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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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HENRY OLIVER,

10/17/2018 12:56 pm  
For Online Publication Only  
**U.S. DISTRICT COURT**  
**EASTERN DISTRICT OF NEW YORK**  
**LONG ISLAND OFFICE**

Plaintiff,

-against-

NANCY BARTLING,

Defendant.

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**AZRACK, District Judge:**

On May 7, 2018, incarcerated *pro se* plaintiff Henry Oliver (“plaintiff”) filed a *in forma pauperis* complaint in this Court against Nancy Bartling (“Bartling” or “defendant”) pursuant to 42 U.S.C. § 1983 (“Section 1983”) alleging a deprivation of his constitutional rights. Plaintiff did not file the required Prisoner Litigation Authorization form (“PLRA”) with his complaint. Accordingly, by Notice of Deficiency dated May 8, 2018 (“Notice”), plaintiff was instructed to complete and return the enclosed PLRA within fourteen (14) days in order for his case to proceed. On May 17, 2018, plaintiff timely filed the PLRA. The Court grants plaintiff’s request to proceed *in forma pauperis* and *sua sponte* dismisses the complaint pursuant to 28 U.S.C. §§ 1915(e)(2)(B) (ii), 1915A(b) for the reasons that follow.

## **I. BACKGROUND**

All material allegations in the complaint are assumed to be true for the purpose of this Order. See, e.g., Rogers v. City of Troy, New York, 148 F.3d 52, 58 (2d Cir. 1998) (in reviewing a *pro se* complaint for *sua sponte* dismissal, a court is required to accept the material allegations in the complaint as true). Plaintiff’s brief handwritten complaint is submitted on the Court’s

Section 1983 complaint form and seeks to impose Section 1983 liability upon Bartling, who is alleged to be plaintiff's defense attorney in an underlying state criminal case. In its entirety, plaintiff alleges:<sup>1</sup>

On May 8, 2017, I was arrested for grand larceny, possession of stolen property, petit larceny, criminal possession of an anti-security item. At my arraignment on May 9, 2017 I asked the court for a felony exam, felony exam was granted by the judge. I was never given a felony exam due to the fact that my attorney, Nancy Bartling, waived my right to a felony exam without my consenting violating my due process.

(Compl. ¶ II.) Plaintiff left blank the space on the form complaint that calls for a description of any claimed injuries (*id.* ¶ II.A.), and seeks "to be release immediately from jail" as well as a damages award in the sum of \$2.5 million. (*Id.* ¶ III.)

## II. DISCUSSION

### A. *In Forma Pauperis* Application

Upon review of plaintiff's declaration in support of the application to proceed *in forma pauperis*, the Court finds that plaintiff is qualified to commence this action without prepayment of the filing fee. 28 U.S.C. § 1915(a)(1). Therefore, plaintiff's application to proceed *in forma pauperis* is granted.

### B. Standard of Review

The Prison Litigation Reform Act requires a district court to screen a civil complaint brought by a prisoner against a governmental entity or its agents and dismiss the complaint, or any portion of the complaint, if the complaint is "frivolous, malicious, or fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915A(b)(1). Similarly, pursuant to the *in*

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<sup>1</sup> Excerpts from the complaint are reproduced here exactly as they appear in the original. Errors in spelling, punctuation, and grammar have not been corrected or noted.

*forma pauperis* statute, a court must dismiss an action if it determines that it “(i) is frivolous or malicious, (ii) fails to state a claim upon which relief may be granted, or (iii) seeks monetary relief from a defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2)(B). The Court must dismiss the action as soon as it makes such a determination. 28 U.S.C. § 1915A(b).

*Pro se* submissions are afforded wide interpretational latitude and should be held “to less stringent standards than formal pleadings drafted by lawyers.” Haines v. Kerner, 404 U.S. 519, 520 (1972) (*per curiam*); see also Boddie v. Schnieder, 105 F.3d 857, 860 (2d Cir. 1997). In addition, the court is required to read the plaintiff’s *pro se* complaint liberally and interpret it as raising the strongest arguments it suggests. United States v. Akinrosotu, 637 F.3d 165, 167 (2d Cir. 2011) (*per curiam*) (citation omitted); Harris v. Mills, 572 F.3d 66, 72 (2d Cir. 2009).

The Supreme Court has held that *pro se* complaints need not even plead specific facts; rather the complainant “need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” Erickson v. Pardus, 551 U.S. 89, 93 (2007) (internal quotation marks and citations omitted); *cf.* Fed. R. Civ. P. 8(e) (“Pleadings must be construed so as to do justice.”). However, a *pro se* plaintiff must still plead “enough facts to state a claim to relief that is plausible on its face.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). “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 v. Iqbal, 556 U.S. 662, 678 (2009) (citations omitted). The plausibility standard requires “more than a sheer possibility that a defendant has acted unlawfully.” Id. at 678. While “‘detailed factual allegations’” are not required, “[a] pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’” Id. at 678 (quoting

Twombly, 550 U.S. at 555).

### C. Section 1983

Section 1983 provides that

[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .

42 U.S.C. § 1983. Section 1983 “is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes.” Baker v. McCollan, 443 U.S. 137, 144 n. 3 (1979); Thomas v. Roach, 165 F.3d 137, 142 (2d Cir. 1999). In order to state a § 1983 claim, a plaintiff must allege two essential elements. First, the conduct challenged must have been “committed by a person acting under color of state law.” Cornejo v. Bell, 592 F.3d 121, 127 (2d Cir. 2010) (quoting Pitchell v. Callan, 13 F.3d 545, 547 (2d Cir. 1994)). Second, “the conduct complained of must have deprived a person of rights, privileges or immunities secured by the Constitution or laws of the United States.” Id.; see also Snider v. Dylag, 188 F.3d 51, 53 (2d Cir. 1999).

#### 1. Section 1983 Claim Against Bartling

As noted above, in order to state a Section 1983 claim, a plaintiff must allege, *inter alia*, that the conduct challenged was “committed by a person acting under color of state law.” Cornejo, 592 F.3d at 127 (citation omitted). Here, Bartling is alleged to be plaintiff defense counsel in an underlying state criminal case. Plaintiff does not allege whether he retained Bartling or whether she was appointed by the court to represent him. Such distinction is of no moment. It is well-established that, even if Bartling was appointed by the Court to

represent plaintiff in the underlying criminal case, she would not be a state actor for purposes of Section 1983. See, e.g., Polk Cnty. v. Dodson, 454 U.S. 312, 325 (1981) (“[A] public defender does not act under color of state law when performing a lawyer’s traditional functions as counsel to a defendant in a criminal proceeding.”). Thus, because the sole defendant is a purely private actor, she does not act under color of state law and cannot be liable under Section 1983.

However, a private actor, such as Bartling, may be considered to be acting under the color of state law for purposes of Section 1983 if the private actor was a ““willful participant in joint activity with the State or its agents.”” Ciambriello v. Cnty. of Nassau, 292 F.3d 307, 324 (2d Cir. 2002) (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970)). Section 1983 liability may also extend to a private party who conspires with a state actor to violate a plaintiff’s constitutional rights. Ciambriello, 292 F.3d at 323-24. To state a plausible Section 1983 conspiracy claim, a plaintiff must allege: “(1) an agreement between a state actor and a private party; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages.” *Id.* at 324-25 (citing Pangburn v. Culbertson, 200 F.3d 65, 72 (2d Cir.1999)).

Here, as is readily apparent, plaintiff has not alleged any facts from which the Court could liberally construe joint action by Bartling with a state actor or that Bartling conspired with a state actor to deprive plaintiff of some constitutional right. Thus, plaintiff has not alleged a plausible conspiracy claim. Because Bartling is not a state actor, there is no legal basis for a Section 1983 claim against her. Accordingly, plaintiff’s Section 1983 claims fail as a matter of law, and are dismissed pursuant to 28 U.S.C. §§ 1915(e)(2) (B)(ii), 1915A(b).

#### **D. Leave to Amend**

A *pro se* plaintiff should ordinarily be given the opportunity “to amend at least once

when a liberal reading of the complaint gives any indication that a valid claim might be stated.” Shomo v. City of New York, 579 F.3d 176 (2d Cir. 2009) (quoting Gomez v. USAA Fed. Sav. Bank, 171 F.3d 794, 795-96 (2d Cir. 1999) (internal quotation marks omitted)). Indeed, a *pro se* plaintiff who brings a civil rights action, “should be ‘fairly freely’ afforded an opportunity to amend his complaint.” Boddie v. New York State Div. of Parole, No. 08-CV-911, 2009 WL 1033786, at \*5 (E.D.N.Y. Apr. 17, 2009) (quoting Frazier v. Coughlin, 850 F.2d 129, 130 (2d Cir. 1988)) (internal quotation marks omitted). Yet while “*pro se* plaintiffs are generally given leave to amend a deficient complaint, a district court may deny leave to amend when amendment would be futile.” Id. (citations omitted).

Here, the court has carefully considered whether plaintiff should be granted leave to amend his complaint. Because the defects in plaintiff’s claims are substantive, and could not be cured in an amended complaint, leave to amend the complaint would be futile and is thus denied.<sup>2</sup>

#### **E. State Law Claims**

Under 28 U.S.C. § 1367(a), “the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.” However, courts “may decline to exercise supplemental jurisdiction over a claim” if “the district court has dismissed all claims over which it has original jurisdiction.” Id. § 1367(c)(3); see Shahriar v. Smith & Wollensky Rest. Grp., Inc., 659 F.3d 234, 245 (2d Cir. 2011). The Supreme Court explained: “[I]n the usual case in which all federal-law claims are

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<sup>2</sup> Moreover, insofar as plaintiff seeks his immediate release from incarceration, such relief is unavailable under Section 1983. The exclusive avenue for such relief is a petition seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Plaintiff is advised that such a petition has certain exhaustion and timeliness requirements of which the Court makes no findings about at this time. The dismissal of the instant complaint is without prejudice to any subsequent habeas relief plaintiff may seek.

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 (1988).

Here, given the absence of a viably pled federal law claim, the interests of judicial economy, convenience, fairness, and comity weigh in favor of not exercising supplemental jurisdiction at this time. Accordingly, the Court declines to exercise supplemental jurisdiction over any potential state-law claims contained in plaintiff’s complaint and dismisses any such claims without prejudice.

### III. CONCLUSION

For the forgoing reasons, the plaintiff’s application to proceed *in forma pauperis* is granted, but plaintiff’s Section 1983 claims are *sua sponte* dismissed for failure to allege a plausible claim for relief pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii), 1915A(b). The Court declines to exercise supplemental jurisdiction over any potential state-law claims contained in plaintiff’s complaint and any such claims are dismissed without prejudice. The Clerk of the Court is directed to mail a copy of this Order to the plaintiff at his last known address and to close this case.

The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this Order would not be taken in good faith and therefore *in forma pauperis* status is denied for the purpose of any appeal. See Coppededge v. United States, 369 U.S. 438, 444-45 (1962).

### SO ORDERED.

Dated: October 17, 2018  
Central Islip, New York

/s/ (JMA)  
Joan M. Azrack  
United States District Judge