UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BARBARA FOX, *et al.,* Plaintiffs, v. GOVERNMENT OF THE DISTRICT OF COLUMBIA, *et al.,* Defendants.	Civil Action No. 10-2118 (RWR)

DEFENDANT DISTRICT OF COLUMBIA'S
MOTION TO DISMISS THE COMPLAINT

COMES NOW Defendant District of Columbia, by and through its undersigned attorneys, the Office of the Attorney General for the District of Columbia, to respectfully move this Honorable Court, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss Counts 4-7 of the "Class Action Complaint for Individual Money Damages and Class Action Damages and Jury Demand" ("complaint") on the following grounds:[1]

1. Plaintiff Hamilton Fox lacks Article III standing because he has no injury in fact and no threat of imminent harm. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 574 (1992); *City of Los Angeles v. Lyons,* 461 U.S. 95 (1983). At a minimum, Plaintiff lacks standing to seek injunctive relief against the District of Columbia, and, if he has any injury at all, it is self-created and not cognizable for standing purposes.

2. Alternatively, Plaintiff Hamilton Fox fails to state a claim for violations of his Fourth, Fifth, Sixth, or Eighth Amendment rights, and the allegations in Count 4, that Mr. Fox

[1] Defendant District of Columbia is named as the Defendant in Counts 4-7 only. *See* Complaint ¶¶ 202-224. The undersigned also now represents the individual Defendants, who are sued only in Counts 1-3; they have not yet been served with process and these papers are not filed on their behalf.

was over-detained, fail to meet the requirements of *Monell v. New York*, 436 U.S. 658, 690 (1978), *Los Angeles County v. Humphries*, 2010 U.S. LEXIS 9444 (November 30, 2010), and *Oklahoma City v. Tuttle*, 471 U.S. 808, 824 (1985).

In support of its motion, Defendant District of Columbia respectfully refers the Court to the attached memorandum of points and authorities. An appropriate, proposed order also accompanies these papers.

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE MOTION TO DISMISS THE COMPLAINT

INTRODUCTION[1]

Plaintiffs in this case are Barbara and Hamilton Fox, who complain in their lengthy complaint about the circumstances of Mr. Fox's arrest and release from custody, and of Mrs. Fox's detention at the time of her husband's arrest, on the evening of Saturday, December 20, 2008. Defendant District of Columbia is named as the Defendant in Counts 4-7 only, which are styled "class" allegations. *See* Complaint ¶¶ 202-224. The allegations pertaining to the circumstances of the arrest are made against the individual Defendants only, not the District of Columbia. *See* Counts 1-3.

This motion challenges the legal sufficiency of the allegations by Plaintiff Hamilton Fox[2] against the District's "post-and-forfeit" system, which he used in order to obtain a more

[1] The facts discussed herein are based on those alleged in the complaint, unless otherwise noted. Nothing stated or referenced is intended by Defendant to convert this motion to one for summary judgment under Rule 56.

[2] As used throughout the remainder of these papers, "Plaintiff" shall refer only to Plaintiff Hamilton Fox. It is not entirely clear how many classes of Plaintiffs Hamilton Fox seeks to represent. Although the allegations pertaining to the putative class appear to relate only to post-and-forfeit issues, Plaintiffs also mentions "the Lively Class" and the "Delayed Release Class." Complaint at 39.

expeditious release without the risk of criminal conviction. *See* D.C. OFFICIAL CODE § 5-335.01. Post-and-forfeit is an optional process that allows "a person charged with certain misdemeanors [to] simultaneously post and forfeit an amount as collateral (which otherwise would serve as security upon release to ensure the arrestee's appearance at trial) and thereby obtain a full and final resolution of the criminal charge." D.C. OFFICIAL CODE § 5-335.01(a). When an arrestee, like Plaintiff, is given the opportunity to post and immediately forfeit collateral, he is being afforded a *privilege* that is not constitutionally required. In the District, post-and-forfeit is made available by written offer for certain misdemeanors, through the Office of the Attorney General (Public Safety Division) ("OAG") at preliminary hearings, and by the Metropolitan Police Department ("MPD") at station houses throughout the City. *See* D.C. OFFICIAL CODE § 5-335.01;[3] Exhibit 2, Wash. Law Rptr., Vol. 125, Nos. 164-65 (Aug. 25-26, 1997).

An important feature of the post-and-forfeit process is that it does not supplant the judicial system; not only is an arrestee free to decline an offer and go forward to a preliminary hearing, even *after* acceptance and release from custody, he or she may still file a motion in Superior Court within 90 days to set aside the forfeiture and recommence the criminal proceedings.[4] *See* D.C. OFFICIAL CODE § 5-335.01(d). Plaintiff did not file a motion, though he admits the post-and-forfeit form he signed stated that "forfeiture could be set aside on motion," Complaint ¶ 153, as required by D.C. OFFICIAL CODE § 5-335.01(d)(6). *See also* Exhibit 3, Sample Post-and-Forfeit Form.[5] Despite his rhetoric suggesting these motions are difficult to

[3] Defendant does not concede that post-and-forfeit through MPD is legally distinguishable from post-and-forfeit through OAG at the preliminary hearing stage. *See* D.C. OFFICIAL CODE § 5-335.01(c) ("Whenever the Metropolitan Police Department ("MPD") or the Office of the Attorney General for the District of Columbia tenders an offer to an arrestee to resolve a criminal charge using the post-and-forfeit procedure…."). Plaintiff, however, is not challenging the post-and-forfeit process used by OAG in the Superior Court.

[4] To be fair, since Plaintiff did not bother to file such a motion, *see infra* discussion, it is impossible to say with certainty what OAG would have done or how the Superior Court would have ruled.

[5] Defendant submits this blank PD67 form for background purposes only, and, by doing so, does not intend to

file, Plaintiff admits the process consists of just two simple steps: (1) getting a case number from the Clerk and (2) filing the motion. *See* Complaint ¶¶ 110-11.

Plaintiff's allegations do not state a claim, no less provide a bases upon which Plaintiff may seek some kind of broad-based injunctive relief against the District.[6] The allegations are limited to the facts of Plaintiff's *one* experience – on the night of December 20, 2008 – when, following his arrest, Plaintiff chose to accept an offer by MPD to post and forfeit $35 at the station house, and was released from custody within about four hours, never being required to appear in court.[7] The forfeiture was noted in the records of the Superior Court of the District of Columbia. Exhibit 1, Docket Report for *United States v. Hamilton Phillips Fox,* No. 2008 PAF 004613 (Superior Court, D.C., Dec. 22, 2008).[8] Despite its many sweeping, conclusory, argumentative, and wholly unsupported allegations about the post-and-forfeit process, the complaint nonetheless fails to state a claim. *See* Counts 4-7.

SUMMARY OF ARGUMENT

Plaintiff's putative class action complaint should be dismissed under Rule 12(b)(1) or 12(b)(6). As a threshold matter, Plaintiff lacks Article III standing, having suffered no actual injury and facing no imminent injury other than one that is wholly abstract and conjectural. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 574 (1992). Plaintiff lacks standing to invoke the jurisdiction of this Court because he suffered no injury as a result of his original decision to take

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convert its motion to one for summary judgment under Rule 56. If the Court finds that its consideration of this document would cause the motion to be so converted, then Defendant hereby withdraws the document and respectfully asks that the Court not consider it for any purpose.

[6] Plaintiff does not explain what equitable relief he seeks for himself or the putative class.

[7] Plaintiff does relate some hearsay evidence about another arrestee sharing his detention cell. *See* Complaint ¶¶ 137-48.

[8] This document is a public record obtained online from Superior Court.

advantage of the post-and-forfeit system and to thereby forfeit $35, *see id.*, and because he does not face any imminent injury, *see City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). Finally, Plaintiff is not entitled to an opportunity to complain about alleged constitutional infirmities in the post-and-forfeit process all of which could have been obviated by the filing of a motion. *Taylor v. Federal Deposit Ins. Corp.*, 132 F.3d 753, 767 (D.C. Cir. 1997).

Even if Plaintiff has an injury-in-fact sufficient to support standing, he has nonetheless failed to state claims for violations of his Fourth, Fifth, Sixth, or Eighth Amendment rights. *First*, in Count 4, Plaintiff alleges his Fourth Amendment right to freedom from unreasonable search and seizure was violated because he posted his $35 and signed the form at about 11:45 p.m., when, he claims with no apparent factual basis, that "all administrative steps incident to the arrest …and release…were completed," but he was not released until "about 4 hours [later]." *See* Complaint ¶¶ 158, 170, 171. Even assuming Mr. Fox's speculative and conclusory allegations about the completion of his paperwork should survive scrutiny under Rule 12(b)(6), a mere four hour delay is not sufficient to state a claim for violation of *any* constitutional protection. *See, e.g., Brass v. County of Los Angeles*, 328 F.3d 1192, 1200 (9th Cir. 2003) (39-hour delay in release by sheriff based on paperwork processing does not violate due process). Further, the District of Columbia cannot be held liable under 42 U.S.C. § 1983 based on a single violation of the law. *Oklahoma City v. Tuttle*, 471 U.S. 808, 824 (1985); *Monell v. New York*, 436 U.S. 658, 690 (1978).

Second, in Count 5, Plaintiff alleges his $35 was property "taken" without due process of law, in violation of the Fifth Amendment. Complaint at ¶ 211. This cannot be correct because Plaintiff's property was not "taken" at all; Plaintiff admits he signed the post-and-forfeit form, thereby voluntarily relinquishing his $35 in order to secure a more expeditious release than that

required by the constitution, and one that ended any further threat to his liberty. Moreover, Plaintiff had the right to seek to set aside the forfeiture, which he, again, voluntarily, chose to not do. Therefore, Plaintiff has no "takings" claim.

Third, in Count 6, Plaintiff claims his Sixth Amendment right to counsel was violated because he was required to "make decisions about analyzing the 'post and forfeit' process" and other matters without benefit of counsel. Complaint ¶ 217. The post-and-forfeit process is reversible upon motion granted by the Superior Court (which Plaintiff did not file). In any event, the Sixth Amendment right to counsel did not attach and Mr. Fox's rights were not violated.

Fourth, in Count 7, Plaintiff alleges his 8th Amendment "bail rights" were violated because "'post-and-forfeit' is not any species of bail," but functions as its equivalent. *See* Complaint ¶¶ 222-23. Plaintiff was not denied the right to bail; he chose to avail himself of an option that obviated a bail determination and secured his release well before it would have been required by the constitution. Accordingly, Count 7 fails to state a claim upon which relief may be granted.

For all these reasons, and those set forth in greater detail below, the complaint should be dismissed as to this Defendant, and as to Counts 4-7.

LEGAL STANDARDS

A motion to dismiss for lack of constitutional standing, under Rule 12(b)(1), essentially seeks dismissal on the basis of lack of subject matter jurisdiction. *See Alliance for Envtl. Renewal, Inc. v. Pyramid Crossgates Co.*, 436 F.3d 82, 89 (2d Cir. 2006) ("Although we have noted that standing challenges have sometimes been brought under Rule 12(b)(6), as well as Rule 12(b)(1), the proper procedural route is a motion under Rule 12(b)(1). The distinction is important…") (internal citations omitted). The standard on such a motion is slightly different

than on a motion under Rule 12(b)(6). As this Court has explained, per Judge Walton:

> To avoid dismissal under Rule 12(b)(1)…, a plaintiff must establish the Court's jurisdiction by a preponderance of the evidence. When determining the question of jurisdiction, federal courts accept the factual allegations contained in the complaint as true.… Moreover, the Court can consider material outside of the pleadings when determining whether it has jurisdiction.

Halcomb v. Office of the Senate Sergeant-At-Arms, 563 F. Supp. 2d 228, 235 (D.D.C. 2008). *Accord Bailey v. Verizon Commun., Inc.*, 544 F. Supp. 2d 33, 35 (D.D.C. 2008) (Lamberth, J.). *See also Spahr v. United States*, 501 F. Supp. 2d 92. 95 (D.D.C. 2207) (Huvelle, J.).

As discussed above, when ruling on Rule 12(b)(6) motions, courts may employ a "two-pronged approach." *Iqbal*, 129 S. Ct. at 1950. Although courts must assume the veracity of all "well-pleaded factual allegations" in the complaint, *id*., they need *not* accept as true "naked assertions devoid of further factual enhancement," *id*. at 1949 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007)), "a legal conclusion couched as a factual allegation," *id.* at 1949-50, or "inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint," *Kowal v. MCI Comms. Corp., Inc.*, 16 F.3d 1271, 1276 (1994). A pleading must offer more than labels and conclusions or a formulaic recitation of the elements of a cause of action. *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 555).

Once a court has determined that there are well-pleaded factual allegations, it must then determine whether the allegations "plausibly give rise to an entitlement to relief" by presenting "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face,'" in that "the court [can] draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. at 1949-50 (quoting *Twombly*, 550 U.S. at 570). Simply alleging facts "consistent with a defendant's liability . . . stops short of the line between possibility and plausibility of entitlement to relief." *Id*. at 1949. *See also Haynesworth v. Miller*, 820 F.2d

1245, 1254 (D.C. Cir. 1987). "Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief under the Federal Constitution, it should not survive a motion to dismiss." *Butz v. Economou*, 438 U.S. 478, 507-508 (1978). *Accord Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982).

The complaint fails to meet the foregoing standards and should be dismissed.

RELEVANT STATUTORY PROVISIONS

D.C. OFFICIAL CODE § 5-335.01. Enforcement of the post-and-forfeit procedure

> (a) For the purposes of this section, the term "post-and-forfeit procedure" shall mean the procedure enforced as part of the criminal justice system in the District of Columbia whereby a person charged with certain misdemeanors may simultaneously post and forfeit an amount as collateral (which otherwise would serve as security upon release to ensure the arrestee's appearance at trial) and thereby obtain a full and final resolution of the criminal charge.
>
> (b) The resolution of a criminal charge using the post-and-forfeit procedure is not a conviction of a crime and shall not be equated to a criminal conviction. The fact that a person resolved a charge using the post-and-forfeit procedure may not be relied upon by any court of the District of Columbia or any agency of the District of Columbia in any subsequent criminal, civil, or administrative proceeding or administrative action to impose any sanction, penalty, enhanced sentence, or civil disability.
>
> (c) Whenever the Metropolitan Police Department ("MPD") or the Office of the Attorney General for the District of Columbia tenders an offer to an arrestee to resolve a criminal charge using the post-and-forfeit procedure, the offer shall be accompanied with a written notice provided to the arrestee describing the post-and-forfeit procedure and the consequences of resolving the criminal charge using this procedure.
>
> (d) The written notice required by subsection (c) of this section shall include, at a minimum, the following information:
>
> (1) The identity of the misdemeanor crime that is to be resolved using the post-and-forfeit procedure and the amount of collateral that is to be posted and forfeited;

(2) A statement that the arrestee has the right to choose whether to accept the post-and-forfeit offer or, alternatively, proceed with the criminal case and a potential adjudication on the merits of the criminal charge;

(3) If the arrestee is in custody, a statement that if the arrestee elects to proceed with the criminal case he or she may also be eligible for prompt release on citation, or will be promptly brought to court for determination of bail;

(4) A statement that the resolution of the criminal charge using the post-and-forfeit procedure will preclude the arrestee from obtaining an adjudication on the merits of the criminal charge;

(5) A statement that the resolution of the criminal charge using the post-and-forfeit procedure is not a conviction of a crime and may not be equated to a criminal conviction, and may not result in the imposition of any sanction, penalty, enhanced sentence, or civil disability by any court of the District of Columbia or any agency of the District of Columbia in any subsequent criminal, civil, or administrative proceeding or administrative action;

(6) A statement that the agreement to resolve the charge using the post-and-forfeit procedure is final after the expiration of 90 days from the date the notice is signed and that, within the 90-day period, the arrestee or the Office of the Attorney General may file a motion with the Superior Court of the District of Columbia to set aside the forfeiture and proceed with the criminal case; and

(7) A statement that, following resolution of the charge using the post-and-forfeit procedure, the arrestee will continue to have an arrest record for the charge at issue, unless the arrestee successfully moves in the Superior Court of the District of Columbia to seal his or her arrest record.

….

(f) An arrestee provided the written notice required by subsection (c) of this section who wishes to resolve the criminal charge using the post-and-forfeit procedure shall, after reading the notice, sign the bottom of the notice, thereby acknowledging the information provided in the notice and agreeing to accept the offer to resolve the charge using the post-and-forfeit procedure. After the arrestee signs the notice, the arrestee shall be provided with a copy of the signed notice.

(g) Within 90 days of the Superior Court of the District of Columbia issuing an updated bond and collateral list, the Chief of Police shall issue a list of all misdemeanor charges that MPD members are authorized to resolve using the post-and-forfeit procedure, and the collateral amount associated with each charge. The Chief shall make the list available to the public, including placing the list on the MPD website.

….

ARGUMENT

I. PLAINTIFF HAMILTON FOX LACKS ARTICLE III STANDING TO CHALLENGE THE POST-AND-FORFEIT PROGRAM

"Because the absence of constitutional standing would divest the Court of subject matter jurisdiction, it must be addressed before analysis of the merits." *Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 101-02 (1998). "Standing is an essential and unchanging predicate to any exercise of the Court's jurisdiction. Accordingly, the Court is obligated to satisfy itself that it has jurisdiction over plaintiffs' claims for equitable relief." *Chang v. United States,* 2010 U.S. Dist. LEXIS 98024, *11-*12 (D.D.C. 2010).

"[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Defenders of Wildlife,* 504 U.S. at 560. Despite the length of the complaint, Plaintiff not pled facts sufficient to invoke the jurisdiction of this Court. The party invoking federal jurisdiction "bears the burden of establishing" the elements of standing:

> First, the plaintiff must have suffered an injury in fact -- an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to be fairly . . . traceable to the challenged action of the defendant, and not . . . the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. at 560-61. Further, "particularized" injury is one that "affects the plaintiff in a personal and individual way." *Id.* at 560 n. 1. "[S]tanding focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Simon v. Eastern Ky. Welfare Rts. Org.*, 426 U.S. 26. 38 (1976). The elements of standing are "not mere pleading

requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i. e., with the manner and degree of evidence required at the successive stages of the litigation." *Defenders of Wildlife*, 505 U.S. at 561.

A. PLAINTIFF HAS NO STANDING TO SEEK INJUNCTIVE RELIEF AGAINST THE DISTRICT OF COLUMBIA BECAUSE HIS INJURY, IF ANY, IS NOT ACTUAL OR IMMINENT BUT CONJECTURAL AND HYPOTHETICAL

In *Lyons*, 461 U.S. 95, the Supreme Court rejected the issuance of a injunction against the possible future use of police procedures based on a one-time arrest, where the arrestee was challenging the use of a chokehold that had rendered him unconscious and caused him physical injury. The court held in pertinent part:

> In order to establish an actual controversy in this case, Lyons would have had not only to allege that he would have another encounter with the police but also to make the incredible assertion either (1) that all police officers in Los Angeles always choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation, or for questioning, or (2) that the city ordered or authorized police officers to act in such manner. Although Count V alleged that the city authorized the use of the control holds in situations where deadly force was not threatened, it did not indicate why Lyons might be realistically threatened by police officers who acted within the strictures of the city's policy. If, for example, chokeholds were authorized to be used only to counter resistance to an arrest by a suspect, or to thwart an effort to escape, any future threat to Lyons from the city's policy or from the conduct of police officers would be no more real than the possibility that he would again have an encounter with the police and that either he would illegally resist arrest or detention or the officers would disobey their instructions and again render him unconscious without any provocation.

Id. at 106 (citations omitted). Pursuant to *Lyons,* a plaintiff seeking to enjoin a municipality based on past violations must plead, *inter alia*, a *likelihood of future injury to himself as an individual. See id.* at 107-08. Following that rule, this Court has held that allegations that a

plaintiff may someday be subject once again to an allegedly unconstitutional MPD policy is not enough to invoke the Court's jurisdiction.

> Even if the Court accepted plaintiff's argument that by failing to specifically instruct [its police officers] on the unconstitutionality of [a particular stop] the District implicitly adopted a policy endorsing them and assuming that policy continues today plaintiff would then have to establish that he himself would again be subjected to such a stop…. It is difficult to imagine a factual scenario in which any plaintiff could make such a showing. Controlling precedent precludes this Court from affording plaintiff even declaratory relief.

Johnson v. Williams, 2009 U.S. Dist. LEXIS 129781, *5 (D.D.C. 2009) (reversing grant of declaratory judgment and dismissing complaint under *Lyons*). *Accord Chang*, 2010 U.S. Dist. LEXIS 98024 (granting summary judgment to District of Columbia based on lack of Article III standing under *Lyons*). Based on this standard, Plaintiff's allegations – which merely suggest, and do not even go so far as to state, that Plaintiff may again be arrested and "forced" to consider another post-and-forfeit offer – are insufficient. *See, e.g.*, *United Transp. Union v. Interstate Commerce Comm'n*, 891 F.2d 908, 912 (D.C. Cir. 1989) ("when considering any chain of allegations for standing purposes, we may reject as overly speculative those links which are predictions of future events (especially future actions to be taken by third parties) and those which predict a future injury that will result from present or ongoing actions."). Accordingly, Plaintiff does not have an injury-in-fact sufficient to allow him to seek equitable relief against the District based on his past experience with the post-and-forfeit system.

B. PLAINTIFF HAS ALSO NOT SUFFERED AN INJURY-IN-FACT BECAUSE ANY INJURY HE HAS IS SELF-CREATED AND NOT FAIRLY TRACEABLE TO THE DISTRICT

If Plaintiff has an injury, it is not cognizable for standing purposes, and is not an injury-in-fact for any purpose because it is self-created and not fairly traceable to conduct by the

District. Plaintiff admits that the form he signed stated "forfeiture could be set aside on motion." Complaint ¶ 153. The form complied with the law, which provides in pertinent part:

> [The form shall include a] statement that the agreement to resolve the charge using the post-and-forfeit procedure is final after the expiration of 90 days from the date the notice is signed and that, within the 90-day period, the arrestee or the Office of the Attorney General may file a motion with the Superior Court of the District of Columbia to set aside the forfeiture and proceed with the criminal case….

D.C. OFFICIAL CODE § 5-335.01(d)(6). Further, there is no question Plaintiff could have filed a motion seeking to set aside the forfeiture and reinstate the criminal proceedings. If he had done so, everything about which he now complains would, in all likelihood, have been mooted.[9] Plaintiff does *argue* that the motions process is "so cumbersome and lengthy as to not be a real option," but this argument cannot be a serious one, since Plaintiff admits the process consists of (1) obtaining a civil action number, and (2) filing the motion, Complaint ¶ 108-109. The import of the Plaintiff's allegations is that *he simply chose to do nothing* about his decision to forfeit $35 in the 90 days after he made the decision, which gives him, at most, a self-created injury not cognizable for standing. *Morris v. Local 819, IBT*, 1995 U.S. Dist. LEXIS 6390, *1 (S.D.N.Y. May 11, 1995) (parties may not manipulate matters to secure or avoid federal jurisdiction); *Taylor v. FDIC*, 132 F.3d 753, 767 (D.C. Cir. 1997) (voluntary departure from employer was self-inflicted and party, therefore, lacked standing to assert action for reinstatement); *J. Roderick MacArthur Found. v. FBI*, 102 F.3d 600, 606 (D.C. Cir. 1996) (organization's disclosure of fact that FBI maintained a file on it defeated its standing for claim that maintenance of file posed risk that outsiders may learn of file), *cert. denied sub nom. Lindblom v. United States*, 522 U.S. 913 (1997).

[9] Nothing in the statute states whether the motions process would have entitled Plaintiff to the relief as of right, but Plaintiff does not allege otherwise (which he could not fairly do, since such allegation would be utter speculation) and the burden of establishing standing is on Plaintiff.

Self-created injuries are also not cognizable because, by definition, they are not attributable to actions fairly traceable to conduct of the defendant.

> Article III standing requires the plaintiff to show causation--that his injury is fairly traceable to the defendant's allegedly unlawful conduct. Our rejection of [the plaintiffs' claim of constructive discharge is concomitantly a decision that their voluntary acts are sufficient independent causes of their separation from the [defendant employer].
>
> This is quite consistent with their (theoretically) having a claim against the [former employer] for its earlier mistreatment. Suppose an employer wrongly denied an employee $ 25 in wages, upon which the employee left in a huff. Plainly he would have no claim to reinstatement, however valid his demand for $ 25 damages. Had Pederson and Taylor remained, they might have been entitled to some sort of restoration to their earlier status; having left under circumstances for which the RTC is not legally culpable, however, they cannot claim that the RTC has deprived them of their jobs, even if its prior treatment of them, though falling short of constructive discharge, was actionable. Failing to show causation, they lack standing.

Taylor v. FDIC, 132 F.3d 753, 767 (D.C. Cir. 1997). In this case, Plaintiff admits he received the statutorily-required notice informing him of his right to file a motion to set aside his post-and-forfeiture decision and go forward with the ordinary judicial process. He now has two attorneys in this case, purports to represent a "class," and, claims, incorrectly, that he has succeeded in convincing a Superior Court judicial officer that he did not commit the offense for which he was arrested. Complaint ¶ 18.[10] Yet, if he had filed the motion, it is likely he would now have nothing to complain about. Therefore, Mr. Fox's "injury," if any, is self-created, and cannot be used to invoke the limited jurisdiction of this Court for any purpose. Mr. Fox lacks standing and claims 4-7 should therefore be dismissed.

[10] If Plaintiff is referring to an expungement proceeding, a search of the Superior Court records revealed an expungement of another arrest, but not of the one at issue here.

II. ALTERNATIVELY, PLAINTIFFS' CLAIMS UNDER COUNTS 4-7 FAIL TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

A. PLAINTIFF'S "FOURTH AMENDMENT" CLAIM (COUNT 4) FAILS

It is not altogether clear what Mr. Fox is alleging in Count 4. In the body of his complaint, Plaintiff says he posted and forfeited $35 and signed the form at about 11:45 p.m., when, he claims with no factual basis, that "all administrative steps incident to the arrest …and release…were completed," but he was not released until "about 4 hours [later]." *See* Complaint ¶¶ 158, 170, 171. Plaintiff also claims that "the District conditions a person's right to release on payment of money and the [post-and-forfeit] process adds delay to a person's release once the right to release attaches," which, he alleges, constitutes "inaction" that somehow violates the Fourth Amendment. *See* Complaint ¶¶ 203-205.

Defendant does not understand this cause of action. Defendant has a right to notice of Plaintiff's claim under Rule 8 and Plaintiff is not entitled to have his pleading liberally construed, as he is represented by counsel. Nonetheless, for the convenience of the Court, and to save both parties time and expense, Defendant offers the following analysis.

First, Plaintiff's *conclusion* about when his paperwork was completed, and therefore when he was entitled to be released, cannot be credited under Rule 12(b)(6), as it is entirely speculative and unsupported by any facts. As explained earlier, although courts must assume the veracity of all "well-pleaded factual allegations" in the complaint, *Iqbal*, 129 S. Ct. at 1950, they need not accept as true "'naked assertion[s] devoid of further factual enhancement," *id*. at 1949 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). There are simply no facts in the complaint to support the conclusion that Mr. Fox was held a minute longer than necessary to complete his paperwork.

Second, even if the Court credits these allegations, a delay of only four hours fails to state a claim for violation of *any* potentially-relevant constitutional protection, particularly where, as here, there is no allegation of bad faith. Plaintiff's Fourth Amendment right to freedom from unreasonable seizure was not violated because *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) ("a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter,…be immune from systemic challenges."). Further, a mere four-hour delay in release is not sufficiently serious to violate the Fifth Amendment's due process guarantee. *See, e.g., Brass v. County of Los Angeles,* 328 F.3d 1192, 1200 (9th Cir. 2003) ("We know of no requirement, constitutional or otherwise, that the Department process release papers in the precise order in which it receives them, or process court-ordered releases ahead of all others. In these circumstances, we cannot say that to the extent that the 39-hour delay in releasing Brass resulted from that policy or custom, it violated his constitutional right to due process of law.").

Third, even if Plaintiff had stated an actionable claim, his allegations would be insufficient to support municipal liability against *this Defendant,* the District of Columbia. *See Monell v. New York*, 436 U.S. 658, 690 (1978). The District is liable for the actions of its employees or agents "only if the agents acted pursuant to municipal policy or custom." *Warren v. District of Columbia*, 353 F.3d 36, 38 (D.C. Cir. 2004). A complaint must allege the existence of a municipal policy or custom, and "a direct causal link between a municipal policy or custom and the alleged constitutional deprivation." *See City of Canton v. Harris,* 489 U.S. 378, 385 (1989). Without these allegations, the complaint must be dismissed. *See, e.g., Ennis v. Lott*, 589 F. Supp. 2d 33, 38-39 (D.D.C. 2008); *Ibrahim v. District of Columbia*, 357 F. Supp. 2d 187, 195 (D.D.C. 2004). Here, Plaintiff has pled only *conclusions* addressing the requirements of municipal liability, but no facts whatsoever. Complaint ¶¶ 205-206. These allegations are also deficient because Plaintiff

has pled facts showing that there has been, at most, only *one* violation, which is insufficient as a matter of law to establish municipal liability under § 1983. *Oklahoma City v. Tuttle*, 471 U.S. 808, 824 (1985).[11] In sum, Plaintiff alleges no facts sufficient to establish that the District has a policy or custom of unnecessary four-hour delays in release.

Accordingly, Count 4 fails both because it does not state a constitutional claim, and because it fails to meet the pleading requirements for municipal liability.

B. PLAINTIFF'S "FIFTH AMENDMENT" CLAIM (COUNT 5) FAILS

As in the prior count, it is not clear in Count 5 what Plaintiff is claiming. Here, he says his $35 was "taken" without due process of law, in violation of the Fifth Amendment and that it is "not any species of bail." Complaint ¶¶ 210-11. This appears to mean that Plaintiff believes his $35 was "taken for public use," entitling him to "just compensation.[12] This cannot be correct because Plaintiff's property was not "taken" at all. As noted, Plaintiff admits he signed the post-and-forfeit form, thereby *voluntarily* relinquishing his $35 to secure a more expeditious release than required by the constitution, and one that ended any further threat to his liberty. Moreover, Plaintiff had the right to seek to set aside the forfeiture, which he, again, voluntarily, chose to not do. Further, the District was not exercising its power of eminent domain in offering Plaintiff the opportunity to post-and-forfeit; without the exercise of such authority, there can be no compensable "taking."

> Petitioner… claims that the forfeiture in this case was a taking of private property for public use in violation of the Takings Clause of the Fifth Amendment, made

[11] Although Plaintiff claims post-and-forfeit "adds delay to a person's release once the right to release attaches," Complaint ¶ 204, he has pled no *facts* to support that conclusion.

[12] Defendant again notes that it has a right to notice of Plaintiff's claim under Rule 8 and that Plaintiff is not entitled to have his pleading liberally construed, as he is represented by counsel. Again, for the convenience of the Court, and to save both parties time and expense, Defendant offers the analysis that follows in the text.

> applicable to the States by the Fourteenth Amendment. But if the forfeiture proceeding here in question did not violate the Fourteenth Amendment, the property in the automobile was transferred by virtue of that proceeding from petitioner to the State. The government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain.

Bennis v. Michigan, 516 U.S. 442, 456 (1996). Accordingly, Plaintiff's voluntary decision to post and forfeit was not "taking."

C. PLAINTIFF'S SIXTH AMENDMENT CLAIM (COUNT 6) FAILS

In Count 6, Plaintiff claims his Sixth Amendment right to counsel was violated because he was required to "make decisions about analyzing the 'post and forfeit' process and how it would affect his right to release and the charges against him and whether it was a payment of bail under the Eighth Amendment without benefit of counsel competent in these questions." Complaint ¶ 217. While it is certainly a stretch to say that this conclusion is supported by the *factual* allegations, *see* Complaint ¶¶ 133-191 (most of which are, themselves, speculation and legal argument), this sweeping allegation about the need to "analyze the post-and-forfeit process" does not support the conclusion that Plaintiff's Sixth Amendment right to counsel was violated since that right does not attach to the post-and-forfeit process. The process occurs in advance of prosecution and obviates the need for it when the arrestee accepts the offer. The process does not involve bail (as Plaintiff admits). And there is no absolute right to counsel for all decisions made post-arrest. The Supreme Court has "never held that the right to counsel attaches at the time of arrest." *United States v. Gouveia*, 467 U.S. 180, 190 (1984). Indeed, the Sixth Amendment right to counsel does not attach until criminal or adversary judicial proceedings have commenced. *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991). Further, the Constitution does not "require the presence or assignment of counsel at a point when and where

there is no reasonable possibility of prejudice to the rights or position of an accused." *McGill v. United States*, 348 F.2d 791, 793 (1965). Plaintiff admits the decision to post and forfeit is reversible upon motion for 90 days after accepting the offer. *See* D.C. OFFICIAL CODE § 5-335.01(d)(6). This is a correct statement of law. Accordingly, there was no reasonable possibility of prejudice to Plaintiff's rights as a result of his decision to forfeit and doing so did not violate his Sixth Amendment right to counsel.

D. PLAINTIFF'S EIGHTH AMENDMENT CLAIM (COUNT 7) FAILS

In Count 7, Plaintiff Fox alleges his Eighth Amendment "bail rights" were violated because "post-and-forfeit is not any species of bail," but, apparently, in Plaintiff's view, functions as its equivalent. *See* Complaint ¶¶ 222-23. Plaintiff, however, was not denied the right to bail; he chose to avail himself of an option that *obviated* a bail determination and secured his release well before it would have been required by the constitution. Certainly, Plaintiff did not have a right to bail while still sitting in the station house prior to being transported to Superior Court for a preliminary hearing. Thus, having chosen to forfeit collateral – instead of proceeding to court where bail might have been an issue – Plaintiff was never in a position to claim a right to bail. Accordingly, Count 7 fails to state a claim.

CONCLUSION

Plaintiff's decision to post and forfeit $35 saved him from the possibility of criminal liability for the offense for which he was arrested, as intended by the District of Columbia. After his decision to forfeit the $35, Plaintiff made the further choice to not seek to set aside the forfeiture. That subsequent decision – made during a 90-day period when Plaintiff was free to

consult his attorney – and which would likely have been granted – deprives Plaintiff of an injury-in-fact sufficient to invoke this Court's jurisdiction to challenge the post-and-forfeit process. Even if the Court finds otherwise, Plaintiff's various complaints about the post-and-forfeit system's infirmities are insufficient to state a claim. For all these reasons, the complaint should be dismissed. An appropriate, proposed Order is attached.

Respectfully submitted,

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MARCH 1, 2011 **COUNSEL FOR DEFENDANT DISTRICT OF COLUMBIA**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BARBARA FOX, *et al.*, Plaintiffs, v. GOVERNMENT OF THE DISTRICT OF COLUMBIA, *et al.*, Defendants.	Civil Action No. 10-2118 (RWR)

ORDER

Upon consideration of the Motion to Dismiss the Complaint, filed by Defendant District of Columbia, the memorandum of points and authorities in support thereof, any opposition thereto, and the entire record in this case, it is, this _____ day of _____, 2011, for the reasons stated by Defendant in its papers,

ORDERED that the motion is hereby **GRANTED**; and it is

FURTHER ORDERED that the Complaint is hereby **DISMISSED WITH PREJUDICE** as to Defendant District of Columbia and as to Counts 4-7.

_____
UNITED STATES DISTRICT JUDGE