IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

ALVIN LAVON MOORE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 1:16-cv-01561-GBL-MSN
	)	
AMERICA ONLINE INC.,	)	
	)	
Defendant.	)	

ORDER

THIS MATTER is before the Court for initial review pursuant to 28 U.S.C. § 1915(e). Plaintiff, who is proceeding *pro se*, filed a Complaint (Dkt. 1), and Motion to Proceed *in forma pauperis* ("IFP Motion") (Dkt. 2) on December 15, 2016. For the reasons explained below, the Court GRANTS Plaintiff's IFP Motion (Dkt. 2) for the limited purpose of reviewing the Complaint and DISMISSES Plaintiff's Complaint *sua sponte* against Defendant.

First, as for Plaintiff's IFP Motion, the Court has carefully considered Plaintiff's financial affidavit to proceed without prepayment of fees, which states that Plaintiff: (1) has not been employed since 2010; (2) collects food stamp assistance; and (3) receives nominal weekly allowance from relatives. Thus, it does not appear that he has the necessary funds to pay the required filing fee at this time. Accordingly, the Court will GRANT Plaintiff's IFP Motion.

Allowing Plaintiff to proceed *in forma pauperis*, the Court has reviewed the Complaint to determine whether it must be dismissed on the grounds that it: (i) is frivolous or malicious, (ii) fails to state a claim on which relief may be granted, or (iii) seeks monetary relief against a defendant who is immune from such relief. 28 U.S.C § 1915(e)(2). A complaint is frivolous

"where it lacks an arguable basis in either law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989).

In his Complaint, Plaintiff requests the trial court vacate in whole an Arbitrator's award entered in favor of Defendant America Online, Inc. ("AOL"). (Dkt. 1.) In the underlying arbitration, Plaintiff asserted that Defendant failed to comply with the Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2510 *et seq.*, when it provided information regarding his account to law enforcement authorities without having received a warrant or subpoena, and without having obtained his consent. (Dkt. 1-1.) Moreover, Plaintiff alleged that Defendant deleted all of his emails, causing him losses and damages. *Id.* During the arbitration proceedings, Defendant acknowledged it released Plaintiff's information pursuant to a request made by the Statesboro Police Department which was conducting an investigation of threatening emails originating from Plaintiff's email account. *Id.* Ultimately, the Arbitrator issued the award in favor of the Defendant, citing that the Plaintiff had not carried his burden of proof in making his claim, nor proved damages. *Id.* Further, the Arbitrator found that the Defendant had released Plaintiff's information pursuant to provisions of the Stored Wire and Electronic Communications Act which permit such release when the provider has a good faith belief that there is an emergency involving danger of death or serious physical injury. *Id.* In the immediate case, Plaintiff alleges the Arbitrator's award was entered in violation of several provisions of the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* ("the FAA").

Before bringing suit in federal court, the question of subject matter jurisdiction must be resolved. It is well established that "while the Federal Arbitration Act creates federal substantive law requiring the parties to honor arbitration agreements, it does not create any [] federal question jurisdiction under 28 U.S.C. § 1331 or otherwise." *Southland Corp. v. Keating*, 465

U.S. 1, 16 n. 9 (1984); *see Home Buyers Warranty Corp. v. Hanna*, 750 F.3d 427, 432-33 (4th Cir. 2014). To be heard in federal court, claims made under the FAA require independent subject matter jurisdiction, such as "diversity of citizenship." *Choice Hotels Int'l, Inc. v. Shiv Hospitality, LLC*, 491 F.3d 171, 175 (4th Cir. 2007) (citation omitted). Federal district courts have diversity jurisdiction in any civil action between citizens of different states where the "amount in controversy" exceeds $75,000. *See* 28 U.S.C. § 1332(a)(1); *Hoschar v. Appalachian Power Company*, 739 F.3d 163, 170 (4th Cir. 2014). For the purpose of diversity of citizenship, the amount in controversy is generally derived from the complaint itself, unless it appears or is in some way shown that the amount stated in the complaint is not claimed in 'good faith.'" *See Choice*, 491 F.3d at 175 (citing *Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 353 (1961).

The Fourth Circuit has not adopted an approach for establishing amount in controversy applicable to arbitration award challenges. *Id.* Circuit courts have taken three different approaches to determining the amount in controversy for purposes of establishing diversity jurisdiction in a suit to confirm, modify, or vacate an arbitration award. *Id.* First, the "demand" approach, adopted by the First, Fifth, Ninth, and DC Circuits, establishes the amount in controversy as that originally sought in the underlying arbitration. *See Pershing, L.L.C. v. Kiebach*, 819 F.3d 179, 183 (5th Cir. 2016); *Theis Research, Inc. v. Brown & Bain*, 400 F.3d 659, 663 (9th Cir. 2004) (citing *Am. Guar. Co. v. Caldwell*, 72 F.2d 209, 211 (9th Cir. 1934)); *Karsner v. Lothian*, 532 F.3d 876, 882 (D.C. Cir. 2008); *Coventry Sewage Associates v. Dworkin Realty Co.*, 71 F.3d 1, 4-5 (1st Cir. 1995). Second, the "award" approach, adopted by the Sixth Circuit, establishes the amount in controversy as the award issued in the arbitration. *See Ford v. Hamilton Invs., Inc.*, 29 F.3d 255, 260 (6th Cir. 1994). Third, the "remand" approach, adopted by the Seventh and Eleventh Circuits, states that where a party seeks to reopen an arbitration, the

amount in controversy is that amount demanded in the underlying arbitration, and where a party challenging the award does not seek to reopen, the amount in controversy is the amount of the arbitration award. *See Peebles v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 431 F.3d 1320, 1325 (11th Cir. 2005); *Sirotzky v. N.Y. Stock Exchange*, 347 F.3d 985, 989 (7th Cir. 2003); *See also U-Save Auto Rental of America, Inc. v. Furlo*, 608 F. Supp. 2d 718, 721-22 (S.D. Miss. 2009) ("The remand approach appears to apply if the petition includes a request to remand and reopen the arbitration proceeding, in which case the amount in controversy is the amount sought in the underlying arbitration").

While there is no dispute as to whether diversity of citizenship exists, the amount in controversy is less than the jurisdictional minimum to establish diversity jurisdiction. *See* 28 U.S.C. § 1332(a); *Hoschar*, 739 F.3d at 170. In *Peebles*, the Eleventh Circuit found that the amount in controversy was met using original demand amount via the remand approach, whereby the plaintiff sought a new arbitration in addition to vacating the existing award. Similarly, here, Plaintiff requests that the Court vacate the arbitration award, and alludes to seeking a new arbitration. (Dkt. 1 at 15, 25.) However, Plaintiff does not meet the amount in controversy requirement using any of the three approaches. Assuming Plaintiff affirmatively seeks a new arbitration, in applying the remand approach, the amount in controversy would be that demanded in the original arbitration, $74,999, which clearly does not exceed $75,000. Applying the demand approach, the amount would be the same. Further, even if the Court were to apply the award approach, the amount in controversy would be a mere $200, far less than what is required to enter federal court. Accordingly, this Court lacks subject matter jurisdiction to hear Plaintiff's claims.

Accordingly, **IT IS HEREBY ORDERED** the Plaintiff's Motion to Proceed *in forma pauperis* (Dkt. 2) is **GRANTED.**

IT IS FUTHER ORDERED that Plaintiff's Complaint is **DISMISSED with PREJUDICE** pursuant to 28 U.S.C. § 1915(e)(2).

IT IS SO ORDERED.

ENTERED this 29th day of March, 2017.

Alexandria, Virginia
3/ 29/ 2017

/s/
Gerald Bruce Lee
United States District Judge