based on the district court judge's actions in the course of judicial proceedings and failed to show that the judge had an actual personal bias or prejudice against him, the district court did not abuse its discretion by denying his recusal motions or his motion for hearing as to recusal. See *Liteky v. United States*, 510 U.S. 540, 555 (1994).

Accordingly, Nyabwa has failed to show an error in the district court's certification decision and has not established that he will raise a nonfrivolous issue on appeal. See *Baugh*, 117 F.3d at 202; *Howard*, 707 F.2d at 220. Nyabwa's motion for leave to proceed IFP is DENIED, and his appeal is DISMISSED as frivolous. See *Baugh*, 117 F.3d at 202 & n.24; 5TH CIR. R. 42.2.

Nyabwa is CAUTIONED that future frivolous, repetitive, or otherwise abusive filings will result in the imposition of sanctions, including dismissal, monetary sanctions, and restrictions on his ability to file pleadings in this court or any court subject to this court's jurisdiction. He should review any pending appeals and actions and move to dismiss any that are frivolous, repetitive, or otherwise abusive.

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 17-20119

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COLLINS O. NYABWA,

Plaintiff - Appellant

v.

CORRECTIONS CORPORATION OF AMERICA,

Defendant - Appellee

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Appeals from the United States District Court  
for the Southern District of Texas

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ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion November 22, 2017, 5 Cir., \_\_\_\_\_, \_\_\_\_\_ F.3d \_\_\_\_\_ )

Before DENNIS, SOUTHWICK, and HIGGINSON, Circuit Judges.

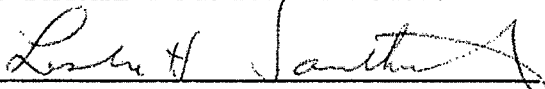
PER CURIAM:

- ( ✓ ) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED R. APP. P. and 5<sup>TH</sup> CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.
- ( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not

having voted in favor, (FED R. APP. P. and 5<sup>TH</sup> CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

- ( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

  
UNITED STATES CIRCUIT JUDGE

**ENTERED**

February 01, 2017

David J. Bradley, Clerk

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

|                         |   |                            |
|-------------------------|---|----------------------------|
| COLLINS O. NYABWA,      | § |                            |
|                         | § |                            |
| Plaintiff,              | § |                            |
| v.                      | § | CIVIL ACTION NO. H-16-1644 |
|                         | § |                            |
| CORRECTIONS CORPORATION | § |                            |
| OF AMERICA (CCA),       | § |                            |
|                         | § |                            |
| Defendant.              | § |                            |

**MEMORANDUM AND ORDER OF DISMISSAL**

Plaintiff Collins O. Nyabwa ("Plaintiff"), a former state inmate and former federal immigration detainee proceeding *pro se* and *in forma pauperis*, has filed a complaint under Bivens v. Six Unknown Named Agents, 91 S. Ct. 1999 (1971), alleging that Defendant Corrections Corporation of America ("CCA") violated his civil rights by wrongfully detaining him. (Docket Entry No. 1). Pending are CCA's Motion to Dismiss (Docket Entry No. 10); Plaintiff's Motion for Declaration of Actual Innocence (Docket Entry No. 13); Plaintiff's Motion for Summary Judgment (Docket Entry No. 14); Plaintiff's Motion for Recusal (Docket Entry No. 15); Plaintiff's Motion for Hearing (Docket Entry No. 16), and Plaintiff's Motion to Amend (Docket Entry No. 19). The Court has considered the motions, responses, and applicable law and concludes as follows.

APPENDIX B

### **I. Background**

On July 29, 2011, Plaintiff was convicted of three counts of "improper photography" in violation of § 21.15(b)(1) of the Texas Penal Code,<sup>1</sup> which prohibited "photograph[ing] or by videotape or other electronic means record[ing], broadcast[ing], or transmit[ing] a visual image of another at a location that is not a bathroom or private dressing room: (A) without the other person's consent; and (B) with intent to arouse or gratify the sexual desire of any person." TEX. PENAL CODE § 21.15(b)(1) (West 2007). Plaintiff entered a plea of guilty and was sentenced to one year in prison. After his sentence discharged in July 2012, he was released from state prison and transferred to the custody of United States Immigration authorities.<sup>2</sup>

From July 2012 to November 2013, United States Immigration authorities held Plaintiff under mandatory detention at a facility operated by Defendant CCA in Houston, Texas, because Plaintiff is a Kenyan national and had been convicted of improper photography under Texas law.<sup>3</sup> In November 2013, Plaintiff was released from the detention center "when an Immigration Judge terminated the proceedings against Plaintiff."<sup>4</sup>

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<sup>1</sup> Docket Entry No. 1 ("Complaint") at 2.

<sup>2</sup> Complaint at 2.

<sup>3</sup> Id.

<sup>4</sup> Id.

On September 17, 2014, the Texas Court of Criminal Appeals, in an unrelated case, held that the improper photography law under which Plaintiff was convicted was "facially unconstitutional in violation of the freedom of speech guarantee of the First Amendment." Ex parte Thompson, 442 S.W.3d 325, 330 (Tex. Crim. App. 2014). On August 23, 2016, this Court granted Plaintiff's petition for habeas corpus relief and vacated Plaintiff's convictions. See Nyabwa v. Davis, Civ. A. No. H-12-1152, 2016 WL 4490635 (S.D. Tex. August 23, 2016).

Plaintiff alleges that CCA is liable for damages under Bivens for violating his constitutional right to be free from false imprisonment. Plaintiff reasons that, because the United States Department of Homeland Security contracted with CCA to house immigration detainees, CCA should be held liable under Bivens as a federal actor.

Plaintiff also seeks a declaration of "actual innocence" and damages of \$5 million for his alleged unlawful detention by CCA. He contends that because federal and state law allow compensation for former prisoners who have been adjudged "actually innocent," by extension CCA should compensate him for his alleged false imprisonment.<sup>5</sup>

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<sup>5</sup> CCA contends that the state and federal unjust conviction compensation acts, Texas Civil Practice and Remedies Code section 103.001 et seq. and 28 U.S.C. § 2513, respectively, do not apply here. In response, Plaintiff clarifies that he is not asserting those statutory claims. See Docket Entry No. 12 at 5 n.1. He states that he "only points to the spirit of these pieces of legislation to bolster his

CCA moves to dismiss, contending that Plaintiff cannot state a claim for which relief may be granted against it and that Plaintiff's motion for leave to amend would be futile.

## **II. Legal Standard**

Federal Rule of Civil Procedure 12(b)(6) provides for dismissal of an action for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). In considering a motion to dismiss under Rule 12(b)(6), the district court construes the allegations in the complaint favorably to the pleader and accepts as true all well-pleaded facts in the complaint. La Porte Constr. Co. v. Bayshore Nat'l Bank of La Porte, Tex., 805 F.2d 1254, 1255 (5th Cir. 1986). In ruling on a Rule 12(b)(6) motion, the district court may rely only on the complaint and its proper attachments. Fin. Acquisition Partners LP v. Blackwell, 440 F.3d 278, 286 (5th Cir. 2006). To survive dismissal, a complaint must plead "enough facts to state a claim to relief that is

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argument that CCA is liable for wrongful imprisonment and should compensate him." Id. In fact, on January 6, 2017, the Court of Federal Claims dismissed Plaintiff's case against the United States, holding that it lacked jurisdiction under 28 U.S.C. §§ 1495 and 2513 to award any compensation to Plaintiff. See Nyabwa v. United States, ---Fed. Cl.---, 2017 WL 80076, at \*7 (Ct. Fed. Cl. Jan. 6, 2017) (Horn, J.) (noting also that "plaintiff's detention at the immigration facility . . . was not improper because the detention was based on plaintiff's criminal conviction, which was not vacated until August 24, 2016, based on the finding of the Texas Court of Criminal Appeals that the statute under which plaintiff was convicted was unconstitutional, which occurred approximately one year after plaintiff was released from the immigration detention center in November 2013").

plausible on its face." Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1974 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). While a complaint "does not need detailed factual allegations . . . [the] allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Twombly, 127 S. Ct. at 1964-65 (citations and internal footnote omitted).

### III. Discussion

Plaintiff, a Kenyan, alleges that CCA wrongfully detained him from July 2012 to November 2013 at its Houston, Texas facility after he was transferred to immigration authorities for deportation proceedings when his sentence ended in July 2012, because the Texas improper photography law under which he was convicted was declared unconstitutional on September 17, 2014. Plaintiff argues that Bivens applies to the CCA, a private corporation, because they contract with the federal government.

"Under Bivens, a person may sue a federal agent for money damages when the federal agent has allegedly violated that person's constitutional rights." Brown v. Nationsbank Corp., 188 F.3d 579,

590 (5th Cir. 1999). To state a viable Bivens claim, a plaintiff must allege facts to show that the defendant is a federal officer acting under color of federal law and that the defendant violated the plaintiff's constitutional rights. See Bivens, 91 S. Ct. at 2004-05; Dean v. Gladney, 621 F.2d 1331, 1336 (5th Cir. 1980), cert. denied, 101 S. Ct. 1521 (1981). However, no implied private right of action exists, pursuant to Bivens, for damages against private entities that engage in alleged constitutional deprivations while acting under color of federal law. See Correctional Services Corp. v. Malesko, 122 S. Ct. 515, 521 (2001) (declining to extend Bivens to a corporate defendant and stating that "the purpose of Bivens is to deter individual federal officers from committing constitutional violations"). Therefore, to the extent that Plaintiff seeks monetary damages from CCA, a privately-operated federal immigration detention center, he fails to state a Bivens claim as a matter of law. See id.

Moreover, Plaintiff does not otherwise state a false imprisonment claim under Texas state law against CCA.<sup>6</sup> "The essential elements of false imprisonment [under Texas law] are: (1) willful detention; (2) without consent; and (3) without authority of law." Randall's Food Markets, Inc. v. Johnson, 891 S.W.2d 640,

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<sup>6</sup> Pursuant to 28 U.S.C. § 1367, this Court has supplemental jurisdiction over Plaintiff's related state law claims that form the same case or controversy as his asserted federal Bivens claim. See 28 U.S.C. § 1367(a).

644 (Tex. 1995) (quoting Sears, Roebuck & Co. v. Castillo, 693 S.W.2d 374, 375 (Tex. 1985)). If "an arrest or detention is executed under process which is legally sufficient in form and duly issued by a court of competent jurisdiction, an action for false imprisonment will not lie." James v. Brown, 637 S.W.2d 914, 918 (Tex. 1982); accord Pete v. Metcalfe, 8 F.3d 214, 218-19 (5th Cir. 1993) ("A person has legal authority for detaining another where the detention is executed by virtue of legally sufficient process issued by a court of competent jurisdiction.").

There is no indication in either Plaintiff's original pleading or his proposed amended pleading that there was any error in the form of the conviction order or the subsequent immigration order that CCA was carrying out when it detained Plaintiff; Plaintiff's sole issue is that the state penal statute under which he was convicted was later declared unconstitutional. Where, as here, a party such as CCA executes a facially valid order of detention, there is no cause of action for false imprisonment. See Brown, 637 S.W.2d at 918; see also United States ex rel. Bailey v. Askew, 486 F.2d 134, 135 (5th Cir. 1973) (holding that "a jailer cannot be held liable for an error in an order of commitment which is patently proper") (citation omitted); Mays v. Sudderth, 97 F.3d 107, 113 (5th Cir. 1996) (holding that officials "charged with executing a facially valid court order . . . 'should not be required to make the Hobson's choice between disobeying the court

order or being haled into court to answer for damages.'") (quoting Patterson v. Von Riesen, 999 F.2d 1235, 1240 (8th Cir. 1993)).

The subsequent invalidation of a statute as unconstitutional does not change this result. "Until judges say otherwise, [officials] have the power to carry forward the directives of the state legislature." Lemon v. Kurtzman, 93 S. Ct. 1463, 1473 (1973); see also Pierson v. Ray, 87 S. Ct. 1213, 1218 (1967) ("Although the matter is not entirely free from doubt, the same consideration would seem to require excusing [a police officer] from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional on its face or as applied."); Contreras v. Schiltgen, 122 F.3d 30, 32 (9th Cir. 1997), on reargument, 151 F.3d 906 (9th Cir. 1998) (holding that immigration officials are entitled to rely on a conviction as a basis for custody and eventual deportation until a plaintiff-detainee has successfully overturned that conviction).

Plaintiff discloses that he was held at CCA until "November 2013 when an Immigration Judge terminated plaintiff's proceedings." Docket Entry No. 1 at 2. Plaintiff pleads no facts to show that there was any indication of a defect in any judicial order mandating Plaintiff's confinement until at least 2014, after Plaintiff had been released from CCA custody in 2013. Under these circumstances, Plaintiff does not state a valid claim for which relief may be granted against CCA for false imprisonment. See,

e.g., Nyabwa v. United States, --- Fed. Cl. ----, 2017 WL 80076, at \*7 (Ct. Fed. Cl. Jan. 6, 2017) (Horn, J.) (noting that the detention was not improper because Plaintiff was released from the detention center a year before the penal statute was declared unconstitutional). Accordingly, this claim will be dismissed.

#### **IV. Claim for a Declaration of Actual Innocence**

Plaintiff also requests a declaration of actual innocence. The federal Declaratory Judgment Act, 28 U.S.C. § 2201, does not create a substantive cause of action but, instead, is merely a procedural vehicle that allows a party to obtain an early adjudication of an actual controversy arising under other substantive law. See Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, 57 S. Ct. 461, 463 (1937). "Based on the facts alleged, there must be a substantial and continuing controversy between two adverse parties" in order for a declaratory judgment action to lie. Bauer v. Texas, 341 F.3d 352, 358 (5th Cir. 2003).

For the reasons explained above, Plaintiff has failed to assert any viable substantive claim for relief against CCA. Plaintiff argues that he has a right to compensation for his detention, but he fails to demonstrate the "existence of a judicially remediable right" to such relief. Schilling v. Rogers, 80 S. Ct. 1288, 1296 (1960). Accordingly, Plaintiff's request for a declaration of actual innocence is denied.

**V. Plaintiff's Motion for Leave to Amend**

Federal Rule of Civil Procedure 15(a) provides that "[t]he court should freely give leave [to amend] when justice so requires." FED. R. CIV. P. 15(a)(2). A denial of a motion for leave to amend under Federal Rule of Civil Procedure 15(a) is reviewed for abuse of discretion. Lefall v. Dallas Indep. Sch. Dist., 28 F.3d 521, 524 (5th Cir. 1994). The Fifth Circuit has explained that "the district court's discretion does not permit denial of a motion to amend unless there is a substantial reason to do so." Id. (citing Dussouy v. Gulf Coast Inv. Corp., 660 F.2d 594, 598 (5th Cir. 1981)). A district court does not abuse its discretion if it denies a motion to amend that would be futile. Id.; see also Briggs v. Mississippi, 331 F.3d 499, 508 (5th Cir. 2003) (holding that the district court did not abuse its discretion "because . . . the proposed amended complaint could not survive a Fed. R. Civ. P. 12(b)(6) motion and allowing [plaintiff] to amend the complaint would be futile.").

In Plaintiff's proposed amended complaint, he states that his convictions have been vacated and, therefore, there was no legal authority to hold him. As discussed in detail above, Plaintiff cannot state a viable Bivens claim against CCA, and his state law false imprisonment claim fails because CCA was entitled to rely on the facially valid detention order in place at the time that he was detained. Plaintiff cannot allege that any court invalidated his

convictions during the time he was held by CCA, because he acknowledges in his pleadings that the penal statute was not declared unconstitutional until 2014, after he was released from custody. Accordingly, Plaintiff's motion will be denied because allowing Plaintiff to amend his complaint would be futile. Briggs, 331 F.3d at 508.

**VI. ORDER**

Based on the foregoing, it is hereby

**ORDERED** that Defendant Correction Corporation of America's Motion to Dismiss (Docket Entry No. 10) is **GRANTED**, and all of Plaintiff's claims against CCA are **DISMISSED** for failure to state a claim for which relief may be granted; it is further

**ORDERED** that Plaintiff's Motion for Declaration of Actual Innocence (Docket Entry No. 13), Plaintiff's Motion for Summary Judgment (Docket Entry No. 14), and Plaintiff's Motion to Amend (Docket Entry No. 19) are **DENIED**; and it is

**ORDERED** that, for the reasons set forth in this Court's Order dated July 23, 2016, Plaintiff's Motion for Recusal (Docket Entry No. 15) and Plaintiff's Motion for Hearing (Docket Entry No. 16) are **DENIED**. See Docket Entry No. 6 at 2-4.

The Clerk will enter this Order, providing a correct copy to all parties of record.

SIGNED at Houston, Texas, on this 1<sup>ST</sup> day of February, 2017.

  
EWING WERLEIN, JR.  
UNITED STATES DISTRICT JUDGE