

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF IOWA  
CENTRAL DIVISION

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HARLAN L. JACOBSEN,

Plaintiff,

vs.

IOWA DEPT. OF TRANSPORTATION; PAUL TROMBINO III, DIRECTOR OF IOWA DOT, Individually and in That Capacity; STEVEN McMENAMIN, REST AREA ADMINISTRATOR, IOWA DOT, Individually and in That Capacity; ROBERT YOUNIE, DIRECTOR OF MAINTENANCE, Individually and in That Capacity; and DAVID GORHAM, SPECIAL ASSISTANT ATTORNEY GENERAL, Individually and in That Capacity,

Defendants.

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**No. 4:12-cv-00446 – JEG**

**O R D E R**

This matter is before the Court on Motion of Defendants Iowa Department of Transportation (IDOT), Paul Trombino III (Trombino), Steven McMenamin (McMenamin), Robert Younie (Younie), and David Gorham (Gorham) to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6).<sup>1</sup> Plaintiff Harlan Jacobsen (Jacobsen) resists. A hearing was not requested, and the Court finds a hearing is unnecessary. Accordingly, the matter is fully submitted and ready for disposition.

**I. FACTUAL BACKGROUND<sup>2</sup>**

Jacobsen is an individual who resides in Tempe, Arizona, and owns a newspaper publishing and distribution business located in Sioux Falls, South Dakota. He publishes newspapers like “Country Singles,” “Iowa Casino Fun,” “Diabetes Cure 101,” “18 Wheel Singles,” and “Add

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<sup>1</sup> When referred to collectively, the five named Defendants will be referred to as “Defendants.”

<sup>2</sup> The facts are taken from Jacobsen’s Complaint. The Court must accept as true all facts alleged in the Complaint for purposes of a Rule 12(b)(6) motion to dismiss. See Zutz v. Nelson, 601 F.3d 842, 848 (8th Cir. 2010).

15 Years,” which are distributed on either monthly or quarterly bases at Iowa public rest areas along the interstate highway system. Jacobsen alleges Defendants used a corrosive ice melt on the sidewalks at Iowa’s public rest areas, and that they used the ice melt in order to damage Jacobsen’s newsrack machines to “kill [his] sales.” Compl., p. 3, ECF No. 1. Additionally, Jacobsen asserts he “has been thru [sic] 19 years of [so called Constitutionally protected distribution hell with Iowa DOT and has sought Court assistance three times because of constant barrage of new tricks to eliminate and destroy Plaintiffs [sic] rights to distribute.” Id. at 4.

During the 19 years that Jacobsen has distributed newspapers in Iowa, he claims Defendants “have moved [his] machines at will, away from all foot traffic, have as a result cut [his] distribution sales to inadequate to pay costs of distribution, and have in each and every case ended distribution for all other for sale publications who left.” Id. Most recently, he alleges that Defendants were selectively salting the public rest areas for one winter season, with the intention of corroding any metal newspaper racks that they disliked. Further, he contends Defendants threatened to seize and dispose of his now-degraded machines without his permission.

## **II. PROCEDURAL BACKGROUND**

Jacobsen filed a Complaint alleging violation of his free speech and due process rights under the federal and state constitutions against Defendants on September 24, 2012. Jacobsen challenges Defendants’ actions and any law supporting their actions in using the ice melt and then asking Jacobsen to fix or move his machines, and he asserts both facial and as applied challenges. Jacobsen requested declaratory relief; damages in excess of two million dollars, court costs, and attorney fees under 41 U.S.C. § 1983; and temporary and permanent injunctive relief. He specifically requested that this Court enjoin Defendants “from removing, seizing or disposing of Jacobsen’s newsracks, newspapers and receipts, from sidewalk areas of the highway rest stop system,” as he has no adequate remedy at law. Id. at 8. Defendants filed a Motion to

Dismiss Jacobsen's Complaint on October 26, 2012, pursuant to Rules 12(b)(1) and 12(b)(6). Jacobsen resisted the motion on November 15, 2012.

### III. DISCUSSION<sup>3</sup>

#### A. Rule 12(b)(6): Failure to State a Claim Standard

Rule 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." However, the "plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (alteration in original). "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.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 570). The Plaintiff's complaint must be read as a whole, rather than "parsed piece by piece to determine whether each allegation, in isolation, is plausible." Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 594 (8th Cir. 2009) (citing Vila v. Inter-Am. Inv. Corp., 570 F.3d 274, 285 (D.C. Cir. 2009)).

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<sup>3</sup> Although Jacobsen is proceeding *pro se*, this Court will treat him not as a novice but in a manner that duly recognizes his special litigation experience. Jacobsen has filed numerous lawsuits in courts across the country, many within the Eighth Circuit, on similar legal issues present in this case. See note 5, *infra*. Further, he purports to be an expert on newsrack distribution and First Amendment cases, with approximately forty years of experience in the industry. Compl. Mem. Ex. D, ECF No. 1-1, p. 21; see Baldwin Cnty. Welcome Ctr. v. Brown, 466 U.S. 147, 152 (1984) ("Procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants. As we stated in Mohasco Corp. v. Silver, 447 U.S. 807, 826 . . . (1980), '[i]n the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.'" (alteration in original); Brown v. Frey, 806 F.2d 801, 804 (8th Cir. 1986) (holding that "[p]ro se litigants are not excused from compliance with substantive and procedural law, but here appellant did not engage in such a course of intentional delay or contumacious conduct as to warrant the drastic sanction of dismissal with prejudice.") (internal citation omitted). The Ninth Circuit has also refused to give Jacobsen special treatment based on his status as a *pro se* litigant. See Jacobsen v. Filler, 790 F.2d 1362, 1364 (9th Cir. 1986) ("First and foremost is that *pro se* litigants in the ordinary civil case should not be treated more favorably than parties with attorneys of record.").

Under the current pleading standard, “[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, 556 U.S. at 678 (citing Twombly, 550 U.S. at 556). Thus, the Court, in examining a motion to dismiss, must determine whether the Plaintiff raises a plausible claim of entitlement to relief after assuming all factual allegations in the Complaint to be true. Id. at 678-79.

### **B. Statute of Limitations**

As a preliminary procedural matter, Defendants contend any of Jacobsen’s constitutional claims alleging action taken before September 24, 2010, are barred by the applicable statute of limitations. It has long been the rule that “all section 1983 claims accruing within a particular state are to be governed by that state’s personal injury statute of limitations.” Wycoff v. Menke, 773 F.2d 983, 984 (8th Cir. 1985); see also Wilson v. Garcia, 471 U.S. 261, 280 (superseded by statute on other grounds, Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, as recognized in Jones v. R.R. Donnelley & Sons, Co., 541 U.S. 369, 378 (2004)) (1985) (concluding that claims brought under section 1983 “are best characterized as personal injury actions”). Iowa’s personal injury statute of limitations is set forth in Iowa Code § 614.1(2), and it only allows suit within two years from the alleged injury. See Iowa Code § 614.1(2) (2011) (“Those [actions] founded on injuries to the person or reputation, including injuries to relative rights, whether based on contract or tort, or for a statute penalty, [may be brought] within two years.”). Defendants’ statute of limitations defense “may properly be asserted through a 12(b)(6) motion to dismiss” when it “‘appears from the face of the complaint itself that the limitation period has run.’” Wycoff, 773 F.2d at 984-85 (quoting R.W. Murray Co. v. Shatterproof Glass Corp., 697 F.2d 818, 821 (8th Cir. 1983)).

Jacobsen alleges wrongful actions by Defendants over the past 19 years, but only actions taken by Defendants on or after September 24, 2010, are actionable in this Court due to the

applicable statute of limitations, as Jacobsen did not file suit in this Court until September 24, 2012. Thus, any claims Jacobsen may have against Defendants under 42 U.S.C. § 1983 before September 24, 2010, must be dismissed under Rule 12(b)(6).

### **C. Eleventh Amendment Sovereign Immunity**

#### **1. Iowa Department of Transportation**

The Eleventh Amendment of the United States Constitution states that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” The Supreme Court has established that “an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state.” Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100 (1984) (quotation omitted). Further, “in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment.” Id. (citations omitted). “This jurisdictional bar applies regardless of the nature of the relief sought,” applying to suits brought in equity or in law. Id. (citation omitted). The Eleventh Amendment “by its terms clearly applies to a suit seeking an injunction, a remedy available only from equity.” Cory v. White, 457 U.S. 85, 91 (1982).

Although 42 U.S.C. § 1983 “provides a federal forum to remedy many deprivations of civil liberties, . . . it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivation of civil liberties. The Eleventh Amendment bars such suits unless the State has waived its immunity . . . .” Will v. Mich. Dep’t of State Police, 491 U.S. 58, 66 (1989) (citation omitted).

As explained by the Eighth Circuit, Jacobsen’s claims against the IDOT must fail as a matter of law because the IDOT is a department of the State of Iowa, and neither Iowa nor the IDOT has waived its sovereign immunity under the Eleventh Amendment. See Jacobsen v. Iowa

Dep't of Transp., 450 F.3d 778, 779-80 (8th Cir. 2006) (per curiam) (affirming the district court's decision finding the IDOT immune from suit in federal court on Eleventh Amendment grounds); see also Doe v. Nebraska, 345 F.3d 593, 597 (8th Cir. 2003) (holding that states and state agencies are immune from suit in federal court on Eleventh Amendment sovereign immunity grounds). All three of Jacobsen's claims against the IDOT must fail – declaratory, monetary, and injunctive – as the IDOT has not waived its sovereign immunity, and this Court therefore lacks jurisdiction over the claims against the IDOT.

## **2. Trombino, McMenemy, Younie, and Gorham**

### **a. Official Capacity**

Jacobsen's claims against Trombino, McMenemy, Younie, and Gorham in their official capacities must fail in the same way his claims against the IDOT failed. “The Eleventh Amendment bars a suit against state officials when ‘the state is the real, substantial party in interest.’” Pennhurst, 465 U.S. at 101 (quoting Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459, 464 (1945)) (citations omitted). The general rule applied by courts “is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter.” Id. (quotation omitted). Further, just “as when the State itself is named as the defendant, a suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief.” Id. at 101-02 (citation omitted).

State officials' immunity against claims for injunctive relief is somewhat limited, as suits may be brought against state officials in federal court, for actions taken in their official capacity, in order to obtain prospective injunctive relief to prevent the state official from violating federal law again in the future. See Fond du Lac Band of Chippewa Indians v. Carlson, 68 F.3d 253, 255 (8th Cir. 1995) (noting that this exception to the immunity doctrine “is based on the idea that the power of federal courts to enjoin ‘continuing violation[s] of federal law [is] necessary to

vindicate the federal interest in assuring the supremacy of that law.’” (quoting Green v. Mansour, 474 U.S. 64, 68 (1985)) (alteration in original)).<sup>4</sup>

Therefore, Jacobsen’s claim for monetary damages under 42 U.S.C. § 1983 against Trombino in his capacity as Director of the IDOT, McMenam in his capacity as an IDOT Rest Area Administrator, Younie in his capacity as Director of Maintenance, and Gorham in his capacity as the Special Assistant Attorney General, must fail on immunity grounds.

### **b. Individual Capacity**

For officials who are sued in their individual capacity, as Trombino, McMenam, Younie, and Gorham were in this case, the complainant is attempting to “impose individual liability upon a government officer for actions taken under color of state law.” Hafer v. Melo, 502 U.S. 21, 25 (1991). For Jacobsen “to establish *personal* liability in [his] § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right.” Id. (quoting Kentucky v. Graham, 473 U.S. 159, 166 (1985)) (emphasis in original) (alteration added). The person sued in their individual capacity can then assert immunity defenses like “objectively reasonable reliance on existing law.” Id. (citing Graham, 473 U.S. at 166-67).

Individuals are not only subject to suits in equity, they can also be sued for monetary damages. Id. at 30-31 (stating that “damages awards against individual defendants in federal courts are a permissible remedy in some circumstances notwithstanding the fact that they hold office,” so the “Eleventh Amendment does not erect a barrier against suits to impose individual and personal liability on state officials under § 1983.” (quotations omitted)). However, “Section 1983, of course, requires a causal relationship between a defendant’s conduct and a plaintiff’s constitutional deprivation. Absent such a relationship, the defendant is entitled to dismissal.”

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<sup>4</sup> This limited claim for injunctive relief fails on other grounds. See text *infra* at 10-16.

Gordon v. Hansen, 168 F.3d 1109, 1113 (8th Cir. 1999) (per curiam) (quoting Latimore v. Widseth, 7 F.3d 709, 716 (8th Cir. 1993) (en banc)) (citation omitted).

Respondeat superior does not provide Jacobsen with any relief in establishing causation, as “[r]espondeat superior is not a basis for liability under 42 U.S.C. § 1983.” Keeper v. King, 130 F.3d 1309, 1314 (8th Cir. 1997) (quoting Kulow v. Nix, 28 F.3d 855, 858 (8th Cir. 1994)) (alteration in original); see also Martin v. Sargent, 780 F.2d 1334, 1337 (8th Cir. 1985) (requiring the plaintiff to show the defendant had knowledge or some direct connection to the incidents resulting in the alleged deprivation of the plaintiff’s constitutional rights, as respondeat superior does not apply in § 1983 suits for damages). Thus, Jacobsen must factually demonstrate in his Complaint that Trombino, McMenamin, Younie, and Gorham were each personally involved in decisions made or actions taken to deprive Jacobsen of his federal constitutional rights; without such a showing, his claim under 42 U.S.C. § 1983 as to each defendant in an individual capacity cannot survive.

Jacobsen fails to allege anywhere in his Complaint that Trombino, Younie, and/or Gorham made a decision or took action that led to the deprivation of his constitutional rights; rather, he states that all four individually-named defendants “are charged with the overall responsibility of operating policy and maintaining public rest areas along the interstate highway system within the State of Iowa, as well as the responsibility of enforcing, and also with the responsibility of administrative rules at Iowa Interstate highway rest stops.” Compl., p. 2, ECF No. 1. He does, however, attach a letter to the memorandum filed along with his Complaint that was sent from McMenamin to Jacobsen on July 30, 2012, regarding Jacobsen’s machines at the Story City SB interstate rest area on Interstate 35. Compl. Mem. Ex. H, ECF No. 1-1, p. 37. Jacobsen then appears to include Trombino, Younie, and Gorham in his responses to McMenamin and in this lawsuit by virtue of their positions working for the State of Iowa rather than any direct connection to the alleged wrong committed against him.

In evaluating the sufficiency of a complaint under Rule 12(b)(6), a court must generally “ignore materials outside the pleadings, but it may consider . . . materials that are ‘necessarily embraced by the pleadings.’” Porous Media Corp. v. Pall Corp., 186 F.3d 1077, 1079 (8th Cir. 1999) (quoting Piper Jaffray Cos. v. Nat’l Union Fire Ins. Co., 967 F. Supp. 1148, 1152 (D. Minn. 1997)). This rule is meant to “prevent a plaintiff from ‘avoid[ing] an otherwise proper motion to dismiss by failing to attach to the complaint documents upon which it relies.’” Young v. Principal Fin. Grp., Inc., 547 F. Supp. 2d 965, 973-74 (S.D. Iowa 2008) (quoting BJC Health Sys. v. Columbia Cas. Co., 348 F.3d 685, 687 (8th Cir. 2003)) (alteration in original). To be “necessarily embraced by the pleadings,” a document’s contents must be “alleged in [the] complaint,” and the parties must not contest the authenticity of those documents. Ashanti v. City of Golden Valley, 666 F.3d 1148, 1151 (8th Cir. 2012) (quotation omitted). As set forth in Rule 12(d), “[i]f, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56.” If the Court treats a 12(b)(6) motion as a motion for summary judgment due to this rule, “[a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.” Fed. R. Civ. P. 12(d).

The letter sent by McMenammin to Jacobsen on July 30, 2012, is necessarily embraced by Jacobsen’s pleading such that this Court will include that document in its analysis of the viability of Jacobsen’s Complaint. In the Memorandum attached to his Complaint, Jacobsen states that “[t]he challenged seizure and disposal notice and the subsequent disposal of without a hearing of thousands of newspapers and hundreds of newspaper machines, seizure and disposal of three months of publisher funds in Iowa rest areas, without granting of chance of a court hearing in time” is a condition necessary to warrant the preliminary injunction he seeks. Compl. Mem., p. 12, ECF No. 1. He later asserts that the “Iowa DOT sen[t] notice to Plaintiff September 12th, 2012, that his machines must be refurbished or they will be seized starting in 3 days and going on for various rest areas over 45 days. No offer of a hearing before seizure and disposal.” Compl. Mem., p. 13, ECF No. 1. It is unclear whether there were two letters sent by

McMenamin, or if Jacobsen simply mis-read the date on McMenamin's letter when he said the notice came on September 12, 2012. However, this Court will include McMenamin's letter, attached as Exhibit H to Jacobsen's Complaint, in its analysis of Defendants' Motion to Dismiss, as it appears to be "necessarily embraced" by Jacobsen's Complaint, and Defendants do not contest its authenticity.

With the inclusion of McMenamin's letter, it is apparent that McMenamin was in some way directly involved with the alleged seizure and disposal of Jacobsen's newsracks, at least with regard to the rest area in Story City. Compl. Mem. Ex. H, ECF No. 1-1, p. 37. However, Jacobsen fails to allege any direct connection between the actions taken regarding his machines and Trombino, Younie, or Gorham. Without any specific facts directly connecting Trombino, Younie, or Gorham to the alleged wrongs committed against Jacobsen, he cannot sustain a claim under 42 U.S.C. § 1983 against any of the three in their individual capacity. Thus, only his individual claim against McMenamin survives the Eleventh Amendment.

#### **D. Injunction Claim**

Jacobsen purports to be an expert in First Amendment litigation related to newsracks and newspaper distribution. He has also filed numerous lawsuits across the country – including in Iowa's federal courts – seeking declaratory relief, injunctive relief, and monetary damages under 42 U.S.C. § 1983.<sup>5</sup> However, he failed in the present suit to properly plead his preliminary injunction claim. Under Local Rule 65,

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<sup>5</sup> See Jacobsen v. Illinois Dep't of Transp., 419 F.3d 642 (7th Cir. 2005); Jacobsen v. City of Rapid City, S.D., 128 F.3d 660 (8th Cir. 1997); Jacobsen v. Harris, 869 F.2d 1172 (8th Cir. 1989); Jacobsen v. Crivaro, 851 F.2d 1067 (8th Cir. 1988); Jacobsen v. Bonine, 123 F.3d 1272 (9th Cir. 1997); Jacobsen v. Filler, 790 F.2d 1362 (9th Cir. 1986); Jacobsen v. Howard, 335 F. Supp. 2d 1009 (D. S.D. 2004); Jacobsen v. Iowa Dep't of Transp., 332 F. Supp. 2d 1217 (N.D. Iowa 2004) (aff'd 450 F.3d 778 (8th Cir. 2006)); Jacobsen v. Rensink, No. C 96-4074, 1997 WL 33833742 (N.D. Iowa, March 15, 1997); Jacobsen v. Howard, 904 F. Supp. 1065 (D. S.D. 1995) (aff'd in part, vacated in part, 109 F.3d 1268 (8th Cir. 1997)); Jacobsen v. Lambers, 888 F. Supp. 1088 (D. Kan. 1995); Jacobsen v. Rauh, Civ. A. No. 89-2255-V, 1991 WL 97530 (D. Kan. May 30, 1991).

[a]ny party requesting a preliminary injunction or a temporary restraining order, or both, must file a separate motion requesting such relief. In the motion, the moving party must set forth with particularity the facts relief upon in support of the request. The moving party also must comply with Fed. R. Civ. P. 65 . . . relating to requests for expedited relief.

Although Jacobsen is proceeding *pro se* in this action, this Court will not grant him leniency with regard to procedural rules. He has been filing suits very similar to the suit at bar for over twenty years, and he claims to be an expert in this area of litigation. Additionally, he has been held to the same standard as parties represented by counsel in other lawsuits, providing Jacobsen with advance warning that he would be held to the same rules as other litigants represented by counsel. See Jacobsen v. Filler, 790 F.2d 1362, 1364 (9th Cir. 1986) (stating that *pro se* litigants in ordinary civil cases should not be treated any more favorably than litigants represented by an attorney, so the court had no duty to Jacobsen to advise him of the procedural actions he should have taken in response to the defendants' motion); Jacobsen v. Illinois Dep't of Transp., 419 F.3d 642, 644-45 (7th Cir. 2005) (noting that "Jacobsen is no stranger to the federal courts. With varying degrees of success, he has sued all across the country to protect his right to distribute his magazines without being fettered by petty regulations. . . . Despite this experience (he normally proceeds *pro se*), Jacobsen has not learned the importance of following certain rules of appellate procedure." (citations omitted)).

Jacobsen failed to file his injunction claim in a separate motion in accordance with Local Rule 65. Thus, his claim for injunctive relief is infirm on procedural grounds. However, the Court having proceeded beyond this procedural error finds Jacobsen's injunction claim fails under Rule 12(b)(6). The four factors this Court must examine in deciding whether to grant a preliminary injunction include "the threat of irreparable harm to the movant; the balance between this harm and the harm created by granting the injunction; the likelihood of success on the merits, and the public interest." Jacobsen v. Rensink, No. C 96-4074, 1997 WL 33833742, at \*2 (N.D. Iowa March 15, 1997) (citing Dataphase Sys., Inc. v. C.L. Sys., Inc., 640 F.2d 109, 113 (8th Cir. 1981)) (citations omitted). "No single [Dataphase] factor in itself is dispositive; in each

case all of the factors must be considered to determine whether on balance they weigh towards granting the injunction.” Baker Elec. Coop., Inc. v. Chaske, 28 F.3d 1466, 1472 (8th Cir. 1994) (internal quotation omitted). However, “if the Plaintiff is unable to show a likelihood of success on the merits or the threat of irreparable injury, the third and fourth Dataphase factors are insufficient on their own to support a preliminary injunction.” Doe v. Perry Cmty. Sch. Dist., 316 F. Supp. 2d 809, 820 (S.D. Iowa 2004) (citing Microware Sys. Corp. v. Apple Computer, Inc., 126 F. Supp. 2d 1207, 1218-19 (S.D. Iowa 2000)). This Court will assume without deciding that Jacobsen has shown irreparable harm from McMenamín’s actions, as his preliminary injunction claim fails due to his inability to succeed on the merits of his claim under the governing legal standard in the Eighth Circuit for regulation of speech at interstate rest areas.

“[A]djudication of a motion for a preliminary injunction is not a decision on the merits of the underlying case.” Branstad v. Glickman, 118 F. Supp. 2d 925, 939 (N.D. Iowa 2000) (quotation omitted) (alteration in original). Instead, “the assessment of the likelihood of success on the merits factor essentially requires the movant find support for its position in governing law.” Doe, 316 F. Supp. 2d at 822 (quoting Branstad, 118 F. Supp. 2d at 939). The Court has already disposed of Jacobsen’s claims against the IDOT and three of the four individually named defendants on immunity grounds. Thus, the only claims remaining are against McMenamín in his individual capacity and for prospective injunctive relief against all four individual defendants in their official capacities. Jacobsen cannot prove any likelihood of succeeding on the merits of his claim against the IDOT or against Trombino, Younie, or Gorham in their individual capacities due to their Eleventh Amendment immunity.

It is well established that distribution of newspapers is protected by the First Amendment, whether distributed for free or for a profit. See Heffron v. Int’l Soc’y for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981); Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943); Lovell v. City of Griffin, Georgia, 303 U.S. 444, 452 (1938). However, this right may be restricted by the IDOT and its agents. See Rensink, 1997 WL 33833742, at \*3 (holding that “the IDOT may restrict Jacobsen’s right to distribute his newspapers”); see also Int’l Soc’y for

Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992) (“[I]t is also well settled that the government need not permit all forms of speech on property that it owns and controls.”). The level of restriction available to the IDOT and its agents is determined by the type of forum at issue. See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 44 (1983) (setting forth the definitions for different types of fora). There are three types of fora that publicly-owned property is separated into: (1) traditional public fora, (2) designated public fora, and (3) nonpublic fora. Jacobsen v. City of Rapid City, S.D., 128 F.3d 660, 662 (8th Cir. 1997).

In determining what category of forum is at issue, “[t]he mere physical characteristics of the property cannot dictate [the] analysis.” United States v. Kokinda, 497 U.S. 720, 727 (1990). In Kokinda, a U.S. Post Office sidewalk was at issue, and the Supreme Court found it important that “[t]he postal sidewalk was constructed solely to assist postal patrons to negotiate the space between the parking lot and the front door of the post office, not to facilitate the daily commerce and life of the neighborhood or city.” Id. at 728. The Supreme Court then stated that “the location and purpose of a publicly owned sidewalk is critical to determining whether such a sidewalk constitutes a public forum.” Id. at 728-29. “[C]onsideration of a forum’s special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved.” Id. at 732 (quoting Heffron, 452 U.S. at 650-51) (alteration in original). In Kokinda, it was determined that the purpose of the post office and the corresponding sidewalk was “to accomplish the most efficient and effective postal delivery system.” Id. Although “individuals or groups have been permitted to leaflet, speak, and picket on postal premises,” the Supreme Court held that “a practice of allowing some speech activities on postal property do not add up to the dedication of postal property to speech activities.” Id. at 730. This is because “[t]he government does not create a public forum by . . . *permitting* limited discourse, but only by intentionally opening a nontraditional forum for public discourse.” Id. (quoting Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 802 (1985)) (alteration and emphasis in original).

Interstate rest areas, and their sidewalks in particular, are nonpublic fora under the test set forth in Kokinda. See Jacobsen v. Iowa Dep't of Transp., 450 F.3d 778, 779 (8th Cir. 2006) (per curiam) (holding that “the perimeter sidewalks at Iowa highways rest areas are nonpublic fora,” so “any government-imposed restrictions need only be reasonable and not an effort to suppress expression merely because of opposition to the speaker’s views.”) (citation omitted); Jacobsen v. Bonine, 123 F.3d 1272, 1274-75 (9th Cir. 1997) (finding that similar to the sidewalks involved in Kokinda, the interstate rest area sidewalks “at issue here do not have the characteristics of public sidewalks traditionally open to expressive activity. These walkways are integral parts of the rest stop areas, which are themselves oases from motor traffic.”); Sentinel Commc’ns Co. v. Watts, 936 F.2d 1189, 1204 (11th Cir. 1991) (holding that “an interstate rest area is a non-public forum,” as “[r]est areas are to be provided on Interstate highways as a *safety measure*”) (quoting 23 C.F.R. § 625.5 (1990)). Although the IDOT and its agents may allow speech-related activities to take place at Iowa’s highway rest areas, including the distribution of newspapers in newsracks, the primary purpose of rest areas is not speech-related, but rather safety and travel-related. Id. The IDOT has not designated its rest areas as places for expressive activity, nor are rest areas traditional public fora. In accordance with the Eighth Circuit’s decision in Jacobsen v. Iowa Department of Transportation, 450 F.3d 778 (8th Cir. 2006) (per curiam), this Court finds that the interstate public rest area sidewalks in Iowa are nonpublic fora, and therefore any restriction on speech at such locations is analyzed under the “reasonableness” test set forth in Kokinda.

The Supreme Court in Kokinda held that “the regulation at issue must be analyzed under the standards set forth for nonpublic fora: It must be reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.” Kokinda, 497 U.S. at 730 (internal quotation and quotation marks omitted). Under this “reasonableness” test for nonpublic fora, “[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.” Id. (quoting Cornelius, 473 U.S. at 806) (alteration in original). This means that “[t]he Government’s decision to restrict access to a nonpublic forum

need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation.” Id. (internal quotation and quotation marks omitted) (emphasis in original).

The court in Jacobsen v. Illinois Dept. of Transportation, 419 F.3d 642 (7th Cir. 2005), held that “[s]o long as the regulations are viewpoint-neutral, as Ja[cob]sen concedes they are here, the state may impose ‘reasonable’ time, place, or manner restrictions at nonpublic fora.” 419 F.3d at 648 (citing Cornelius, 473 U.S. at 806). The court went on to find it reasonable to require maintenance of newsracks by the owner of the newsrack, holding that “[i]t is reasonable for IDOT not to want potentially hazardous, broken-down newsracks ornamenting the state’s rest areas.” Id. at 649. Additionally, any concern by Jacobsen that his newsracks are moved away from main thoroughfare sidewalks at rest areas by the rest area administrators is set off by the IDOT’s interest in aesthetics and safety concerns for the public. See Jacobsen v. Howard, 335 F. Supp. 2d 1009, 1013 (D. S.D. 2004) (citing Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804-05 (1984)).

In the present case, McMenamain informed Jacobsen that his newsracks would be removed from the Story County interstate rest area, as they “either had not been serviced, were inoperable, or in such ill repair that they have become a pedestrian hazard for the traveling public.” Compl. Mem. Ex. H, ECF No. 1-1, p. 37. McMenamain gave Jacobsen 45 days to repair, replace, or remove his machines, and if Jacobsen failed to do so, his machines would be removed by the IDOT. Id. Jacobsen attempts to blame the condition of his machines on the use of ice melt by the IDOT. Ice melt is used by the IDOT at rest areas and many other locations throughout the state to ensure the safety of travelers on Iowa’s roadways and sidewalks during the winter months. The public’s ability to access rest area facilities safely during all times of the year is one of the primary purposes of rest areas, as established in Illinois Dep’t of Transportation and Howard. Thus, the IDOT’s use of ice melt, and McMenamain’s later request that Jacobsen ensure his newsracks are properly maintained, are reasonable in light of the IDOT’s interest in ensuring the safety of visitors to Iowa’s rest areas. Jacobsen therefore fails to illustrate to this Court his

likelihood of success on the merits of his First Amendment claim against McMenemy. Additionally, Jacobsen fails to set forth facts implicating the other named defendants in the actions taken against him, so his prospective injunctive relief claims against Trombino, Younie, and Gorham must also fail under Rule 12(b)(6).

**E. First Amendment Violation Claim**

In order to survive Defendants' Motion to Dismiss as to McMenemy, Jacobsen must allege sufficient facts to support his claim that McMenemy violated Jacobsen's First Amendment rights. As set forth in the preliminary injunction "likelihood of success on the merits" section, this Court finds that Jacobsen has failed to allege sufficient facts to indicate any ability to succeed on the merits of his First Amendment claim against McMenemy. Thus, his claim must be dismissed under Rule 12(b)(6).

**F. Other Constitutional Claims<sup>6</sup>**

Jacobsen also requests relief in his Complaint due to "[t]he actions and planned seizure of Plaintiff Jacobsen of his rights, privileges and immunities secured by the United States Constitution under the First and Fourteenth Amendment, and violation of the Fifth Amendment with seizure of Plaintiff's property without due process." Compl. p. 7, ECF No. 1. He fails to allege facts to support a claim under the Privileges or Immunities Clause of the Fourteenth Amendment, which states, "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." To prove a violation of this clause, Jacobsen must prove that his "right to travel – the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State" was infringed upon by Defendants.

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<sup>6</sup> Although the Court has already determined that some of the named Defendants have immunity under the Eleventh Amendment, it will refer to Defendants as a group in this section to summarily deal with any other constitutional claims Jacobsen may have against the Defendants who do not have complete immunity.

Saenz v. Roe, 526 U.S. 489, 503 (1999). Jacobsen does not provide facts to support an allegation that his right to travel was infringed upon in any manner, nor is he a citizen of Iowa to be treated to the same privileges and immunities that the Fourteenth Amendment Privileges or Immunities Clause protects.

If Jacobsen was actually referring to the Privileges and Immunities Clause found in Article IV, § 2 of the United States Constitution, he still fails to state a claim against any of the defendants under Rule 12(b)(6). The Privileges and Immunities Clause states that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” This clause ensures that “by virtue of a person’s state citizenship, a citizen of one State who travels in other States, intending to return home at the end of his journey, is entitled to enjoy the ‘Privileges and Immunities of Citizens in the several States’ that he visits.” Id. at 501. Essentially, this Clause “provides important protections for nonresidents who enter a State whether to obtain employment . . . to procure medical services . . . or even to engage in commercial shrimp fishing.” Id. (internal citations omitted). The Privileges and Immunities Clause “bar[s] discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States.” Id. Jacobsen fails to allege any facts to support a finding of discrimination committed by Defendants against him that Iowa citizens did not experience. Thus, he has failed to allege Defendants violated his rights under the Privileges and Immunities Clause set forth in Article IV, § 2 of the United States Constitution.

Jacobsen also summarily alleges Defendants violated his rights under the Fourth and Fifth Amendments to the United States Constitution. Other than making a conclusory statement that his Fifth Amendment rights were violated, Jacobsen fails to present sufficient facts to make out a plausible claim his newsracks were taken for a public use without just compensation. See U.S. Const. amend. V (“nor shall private property be taken for public use, without just compensation”).

More fundamentally, Jacobsen fails to allege sufficient facts to indicate that he lacked an opportunity to contest the seizure of his property by Defendants for purposes of his due process claim under the Fourth Amendment. He had 45 days after McMenamín's July 30, 2012, letter, which provided Jacobsen with an opportunity to either contest McMenamín's request or comply in some manner. McMenamín's request was not a violation of Jacobsen's First Amendment rights, and it was reasonable for McMenamín to request that Jacobsen repair his newsracks or they would be removed from the sidewalk to prevent harm to the public visitors at the rest area. There is no indication Jacobsen sought to take advantage of any procedure to prevent the seizure of his property after his newsracks were found to be a safety hazard for patrons of the rest area at issue, short of once again litigating the issues.

**G. Preclusion**

Although Defendants raise arguments for issue and claim preclusion of Jacobsen's First Amendment claims before specified dates, this Court finds it unnecessary to engage in preclusion analysis at this time, as all of Jacobsen's claims fail on other grounds.

**IV. CONCLUSION**

For the reasons stated, Defendants' Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6), ECF No. 20, must be **granted**.

**IT IS SO ORDERED.**

Dated this 7th day of May, 2013.

  
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JAMES E. GRITZNER, Chief Judge  
U.S. DISTRICT COURT