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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Byron Murphy,)	No. CV 06-1732-PHX-PGR (MEA)
Plaintiff,)	ORDER
vs.)	
Joe Gordwin, et al.,)	
Defendants.)	

Pending before the Court is Plaintiff's First Amended Complaint (Doc. # 5), filed in compliance with this Court's August 15, 2006 Order (Doc. # 3). The Court will dismiss the action.¹

I. Statutory Screening of Prisoner Complaints

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if Plaintiff has raised claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2). If the Court determines that a pleading could be cured by the allegation of other facts, a *pro se* litigant is entitled to an opportunity to amend the

¹ Plaintiff has previously been given leave to proceed *in forma pauperis* (Doc. # 3).

1 complaint before dismissal of the action. See Lopez v. Smith, 203 F.3d 1122, 1127-29 (9th
2 Cir. 2000) (*en banc*). The Court is required to grant leave to amend "if a complaint can
3 possibly be saved," but not if the Complaint "lacks merit entirely." Id. at 1129. However,
4 leave to amend need not be given if a complaint as amended is subject to dismissal. Moore
5 v. Kayport Package Exp., Inc., 885 F.2d 531, 538 (9th Cir. 1989). The Court's discretion to
6 deny or grant leave to amend is particularly broad where Plaintiff has previously been
7 permitted to amend his complaint. See Sisseton-Wahpeton Sioux Tribe v. United States, 90
8 F.3d 351, 355 (9th Cir. 1996). Failure to cure deficiencies by previous amendments is one
9 of the factors to be considered in deciding whether justice requires granting leave to amend.
10 Moore, 885 F.2d at 538.

11 **II. Amended Complaint**

12 Plaintiff's Amended Complaint again names the Federal Bureau of Investigation and
13 FBI Agent Joe Gordwin as Defendants. Plaintiff presents two claims for relief. First,
14 Plaintiff again avers that Defendant Gordwin visited Plaintiff while he was incarcerated at
15 the Fourth Avenue Jail in Phoenix, Arizona and threatened Plaintiff's life and the life of
16 Plaintiff's family. Plaintiff further avers that Defendant Gordwin used his position to
17 influence the "police department to place surveillance watches on [Plaintiff] and [his]
18 businesses" (Doc. # 5 at 4). Plaintiff further claims that Defendant Gordwin took Plaintiff's
19 wife to meetings of "official business" in order to "scare her into continuing and affair with
20 him [Defendant Gordwin]." Id.

21 Count II claims that the Federal Bureau of Investigation "was and is derelict in its
22 official capacity as the protector of the people by allowing one of their officers to go on an
23 illegal spree of false accusation." Id. at 5. Plaintiff seeks injunctive relief and monetary
24 damages in the amount \$15,000,000.

25 **III. Failure to State a Claim**

26 Plaintiff has named FBI Agent Joe Gordwin and the Federal Bureau of Investigation
27 as Defendants in this action.
28

1 First, Plaintiff has again misidentified the jurisdictional basis for this action. Plaintiff
2 has avowed that this Court has jurisdiction pursuant to 42 U.S.C. § 1983, but because all
3 Defendants in this action are federal government agencies or federal officials, the Court must
4 construe Plaintiff's claims as brought pursuant to Bivens v. Six Unknown Named Agents of
5 Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

6 Second, Plaintiff has again failed to set forth any facts to support his claim of a
7 constitutional violation. Plaintiff claims that Defendant Gordwin was acting pursuant to his
8 official capacity to visit Plaintiff and threaten his life. However, Plaintiff also avers that
9 Defendant Gordwin was not there for any federal reason. Moreover, Plaintiff does not
10 articulate how he was threatened, what valley police department placed Plaintiff under
11 surveillance, what that surveillance entailed, and specifically how Plaintiff was affected. In
12 short, Plaintiff has not cured the deficiencies from his original Complaint.

13 Finally, Plaintiff has again named the Federal Bureau of Investigation despite the
14 Court's admonition that allegations of *respondeat superior* are not cognizable in a Bivens
15 action. Terrell v. Brewer, 935 F.3d 1015, 1018 (9th Cir. 1991); accord Dalrymple v. Reno,
16 334 F.3d 991 (11th Cir. 2003); Risley v. Hawk, 108 F.3d 1396, 1396-97 (D.C. 1997); Abate
17 v. Southern Pacific Transp. Co., 993 F.3d 107, 109 (5th Cir. 1993).

18 Because the Court has given Plaintiff an opportunity to cure the defects in his original
19 Complaint, and Plaintiff's Amended Complaint still presents the same deficiencies, Plaintiff's
20 action will be dismissed for failure to state a claim without leave to amend. See Moore, 885
21 F.2d at 538.

22 **IT IS THEREFORE ORDERED THAT:**

23 (1) The Amended Complaint and this action are **DISMISSED** for failure to state a
24 claim, and the Clerk of Court must enter judgment accordingly.

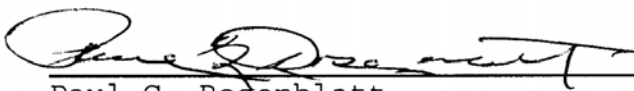
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(2) The Clerk of Court must make an entry on the docket indicating that the dismissal for failure to state a claim is under 28 U.S.C. § 1915(g).

DATED this 11th day of September, 2006.


Paul G. Rosenblatt
United States District Judge