UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-1902

(Summary Calendar)

WILLIAM WILSON,

Plaintiff-Appellant,

versus

FIRST GIBRALTAR BANK, F S B, Arlington, Texas (successor-in-interest) to, o/b/o Gibraltar Savings Association Arlington, Texas, ET AL.,

Defendants,

JOHN DOE #1, individually and as Custodians of Accounts for First Gibraltar Bank, Dallas, Texas, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(CA-4-90-652-E)

(May 12, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

William Wilson, proceeding *pro se,* appeals the district court's grant of summary judgment to the Federal Deposit Insurance Corporation ("FDIC"), the dismissal of civil rights and pendent

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[*] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

state-law claims against other defendants, and denial of leave to amend his complaint. We affirm.

I

The following allegations by Wilson gave rise to this lawsuit. Wilson opened a checking account with Gibraltar Savings Association ("GSA") in Arlington, Texas. Thereafter, without Wilson's authorization, or a subpoena, or a warrant, a custodian of accounts at GSA released Wilson's account balance to an investigator for the Pueblo County, Colorado district attorney's office. Later, another GSA employee released additional account information to an assistant district attorney from Dallas County, who forwarded the information to the deputy district attorney in Pueblo County.

Wilson was in prison in Colorado for a crime unrelated to this case. In appealing his conviction, Wilson sought to proceed *in forma pauperis*. However, the Pueblo County prosecutor opposed Wilson's application to proceed *in forma pauperis,* arguing that Wilson's GSA account balances proved he was not indigent. Wilson's application was denied, and his appeal was later dismissed for failure to pay costs.

Wilson also experienced difficulty in using his GSA accounts. GSA refused to honor (1) a $5,800 check to Izmiralda El Sheikh, and (2) a $352 check which Wilson made payable to himself. On both occasions Wilson had an account balance of $6,400. Wilson alleged that the Pueblo County defendants conspired with employees of GSA to prevent him from withdrawing funds from his GSA account, so that the balance of that account would remain great enough to preclude

him from proceeding *in forma pauperis* in appealing his Colorado criminal conviction.

Wilson sued the district attorney, a deputy district attorney, and an investigator employed by the district attorney in Pueblo County ("Pueblo defendants"); the district attorney and an assistant district attorney for Dallas County ("Dallas defendants"); and several unnamed employees of GSA ("GSA Doe defendants").[1] Wilson alleged violations of the federal constitution, numerous federal statutes, and Texas law. Most importantly for purposes of this appeal, Wilson brought claims under 42 U.S.C. §§ 1983 and 1985(3), alleging violations of his right to procedural due process, and his right to be free from unreasonable searches under the Fourth Amendment.

On motions of the defendants, the district court dismissed most of Wilson's claims with prejudice and ordered that their dismissal be a final order pursuant to Fed. R. Civ. P. 54(b). However, the district court dismissed Wilson's federal civil rights claims without prejudice, and authorized Wilson to file an amended complaint adding the FDIC, as receiver for GSA, as defendant.[2] Wilson filed his second amended complaint, naming the FDIC as the sole defendant. The FDIC moved for summary judgment, and the

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[1] Wilson sued several other parties that are not relevant to the issues raised on appeal.

[2] Wilson appealed the district court's decision, and we affirmed as to all claims dismissed with prejudice. However, because the district court did not include in the Rule 54(b) certification its dismissal of Wilson's federal civil rights claims, we lacked jurisdiction to review those rulings.

district court held that the FDIC was "entitled to a judgment as a matter of law based on the defense of prudential mootness" and granted summary judgment, dismissing Wilson's action against the FDIC with prejudice.

Wilson appeals, contending that the district court erred by (1) dismissing his civil rights claims against the Pueblo, Dallas, and GSA Doe defendants in its first order; (2) granting summary judgment to the FDIC on grounds of prudential mootness, before he could conduct adequate discovery; (3) dismissing his pendent state-law claims; and (4) denying him leave to amend his complaint on several occasions.[3]

II

A

Wilson first argues that the district court erred by dismissing without prejudice his civil rights claims against the Pueblo, Dallas, and GSA Doe defendants under 42 U.S.C. §§ 1983 and 1985(3).[4] No reversible error is shown.

"To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins,* 487 U.S. 42, 48, 108 S. Ct. 2250, 2254-55, 101 L. Ed. 2d 40

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[3] Although Wilson's *pro se* brief purports to raise seven "appeal points," the foregoing are the only claims of error alleged by Wilson.

[4] Although the caption to this section of Wilson's brief refers to "all defendants," only the Pueblo, Dallas, and GSA Doe defendants are implicated by Wilson's argument.

(1988). "In order to state a cause of action under 42 U.S.C. § 1985(3), a plaintiff must allege:

> 1) the defendants conspired
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> 2) for the purposes of depriving, either directly or indirectly, any person or class of persons of the equal protection of the law, or of equal privileges and immunities under the laws; and
>
> 3) one or more of the conspirators committed some act in furtherance of the conspiracy; whereby
>
> 4) another is injured in his person or property or deprived of having and exercising any right or privilege of a citizen of the United States; and
>
> 5) the action of the conspirators is motivated by a racial animus.

Wong v. Stripling, 881 F.2d 200, 202-03 (5th Cir. 1989).

Wilson alleged that he was subjected to an unreasonable search, in violation of the Fourth Amendment, when the GSA Doe defendants released information regarding his GSA accounts to the Pueblo and Dallas defendants. Wilson further alleged that the defendants, by acting without a warrant or subpoena, violated his right to procedural due process, guaranteed by the Fourteenth Amendment. Wilson alleged that the defendants engaged in the foregoing misconduct with the knowledge, and for the reason, that he was an Arab.[5]

The district court dismissed Wilson's claims under § 1983 and § 1985(3) for failure to state a claim on which relief could be

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[5] Wilson further alleged that the Pueblo, Dallas, and GSA Doe defendants conspired to prevent him from withdrawing his GSA funds. The district court did not address that claim, and Wilson does not argue that the district court's failure to address it was error.

granted. *See* Fed. R. Civ. P. 12(b)(6). The district court reasoned that Wilson's allegation of an unreasonable search was meritless because, under *United States v. Miller,* 425 U.S. 435, 440, 96 S. Ct. 1619, 1622-23, 48 L. Ed. 2d 71 (1976), bank records are not protected by the Fourth Amendment. The district court did not explicitly address Wilson's procedural due process claim.

Wilson contends that the district court erred by dismissing his claims, because "[e]ven under [*Miller*] . . . access to bank records is to be controlled by existing legal process. No such legal process was used in this case."[6] In essence, Wilson contends that the holding in *Miller*))that bank records are not protected by the Fourth Amendment))does not foreclose his procedural due process claim. We disagree.

As Wilson concedes, he may not prevail on his procedural due process claim unless he had a liberty or property interest which was abridged. *See Bd. of Regents of State Colleges v. Roth,* 408 U.S. 564, 569, 92 S. Ct. 2701, 2705, 33 L. Ed. 2d 548 (1972) ("The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property."). The only interest alleged in Wilson's complaint to have been abridged without due process was Wilson's alleged Fourth Amendment right to be free from unreasonable searches of his bank records. However, as the

[6] Wilson points out that neither the Pueblo defendants nor the Dallas defendants obtained a subpoena or a warrant before searching his bank records.

district court held, the Fourth Amendment confers no such right.[7] *See Miller,* 425 U.S. at 440, 96 S. Ct. at 1622-23 (holding that depositor's account records did not fall within zone of privacy protected from intrusion by Fourth Amendment, because records were bank's business records rather than depositor's private papers). Therefore, Wilson failed to state a claim for which relief could be granted under 42 U.S.C. § 1983, because he did not "allege the violation of a right secured by the constitution and laws of the United States." *West,* 487 U.S. at 48, 108 S. Ct. at 2254-55. Neither did Wilson state a claim under § 1985(3), which requires a showing that the plaintiff was deprived of a "right or privilege of a citizen of the United States." *Wong,* 881 F.2d at 202-03.

Wilson contends, however, that the district court erred by dismissing his claims without considering the issue of limitations, because the statute of limitations has now run on his claims, such that he can no longer refile them. Wilson's argument is without merit.

In *Williams v. Dallas County Comm'rs,* 689 F.2d 1212 (5th Cir. 1982), *cert. denied,* 461 U.S. 935, 103 S. Ct. 2102, 77 L. Ed. 2d 309 (1983), upon which Wilson relies, the district court dismissed a cause of action under 42 U.S.C. § 1983 for failure to state a

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[7] Wilson argues for the first time on appeal that he has a reasonable expectation of privacy in his bank records under the Constitution of the State of Colorado. As this contention is presented for the first time on appeal, we do not consider it. *See United States v. Garcia-Pillado,* 898 F.2d 36, 39 (5th Cir. 1990) ("[I]ssues raised for the first time on appeal `are not reviewable by this [C]ourt unless they involve purely legal questions and failure to consider them would result in manifest injustice.'").

claim, and we remanded "for the limited purpose of enabling the court to consider whether, in light of the applicable statute of limitations, dismissal or stay of proceedings present[ed] the preferable course of action." *Id.* at 1214-15. In *Williams,* and cases cited therein, *see Richardson v. Fleming,* 651 F.2d 366 (5th Cir. Unit A 1981); *Delaney v. Giarusso,* 633 F.2d 1126 (5th Cir. 1981), the plaintiff's action under § 1983 was subject to dismissal because it challenged the validity of the plaintiff's confinement, and was therefore required to be brought as an application for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254. *See Williams,* 689 F.2d at 1214; *Richardson,* 651 F.2d at 372-73; *Delaney,* 633 F.2d at 1128, *citing Fulford v. Klein,* 529 F.2d 377, 381 (5th Cir. 1976), *adhered to on rehearing en banc,* 550 F.2d 342 (5th Cir. 1977). It was necessary for the district court to consider the effects of the statute of limitations, because it was anticipated that the plaintiff would refile after exhausting his state remedies. *See Richardson,* 651 F.2d at 373 (stating that, where claims are dismissed because they should be asserted in a habeas proceeding, "the District Court should observe due regard of the prisoner's claims regarding statute of limitations problems in deciding whether to stay the action pending state exhaustion or to dismiss it"), *cited in Williams*; *Delaney,* 633 F.2d at 1128 (remanding "for consideration of whether Delaney's illegal arrest cause of action under section 1983 should be dismissed without prejudice, or, for statute of limitations reasons, be held in abeyance pending a showing that Delaney has exhausted his state-

court remedies"), *cited in Williams*.

Wilson's reliance on *Williams* is misplaced. Here, although the district court remarked that it "was difficult to determine whether [Wilson's] Section 1983 and 1985 claims might best be adjudicated in a habeas corpus proceeding," the district court dismissed Wilson's civil rights claims on their merits))not because they should have been brought under 28 U.S.C. § 2254. The district court's ruling was correct, because Wilson's claim does not challenge the legality of his incarceration in Colorado.[8]

> "[T]he propriety of a prisoner's § 1983 action is not to be determined solely on the basis of the relief sought, i.e., monetary damages as opposed to relief from confinement, but instead the federal court must examine the basis of the complaint and determine whether the claim, if proven, would factually undermine or conflict with validity of the state court conviction which resulted in the prisoner's confinement."

Williams, 689 F.2d at 1214 (quoting *Richardson*). Wilson alleges that he was denied the right to appeal his criminal conviction in Colorado because of the defendants' actions. If proven, Wilson's claim might establish that he is entitled to an appeal from his Colorado criminal conviction, but it would not establish that that conviction was invalid. Wilson's reliance on *Williams* is therefore misplaced, and his limitations argument is without merit.

B

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[8] Wilson emphatically denies that he is challenging the validity of his former confinement in Colorado. *See* Brief for Wilson at 19 ("Neither the facts of this case, nor the requested relief[,] even when liberally interpreted, would remotely pertain to a writ of habeas corpus."). Wilson represents that the conviction leading to his confinement in Colorado was invalidated on other grounds, and that he is no longer in custody.

Wilson also claims that the district court erred by granting summary judgment in favor of the FDIC on grounds of prudential mootness. Wilson offers two arguments in support of his claim: (1) that GSA's assets exceeded its liabilities, and therefore he could have collected damages from the FDIC, as receiver; and (2) that the district court's ruling was premature, because he had not had an adequate opportunity to conduct discovery.

1

The district court granted summary judgment in favor of the FDIC based on "the absence of assets to fulfill a judgment for" Wilson. The Financial Institutions Reform, Recovery and Enforcement Act provides that "[t]he maximum liability of the [FDIC], acting as receiver . . . to any person having a claim against the receiver or the insured depository institution for which such receiver is appointed shall equal the amount such claimant would have received if the [FDIC] had liquidated the assets and liabilities of such institution . . . ." 12 U.S.C. § 1821(i)(2). The district court determined that under § 1821(i)(2) the FDIC's maximum liability to Wilson was zero, because the Federal Home Loan Bank Board ("the Bank Board") had found that liquidation of GSA's assets and liabilities would leave nothing to satisfy the claims of unsecured creditors such as Wilson. Therefore the district court determined that the FDIC was entitled to judgment as a matter of law, based on the defense of prudential mootness. *See Triland Holdings & Co. v. Sunbelt Serv. Corp.,* 884 F.2d 205, 208 (5th Cir. 1989) (recognizing that where

"there will never be any assets with which to satisfy a judgment" an action may be dismissed "on prudential grounds").

Wilson contends that the district court's decision was erroneous because, contrary to the Bank Board's determination, over $61,000 was available to satisfy the claims of unsecured creditors. Wilson's argument is without merit, because the Bank Board's finding of worthlessness of unsecured claims is binding on this Court. *See First Indiana Fed. Sav. Bank v. FDIC,* 964 F.2d 503, 506 n.7 (5th Cir. 1992) (stating that Bank Board's determination of the worthlessness of institution's unsecured claims "binds the courts hearing actions on those claims"). Although the Bank Board's determination may be reviewed under the Administrative Procedure Act ("APA"), *see* 5 U.S.C. §§ 701-706, Wilson may not attack that determination collaterally in his suit against the FDIC as receiver. *See 281-300 Joint Venture v. Onion,* 938 F.2d 35, 38 (5th Cir. 1991) (stating that a "collateral attack on the [Bank Board's] determination [was] improper"), *cert. denied,* ___ U.S. ___, 112 S. Ct. 993, 117 L. Ed. 2d 105 (1992); *Gulley v. Sunbelt Sav., F.S.B.,* 902 F.2d 348, 351 n.4 (5th Cir. 1990), *cert. denied,* 498 U.S. 1025, 111 S. Ct. 673, 112 L. Ed. 2d 665 (1991).

Wilson contends that he challenged the Bank Board's finding before the district court under the APA. Wilson is wrong, because neither the Bank Board nor its successor, the Office of Thrift Supervision ("OTS"), was made a defendant in this case. *See* 5 U.S.C. § 703 (providing that "the action for judicial review" of administrative action "may be brought against the United States,

the agency by its official title, or the appropriate officer").[9] Wilson's attempt to challenge the Bank Board's finding in this proceeding is without merit.

2

After Wilson submitted his first set of interrogatories to the FDIC, the FDIC moved for a protective order, arguing that Wilson's interrogatories were unduly burdensome and harassing. The district court ordered that the FDIC would not "be required to answer any discovery propounded by" Wilson. After the FDIC moved for summary judgment, claiming prudential mootness, Wilson moved under Fed. R. Civ. P. 56(f) for time to conduct discovery into whether the FDIC had paid unsecured claims against GSA.[10] In an affidavit, Wilson stated that he had seen, in an NBC news report on television, that the FDIC had paid all of GSA's unsecured claims. The district court never ruled on Wilson's Rule 56(f) motion, and several months later it granted summary judgment in favor of the FDIC, effectively denying Wilson's motion under Rule 56(f).

"The grant or denial of a continuance pursuant to Rule 56(f)

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[9] Wilson sought to add the Bank Board as a defendant below, but he was not granted leave to do so. On appeal Wilson fails to establish that the district court abused its discretion by failing to permit him to add the Bank Board. *See infra* part II.D.

[10] Rule 56(f) provides:

> Should it appear from the affidavits of a party opposing the motion [for summary judgment] that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may . . . order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had . . . .

is to be disturbed on appeal only if the district court's decision reflects an abuse of discretion." *Cormier v. Pennzoil Explor. & Prod. Co.*, 969 F.2d 1559, 1561 (5th Cir. 1992). "A plaintiff's entitlement to discovery prior to a ruling on a summary judgment motion may be cut off when, within the trial court's discretion, the record indicates that further discovery will not likely produce facts necessary to defeat the motion." *Id.*

Wilson sought discovery under Rule 56(f) to prove that the FDIC had paid unsecured claims against GSA, and therefore))contrary to the Bank Board's finding))his unsecured claims against GSA were not worthless. However, the Bank Board's finding may not be challenged in this suit against the FDIC, and the finding that unsecured claims against GSA were worthless required summary judgment on the grounds of prudential mootness. *See supra,* part II.B.1. Because Wilson is not entitled to challenge the Bank Board's finding in this proceeding, no facts produced by the requested discovery could have defeated the FDIC's motion for summary judgment. The district court therefore did not abuse its discretion by cutting off discovery when it did.

C

Wilson next argues that the district court abused its discretion by dismissing his pendent state law claims when it dismissed his federal law claims against the FDIC.[11] Wilson's

[11] "A federal court has the power and thus the discretion to exercise pendent jurisdiction over state-law claims if (1) the complaint reveals that the court has jurisdiction over a substantial federal question to which the state claim may pend, and (2) the state and federal claims derive from a common nucleus

argument is without merit.

"[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine))judicial economy, convenience, fairness, and comity))will point toward declining to exercise jurisdiction over the remaining state-law claims." *Carnegie-Mellon Univ. v. Cohill,* 484 U.S. 343, 350 n.7, 108 S. Ct. 614, 619 n.7, 98 L. Ed. 2d 720 (1988). "No single factor . . . is dispositive" in determining whether a district court abused its discretion in deciding jurisdiction over pendent state-law claims. *Parker & Parsley Petr. Co. v. Dresser Indus.*, 972 F.2d 580, 587 (5th Cir. 1992).

Wilson argues that the district court abused its discretion, for one reason: because the state statute of limitations barred him from pursuing his state law claims in the state courts. Wilson is wrong. Under Texas law, Wilson had 60 days, after the district court entered its judgment, to refile his pendent claims in state court. *See* Tex. Civ. Prac. & Rem. Code Ann. § 16.064 (Vernon 1986) (providing that statute of limitations is suspended between filing in one court and refiling in a second court, where suit was dismissed for lack of jurisdiction in first court and was refiled in second court within sixty days); *Vale v. Ryan,* 809 S.W.2d 324, 326-27 (Tex. App.))Austin 1991, *no writ*) (holding that § 16.064

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of operative fact." *Grinter v. Petr. Oper. Support Serv., Inc.*, 846 F.2d 1006, 1008 (5th Cir.) (citing *United Mine Workers v. Gibbs,* 383 U.S. 715, 725, 86 S. Ct. 1130, 1138, 16 L. Ed. 2d 218 (1966)), *cert. denied,* 488 U.S. 969, 109 S. Ct. 498, 102 L. Ed. 2d 534 (1988).

applied because "a federal court's refusal to exercise jurisdiction over a pendent state claim is tantamount to a dismissal for lack of jurisdiction"). Wilson's argument is therefore without merit.[12]

D

Wilson also claims that the district court erred by denying him leave to amend his complaint. *See* Fed. R. Civ. P. 15(a). The decision whether to allow an amendment is to be made by the district court. *Topalian v. Ehrman,* 954 F.2d 1125, 1139 (5th Cir.), *cert denied,* ___ U.S. ___, 113 S. Ct. 82, L. Ed. 2d (1992). "While `leave shall be freely given when justice so requires,' the decision rests in the sound discretion of the trial court . . . . Our review extends only to whether the trial court abused that discretion." *Id.* (quoting *Ross v. Houston Indep. Sch. Dist.*, 699 F.2d 218, 228 (5th Cir. 1983)); *see also Avatar Explor., Inc. v. Chevron, U.S.A., Inc.*, 933 F.2d 314, 320-21 (5th Cir. 1991).

In his response to the FDIC's motion for summary judgment,

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[12] Pendent jurisdiction, which was recognized by the Supreme Court in *United Mine Workers v. Gibbs,* is now subsumed within supplemental jurisdiction, as described in 28 U.S.C.A. § 1367 (West 1993). *Rhyne v. Henderson County,* 973 F.2d 386, 395 (5th Cir. 1992). However, § 1367 applies only to "actions commenced on or after the date of [its] enactment," which was 1 December 1990. 28 U.S.C.A. § 1367 note. Because Wilson filed his original complaint on 20 August 1990, § 1367 does not apply to this case. We note, however, that we would reject Wilson's argument under § 1367 as well. *See* 28 U.S.C. § 1367(c)(3) ("The district courts may decline to exercise supplemental jurisdiction over a claim . . . if . . . the district court has dismissed all claims over which it has original jurisdiction."); *Noble v. White,* 996 F.2d 797, 799 (5th Cir. 1993) (stating that under § 1367(c)(3) "[d]istrict courts enjoy wide discretion in determining whether to retain supplemental jurisdiction over a state claim once all federal claims are dismissed"); *Rhyne,* 973 F.2d at 395 (affirming dismissal of all state law claims after all federal law claims dismissed under § 1367(c)(3)).

Wilson sought leave to add the Bank Board as a defendant, in order to challenge the Bank Board's determination that unsecured claims against GSA were worthless. In its order granting summary judgment in favor of the FDIC, the district court stated:

> [I]t would not be judicious at this point in the proceedings to add the Bank Board as a party as is sought by the plaintiff. Allowing plaintiffs to collaterally attack the Bank Board's determination of the value of a failed institution's assets almost four years after that evaluation was made would be unduly burdensome on the FDIC as Receiver . . . .

Wilson argues that the district court erred, because his request to add the Bank Board as a defendant was timely. Wilson's argument on this issue is frivolous. Neither of the cases upon which Wilson relies, *FDIC v. Wheat,* 970 F.2d 124 (5th Cir. 1992) and *Green v. RTC,* 794 F. Supp. 409 (D.D.C. 1992), provides any support for the proposition that the district court abused its discretion by denying Wilson's request to add the Bank Board as a defendant.

As to the other instances wherein the district court denied Wilson leave to amend his pleadings, Wilson fails to present an argument that the district court abused its discretion.[13] Wilson

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[13] Wilson lists the occasions when he sought leave to amend, states that his requests were denied, and then quotes from cases dealing with amendment of pleadings, without explaining why the district court's denial of leave to amend was erroneous.

Wilson appears to present an argument when he states:

> On June 25, 1992, Wilson informed the Court of his newly discovered evidence against FDIC (in his Supplemental Response in opposition to FDIC's motion for summary judgment), only SEVEN days after he was made aware of said facts! This is certainly [a] timely request, and [it] is certainly an abuse of discretion by the court to deny the request.

asserts "[i]n the alternative" that his "requests should have been interpreted by the court as supplemental pleadings." *See* Fed. R. Civ. P. 15(d). However, Wilson offers no justification for this bald assertion. He merely quotes legal rules pertaining to supplemental pleadings, without explaining how those rules affect this case.

"A party who inadequately briefs an issue is considered to have abandoned the claim." *Friou v. Phillips Petr. Co.,* 948 F.2d 972, 975 (5th Cir. 1991). Although we construe the arguments of *pro se* litigants liberally, it is not our place to make arguments on their behalf where they have presented none at all. Wilson has waived these claims.

III

For the foregoing reasons, we **AFFIRM**.

However, Wilson's Supplemental Response to the FDIC's summary judgment motion does not contain a request for leave to amend his pleadings.