

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

JULIAN MARCUS RAVEN,

Plaintiff,

v.

1:25-cv-01624 (AMN/DJS)

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION
et al.,

Defendants.

APPEARANCES:

OF COUNSEL:

JULIAN MARCUS RAVEN

714 Baldwin Street
Elmira, New York 14901
Plaintiff *pro se*

Hon. Anne M. Nardacci, United States District Judge:

MEMORANDUM-DECISION AND ORDER

I. Introduction

On November 25, 2025, the Court ordered plaintiff *pro se* Julian Marcus Raven (“Plaintiff”) to show cause, by December 5, 2025, why this action should not be dismissed *sua sponte* on numerous grounds. Dkt. No. 11 (“Order”). Beginning on November 27, 2025, Plaintiff made various submissions in response. *See, e.g.*, Dkt. Nos. 15-17, 19, 21, 23, 25. After carefully considering Plaintiff’s submissions, the Court finds that Plaintiff has failed to show cause and, for the reasons set forth below, dismisses this action *sua sponte*.

II. Background

A. Factual Allegations

Plaintiff owns property in Elmira, New York (the “Property”). Dkt. No. 1 (“Complaint”) at ¶ 2. He alleges that defendant New York State Department of Environmental Conservation (“DEC”) issued a “March 6, 2017 Order on Consent” that classified the Property as a “‘Class 2 Significant Threat’ site, despite the absence of due process[.]” *Id.* at ¶¶ 2-3; *see also ELG Utica Alloys, Inc. v. Niagara Mohawk Power Corp.*, No. 16-cv-1523, 2023 WL 2655111, at *4 (N.D.N.Y. Mar. 27, 2023) (“Under New York Environmental Conservation Law, a Class 2 site is one which poses a ‘significant threat to the public health or environment – action required.’”) (citations omitted). Plaintiff alleges that defendant Dudley Loew (“Defendant Loew”) was the DEC employee responsible for this classification in 2017, Dkt. No. 1 at ¶ 15; that defendant Amanda Lefton, the DEC Commissioner (“Defendant Lefton”) is also liable because she had “final authority for all orders, decisions, and conclusions made by DEC officials,” *id.* at ¶ 14; and that defendant Kathy Hochul, the New York State Governor (“Defendant Hochul”) is liable as well, because she is the “ultimately responsible party, over the DEC’s actions[.]” *id.* at ¶ 13.

Plaintiff further alleges that, in September 2023, he contacted the DEC regarding his Property. *Id.* at ¶ 37. Plaintiff attaches to the Complaint his September 6, 2023 email to the DEC. Dkt. No. 1-1 at 25; *L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 422 (2d Cir. 2011) (“A complaint is [also] deemed to include any written instrument attached to it as an exhibit, materials incorporated in it by reference, and documents that, although not incorporated by reference, are ‘integral’ to the complaint.” (alteration in original) (citation omitted)).¹ Plaintiff’s email stated:

¹ Citations to court documents utilize the pagination generated by CM/ECF, the Court’s electronic filing system, and not the documents’ internal pagination.

I hope you are well. Please can you give me a remediation plan status update on [the Property].

I have a tenant I would like to keep updated and I also need to know any upcoming dates for any public meetings or anything I may need to be personally present for. I will be out of the country from mid Nov[.] to mid January for personal family matters.

Dkt. No. 1-1 at 25. Plaintiff alleges that the DEC responded to his request. Dkt. No. 1 at ¶ 38.

Plaintiff attaches to the Complaint the DEC's September 7, 2023 response, which stated:

Since my update to you in May, it was determined that some additional sampling of soil and groundwater was necessary to confirm the nature and extent of site contamination. That sampling was performed by our engineering consultants at HRP on August 30th and we are now waiting on analytical results. Because of this delay, the Proposed Remedial Action Plan is likely to be released closer to the end of this year and we will not proceed with designing the remedy until later into next year.

In the meantime, I can keep you updated on the dates of public comment periods and public meetings as they are decided.

Dkt. No. 1-1 at 26.

More than a year and a half later, Plaintiff alleges that “he learned through a friend who called him while [Plaintiff was] in Spain, that [Plaintiff's P]roperty was on the local news.” Dkt. No. 1 at ¶ 39. Plaintiff attaches to the Complaint his March 13, 2025 email to the DEC requesting an update, as well as an email response dated the same day from defendant Kira Bruno, a DEC employee (“Defendant Bruno”). Dkt. No. 1-1 at 29-30; *see also* Dkt. No. 1 at ¶ 40. Defendant Bruno's response stated, *inter alia*, that “[f]or your convenience, the final Proposed Remedial Action Plan is attached to this email, as well as the factsheet.” Dkt. No. 1-1 at 30. The attached “State Superfund Program” fact sheet regarding Plaintiff's Property stated, *inter alia*, “Remedy Proposed for State Superfund Site: NEW Public Comment Period and NEW Public Meeting Announced.” *Id.* at 32. The fact sheet further stated that “[]DEC is accepting written comments about the proposed plan, called a Proposed Remedial Action Plan (PRAP) from **March 12th**

through **June 12th, 2025**” and announced that a public meeting at a location in Elmira had been scheduled for May 29, 2025. *Id.* Plaintiff attaches to the Complaint further correspondence he received from the DEC, dated September 5, 2025, which requested that Plaintiff enter into a consent order regarding remediation of the Property. Dkt. No. 1-1 at 34-36.

In October 2025, Plaintiff commenced an Article 78 proceeding in New York State Supreme Court, Chemung County (“State Court”), against the DEC and Defendants Hochul, Lefton, Loew, and Bruno, challenging the March 2017 classification of his Property and seeking emergency relief. *See Raven v. NYS DEC et al.*, Index No. 2025-1215 (N.Y. Sup. Ct. filed Oct. 16, 2025) (“State Court Action”); Dkt. No. 1-1 at 14-16; *see also Giraldo v. Kessler*, 694 F.3d 161, 164 (2d Cir. 2012) (“We also take judicial notice of relevant matters of public record.”) (citations omitted). In connection with the State Court Action, Plaintiff alleges that he “filed an Order to Show [Cause] and multiple TROs,” Dkt. No. 1 at ¶ 70, and also submitted a Freedom of Information Law (“FOIL”) request for various records from the DEC, *id.* at ¶¶ 41-46. The FOIL correspondence Plaintiff attaches to the Complaint indicates that he requested, in October 2025, “all electronic communications” “to or from NYS DEC attorney [Defendant] Loew, dated between January 1, 2016 and December 31, 2017, that contain or reference” various search terms. Dkt. No. 1-1 at 8.

Plaintiff alleges that defendant Nicholas Buttino, the assistant attorney general who appeared on behalf of the defendants in State Court (“Defendant Buttino”) made false statements in the State Court Action, when he “falsely labeled Plaintiff a ‘responsible party’” and stated “that [the] DEC had ‘classified the property in 2009.’” Dkt. No. 1 at ¶¶ 18, 84-89. Plaintiff alleges that defendant Letitia James, the New York State Attorney General (“Defendant James”) is liable “for supervising attorneys who committed constitutional violations.” *Id.* at ¶ 17.

Plaintiff sues Defendants Hochul, James, Lefton, Loew, Bruno, James, and Buttino exclusively in their official capacities. *Id.* at ¶¶ 13-18.

B. Legal Claims

Plaintiff seeks to assert various claims pursuant to 42 U.S.C. § 1983 (“Section 1983”). He appears to style his claims as various violations of due process, Dkt. No. 1 at ¶¶ 96-113, 71-74;² “Denial of Access to the Courts[,]” *id.* at ¶¶ 114-117; and “Stigma-Plus Constitutional Tort[,]” *id.* at ¶¶ 90-95.

C. Procedural History

On November 19, 2025, following a hearing, the State Court issued an order “find[ing] that there is no imminent harm in the context of moving forward with any remediation or any other enforcement actions[;]” and “denying the request for a temporary restraining order pending the January 6, 2026 return date, without prejudice for leave for [Plaintiff] to reapply to this Court for a temporary restraining order, should the [DEC] exercise its ten-day notice requirements under [N.Y. Env’t Conserv. Law §§] 27-1309(4) and 27-1313(8) to move forward with sampling or a remedial action.” State Court Action, Dkt. No. 32 at 2.

The next day, Plaintiff commenced this action in federal court. Dkt. No. 1. On November 24, 2025, the Court denied Plaintiff’s application for emergency relief and related motions. Dkt. No. 10. On November 25, 2025, the Court issued the Order, detailing numerous potential defects with Plaintiff’s claims and ordering him to show cause why the Complaint should not be dismissed *sua sponte*. Dkt. No. 11.

² These paragraphs have the same numbering as factual allegations earlier in the Complaint, but appear towards the end of the Complaint. *See* Dkt. No. 1 at 21.

On November 27, 2025, Plaintiff made his first submission in response to the Order. Dkt. No. 15.

On November 29, 2025, Plaintiff filed a submission regarding the State Court Action, stating that the State Court had allegedly not yet ruled “on multiple pending motions” and had not addressed so-called “extrajudicial knowledge[.]” Dkt. No. 16 at 1.

On December 1, 2025, Plaintiff filed another submission, stating that he had “filed a formal complaint in the New York State Commission on Judicial Conduct and also filed a formal notice with the Sixth Judicial District Administrative Judge” regarding his concerns with the State Court. Dkt. No. 17 at 2.

On December 2, 2025, Plaintiff filed another submission with a transcript from the State Court Action, noting, *inter alia*, that the State Court’s “comments during the [November 14, 2025] hearing reveal extra-judicial knowledge and pre-judgment of my [P]roperty.” Dkt. No. 19 at 3.

The entirety of the comments to which Plaintiff takes issue are emphasized below:

THE COURT: Okay. So, we’re going to go ahead and get started on this matter. I want to make sure that everyone is aware that today we are simply here to argue the issue of the temporary restraining order application that was brought by Mr. Raven.

I know that -- Mr. Raven, I’m looking at some of your submissions that you’re somewhat eager to move forward with our January 6th arguments on the merits of your petition. That’s for January. So, I want you to constrain your arguments. And I want the respondent in this matter to constrain your arguments simply to the matter of the temporary restraining order that’s before the court. *I am fully aware of all the facts and circumstances of almost 20 years regarding this property.*

So, Mr. Raven, in regards to your request for a temporary restraining order, what would you like me to know?

Dkt. No. 19-1 at 3:9-25 (emphasis added).

On December 4, 2025, Plaintiff filed another submission stating that “[o]n December 4, 2025, I filed a **criminal complaint** with Officer [] of the Elmira Police Department and Detective Bureau **concerning false and materially misleading statements** made by [Defendant] Buttino during the November 14, 2025 Temporary Restraining Order hearing [in State Court.]” Dkt. No. 21 at 1.

Plaintiff has filed numerous additional submissions, including on December 4, 2025. One of Plaintiff’s submissions on that day argued, *inter alia*, that, while Plaintiff “had already seen the orders through monitoring of the docket and therefore responded promptly[,]” “[h]ad [Plaintiff] relied on service by mail, [he] would not have had a meaningful opportunity to respond” to the Order. Dkt. No. 23 at 2. A subsequent submission that same day stated that “[o]n December 4, 2025, Plaintiff prepared for filing a judicial misconduct complaint” against the Court. Dkt. No. 25 at 1.

On December 5, 2025, Plaintiff submitted a letter to Chief United States District Judge Brenda K. Sannes in connection with this case.³ Dkt. No. 28. The undersigned respectfully referred that letter to the Chief Judge, and the Chief Judge has responded to Plaintiff. Dkt. Nos. 31-32.

III. STANDARD OF REVIEW

An action is considered “frivolous,” as a legal matter, “when either: (1) ‘the ‘factual contentions are clearly baseless,’ . . . or (2) ‘the claim is based on an indisputably meritless legal

³ On the same day, Defendant also directed a submission to this Court which stated that “[t]his Notice is **not** a motion for recusal.” Dkt. No. 26 at 1. Even if it were, the submission provides no basis for recusal. *See, e.g., Litovich v. Bank of Am. Corp.*, 106 F.4th 218, 224 (2d Cir. 2024) (“[T]he test for whether an appearance of partiality exists ‘is an objective one based on what a reasonable person knowing all the facts would conclude.’ . . . ‘Where a case, by contrast, involves remote, contingent, indirect or speculative interests, disqualification is not required.’”) (citations omitted).

theory.” *Murray v. New York*, No. 24-cv-08015, 2024 WL 5009955, at *1 (S.D.N.Y. Dec. 6, 2024) (quoting *Livingston v. Adirondack Beverage Co.*, 141 F.3d 434, 437 (2d Cir. 1998)). “A claim is based on an ‘indisputably meritless legal theory’ when either the claim lacks an arguable basis in law . . . or a dispositive defense clearly exists on the face of the complaint.” *Livingston*, 141 F.3d at 437. And “[d]istrict courts may dismiss a frivolous complaint *sua sponte* even when the plaintiff has paid the required filing fee.” *Metellus v. Jolly*, No. 24-2546, 2025 WL 3239753, at *1 (2d Cir. Nov. 20, 2025) (summary order) (quoting *Fitzgerald v. First E. Seventh St. Tenants Corp.*, 221 F.3d 362, 364 (2d Cir. 2000) (*per curiam*)).

Sua sponte dismissal may also be appropriate when “it is unmistakably clear that the court lacks jurisdiction, or that the complaint lacks merit or is otherwise defective.” *Watley v. Katz*, 631 F. App’x 74, 75 (2d Cir. 2016) (quoting *Snider v. Melindez*, 199 F.3d 108, 113 (2d Cir. 1999)).

Additionally, “a district court may dismiss an action *sua sponte* for failure to state a claim so long as the plaintiff is given notice of the grounds for dismissal and an opportunity to be heard.” *Grant v. Cnty. of Erie*, 542 F. App’x 21, 24 (2d Cir. 2013) (citing *Thomas v. Scully*, 943 F.2d 259, 260 (2d Cir. 1991)). “The issuance, for example, of an order to show cause why a complaint should not be dismissed *sua sponte* for a stated reason, will typically suffice to provide notice and an opportunity to be heard.” *Nwoye v. Obama*, No. 22-1253, 2023 WL 382950, at *1 (2d Cir. Jan. 25, 2023) (summary order) (collecting cases).

Finally, district courts must “liberally construe pleadings and briefs submitted by pro se litigants, reading such submissions to raise the strongest arguments they suggest.” *Walker v. Senecal*, 130 F.4th 291, 297 (2d Cir. 2025) (quoting *Kravitz v. Purcell*, 87 F.4th 111, 118 (2d Cir. 2023)).

IV. DISCUSSION

After detailing numerous potential defects with Plaintiff's claims, the Order stated:

Plaintiff is invited to address: (i) the timeliness of his Section 1983 claims; (ii) the personal involvement of each Defendant in the constitutional deprivations he alleges; (iii) Eleventh Amendment immunity; (iv) the nature of his Fourteenth Amendment claims; and (v) whether any abstention doctrines apply, given the nature of his claims and his related State Court Action.

Dkt. No. 11 at 3-4. As detailed above, Plaintiff has responded to the Order and has made multiple additional submissions. *See supra* Section II.C.

A. Statute of Limitations

"The statute of limitations for § 1983 actions arising in New York is three years." *Lucente v. Cnty. of Suffolk*, 980 F.3d 284, 308 (2d Cir. 2020) (citations omitted); *see also Bryan v. Fleetbank N.A.*, No. 21-2143, 2022 WL 6832280, at *2 (2d Cir. Oct. 12, 2022) (summary order) (noting "that a court may dismiss a complaint *sua sponte* as time-barred if that defense is clear from the face of the complaint") (citing *Pino v. Ryan*, 49 F.3d 51, 53-54 (2d Cir. 1995)).

As detailed above, the Complaint seeks to challenge the DEC's March 2017 classification of Plaintiff's Property. *See supra* Section II.A. Plaintiff further alleges that he corresponded with the DEC regarding his Property in the ensuing years. *Id.*

In response to the Order, Plaintiff states that he "approached the DEC in 2014 prior to the purchase of the [Property] . . . that was stuck in legal limbo due its inconclusive classification status and lingering fears about potential hazardous waste." Dkt. No. 15 at 10; *see also Hotaling v. Martuscello*, No. 24-cv-01216, 2025 WL 2607661, at *1 (N.D.N.Y. Sept. 9, 2025) ("[W]here a *pro se* plaintiff has submitted other papers to the Court, such as legal memoranda, the Court may consider statements in such papers to supplement or clarify the plaintiff's pleaded allegations.") (alteration in original) (citation omitted). According to Plaintiff, "[t]hree years later DEC project

attorney Defendant Loew issued the March 6th, 2017 **Order on Consent**” without adequate process. Dkt. No. 15 at 10. “The order arrived, confusing my [P]roperty with [another property].” *Id.* Plaintiff states that “[a]nd from then on, the DEC has illegitimately acted upon this fatal administrative error[.]” *Id.* at 11. Plaintiff contends that “[a]lthough the DEC’s conduct originated in 2017, the constitutional injury alleged is **not a completed historical event**, but an **ongoing and continuing violation** that persists to the present day.” *Id.* at 22.

The Court finds that all of Plaintiff’s claims challenging the DEC’s March 2017 classification of the Property accrued almost nine years ago and are time-barred. *Lucente*, 980 F.3d at 308. Plaintiff’s assertion that the continuing violation doctrine should render his claims timely is unpersuasive. *Id.* at 309 (“The continuing violation doctrine, where applicable, provides an ‘exception to the normal knew-or-should-have-known accrual date.’”) (citation omitted). Plaintiff’s claims do not appear to implicate the doctrine. *Id.* (“[T]he doctrine is utilized most often in connection with certain Title VII claims[.]”). Even if they do, “the continuing violation doctrine [] applies not to discrete unlawful acts, even where those discrete acts are part of ‘serial violations,’ but to claims that by their nature accrue only after the plaintiff has been subjected to some threshold amount of mistreatment.” *Id.* (citation omitted). The mistreatment Plaintiff alleges accrued in 2017 when he states he learned of the Order on Consent through which the DEC purportedly misclassified his Property. Dkt. No. 15 at 10. As a result, the Court finds that all of Plaintiff’s Section 1983 claims challenging that classification and alleging related injuries in the years since are time-barred.⁴ *See, e.g., DeSuze v. Ammon*, 990 F.3d 264, 272 (2d Cir. 2021) (“The

⁴ Plaintiff does not argue that equitable tolling should apply to his claims. *See generally* Dkt. No. 15; *Doe v. United States*, 76 F.4th 64, 71 (2d Cir. 2023). Given Plaintiff’s *pro se* status, the Court has nonetheless considered the doctrine, but finds that Plaintiff is not entitled to equitable tolling. *See, e.g., Powell v. Lab Corp.*, No. 17-cv-3632, 2018 WL 6814371, at *5 (E.D.N.Y. Dec. 27, 2018) (“Here, there is absolutely no basis to apply the doctrine of equitable tolling. Plaintiff’s own

ensuing injuries allegedly caused the [plaintiffs] continuing harms extending into the limitations period, but ‘a continuing violation cannot be established merely because the claimant continues to feel the effects of a time-barred . . . act.’”) (second alteration in original) (quoting *Harris v. City of New York*, 186 F.3d 243, 250 (2d Cir. 1999)).

B. Personal Involvement

“It is well settled that, in order to establish a defendant’s individual liability in a suit brought under § 1983, a plaintiff must show, *inter alia*, the defendant’s personal involvement in the alleged constitutional deprivation.” *Morabito v. New York*, 803 F. App’x 463, 466 (2d Cir. 2020) (quoting *Grullon v. City of New Haven*, 720 F.3d 133, 138 (2d Cir. 2013)). The Second Circuit has also made clear that “there is no special rule for supervisory liability” under Section 1983. *Tangreti v. Bachmann*, 983 F.3d 609, 618 (2d Cir. 2020). “Instead, a plaintiff must plead and prove ‘that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.’” *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009)).

The Complaint fails to allege the personal involvement of the New York State Governor, Attorney General, or DEC Commissioner in any constitutional violation. *See generally* Dkt. No. 1. Plaintiff alleges only that the position each of these Defendants held renders them ultimately responsible for the conduct he seeks to challenge. *Id.* at ¶¶ 13, 14, 17. In response to the Order, Plaintiff reiterates this position as to Defendants Hochul and Lefton, and does not address Defendant James. Dkt. No. 15 at 21. Plaintiff also appears to acknowledge that these “high-level officials” are not “those officials directly responsible for the ongoing conduct at issue[.]” *Id.* Because Plaintiff has not alleged the personal involvement of Defendants Hochul, James, and

allegations demonstrate that he was aware of defendants’ alleged violations at the time they occurred.”).

Lefton in any constitutional violation, all claims against these Defendants are dismissed. *See, e.g., Tangreti*, 983 F.3d at 618; *Hernandez v. Keane*, 341 F.3d 137, 144-45 (2d Cir. 2003) (“[S]upervisor liability in a § 1983 action depends on a showing of some personal responsibility, and cannot rest on *respondeat superior*. . . . ‘Absent some personal involvement by [the supervisory official] in the allegedly unlawful conduct of his subordinates,’ he cannot be liable under section 1983.”) (second alteration in original) (citations omitted).

C. Eleventh Amendment Immunity

As the Court previously noted, “any Section 1983 claim for money damages against the DEC or New York State officials that is timely . . . nonetheless appears barred by the Eleventh Amendment, *see, e.g., Morabito*[], 803 F. App’x at 465] (‘It is well settled that § 1983 does not override Eleventh Amendment immunity. . . . The district court thus correctly held that the Eleventh Amendment barred the [plaintiff’s] § 1983 suit against New York (a state), the DEC (a state agency), and Seggos (a state official) in his official capacity.’) (citation omitted).” Dkt. No. 10.

The Complaint asserts that, because of the DEC’s classification, Plaintiff suffered “reputational stigma, and economic harm[,]” Dkt. No. 1 at ¶ 40; “immediate and substantial economic harm[,]” *id.* at ¶ 60; and “tangible and measurable harm, including loss of Plaintiff’s commercial tenant, interference with business opportunities, reputational damage in the community, and diminution of property value[,]” *id.* at ¶ 94. Plaintiff has also argued that the alleged constitutional violations are ongoing because of his “[c]ontinued reputational and economic injury[.]” Dkt. No. 15 at 22.

Plaintiff has clarified, however, that he “does not seek monetary damages from the State of New York, the DEC, or any official sued in an official capacity. **To the extent any stray language**

in the Complaint could be read as seeking monetary damages from [these defendants], Plaintiff expressly disclaims and withdraws any such relief.” *Id.* at 31. Accordingly, the Court finds that the Complaint does not state a claim for money damages against any Defendant. *Hotaling*, 2025 WL 2607661, at *1.

Plaintiff argues that Defendants are not immune from the non-monetary relief he seeks pursuant to the *Ex parte Young* exception to Eleventh Amendment immunity. *See, e.g.*, Dkt. No. 15 at 11-12. Under this exception, “a plaintiff may sue a state official acting in his official capacity—notwithstanding the Eleventh Amendment—for prospective, injunctive relief from violations of federal law.” *State Emps. Bargaining Agent Coal v. Rowland*, 494 F.3d 71, 95 (2d Cir. 2007) (citation omitted). However, “the Supreme Court has made clear that this exception only contemplates action brought against individual defendants in their official capacities, and ‘has no application in suits against the States and their agencies, which are barred regardless of the relief sought.’” *Mann v. N.Y. State Ct. of Appeals*, No. 21-cv-49, 2021 WL 5040236, at *5 (N.D.N.Y. Oct. 29, 2021) (quoting *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)). Thus, any Section 1983 claim against the DEC is barred by the Eleventh Amendment.

The Court need not determine whether Plaintiff’s remaining claims fall within the *Ex parte Young* exception because, even if they do, none are viable for the reasons discussed next.

D. Failure to State a Claim

To the extent that any of Plaintiff’s claims are timely and are not barred by the Eleventh Amendment, his allegations fail to state a claim under Section 1983 against any Defendant.

Under Section 1983, “[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’ is ‘liable to the party injured.’” *Kravitz*, 87 F.4th at 129 (alterations in original) (quoting 42 U.S.C. § 1983).

Plaintiff has not stated a procedural due process claim. *See, e.g.*, Dkt. No. 1 at ¶¶ 108-113. “To prevail on a Fourteenth Amendment procedural due process claim, [Plaintiff] must demonstrate ‘(1) that Defendants deprived him of a cognizable interest in ‘life, liberty, or property,’ (2) without affording him constitutionally sufficient process.’” *Baltas v. Maiga*, 119 F.4th 255, 263 (2d Cir. 2024) (quoting *Proctor v. LeClaire*, 846 F.3d 597, 608 (2d Cir. 2017)). Regardless of whether Plaintiff’s allegations are sufficient to establish the first element, Plaintiff cannot allege that he was denied constitutionally sufficient process. As the Order noted, given the nature of Plaintiff’s claims,

his pending Article 78 proceeding vitiates any due process claim under Section 1983. *See, e.g., Nicholas v. Seggos*, No. 23-cv-463, 2023 WL 6121164, at *6 (N.D.N.Y. Sept. 19, 2023) (“In New York State, an Article 78 proceeding provides an avenue of postdeprivation redress that satisfies due process requirements.”) (citation omitted), *report and recommendation adopted*, 2023 WL 7004103 (N.D.N.Y. Oct. 24, 2023); *Beechwood Restorative Care Ctr. v. Leeds*, 436 F.3d 147, 157 (2d Cir. 2006) (“An Article 78 proceeding is adequate for due process purposes even though the petitioner may not be able to recover the same relief that he could in a § 1983 suit.”) (citation omitted).

Dkt. No. 11 at 2. Plaintiff’s submissions do not appear to argue otherwise. *See, e.g.*, Dkt. No. 15. Instead, Plaintiff “notes that related claims remain actively pending in **New York State Supreme Court**” and argues “that Plaintiff’s claims present substantial, justiciable issues that [t]he New York Supreme Court has found worthy of formal consideration[.]” *Id.* at 18. Because Plaintiff is presently pursuing the very process that is implicated by his claims, he has failed to state a procedural due process claim.

Plaintiff has also not stated a substantive due process claim. Dkt No. 1 at ¶¶ 102-107. “The Fourteenth Amendment guarantees ‘more than fair process’; it ‘cover[s] a substantive sphere as well, barring certain government actions regardless of the fairness of the procedures used to implement them.’” *Hurd v. Fredenburgh*, 984 F.3d 1075, 1087 (2d Cir. 2021) (alteration in original) (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998)). Plaintiff’s substantive due process claim is simply a threadbare reformulation of his procedural due process claims, and thus fails for the same reasons.⁵ In any event, his allegations—which boil down to his contention that a state agency made an “administrative error” in 2017, Dkt. No. 15 at 11—are insufficient to state a substantive due process claim. *See, e.g., Handsome, Inc. v. Town of Monroe*, No. 23-711, 2024 WL 2747142, at *4 (2d Cir. May 29, 2024) (summary order) (“Substantive due process is an outer limit on the legitimacy of government action. It does not forbid governmental actions that might fairly be termed arbitrary and capricious and for that reason correctable in a state court lawsuit seeking review of administrative action[.]”) (citation omitted); *Ferran v. Town of Nassau*, 471 F.3d 363, 369-70 (2d Cir. 2006) (“To establish a substantive due process violation, the [plaintiffs] must show that the [defendant]’s alleged acts against their land were . . . ‘conscience-shocking,’ or ‘oppressive in the constitutional sense,’ not merely ‘incorrect or ill-advised.’”) (citation omitted).

Plaintiff has also failed to state a separate due process claim for “False Government Statements.” Dkt. No. 1 at ¶¶ 71-74 (citing, *inter alia*, *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 130 (2d Cir. 1997)). As the authority that Plaintiff cites makes clear, such claims typically arise from the fabrication of evidence in connection with a criminal proceeding. *See, e.g., Ricciuti*,

⁵ Another of Plaintiff’s claims similarly contends that Defendants acted without “the procedural and substantive prerequisites” and also fails for these reasons. Dkt. No. 1 at ¶¶ 96-101.

124 F.3d at 130 (“When a police officer creates false information likely to influence a jury’s decision and forwards that information to prosecutors, he violates the accused’s constitutional right to a fair trial, and the harm occasioned by such an unconscionable action is redressable in an action for damages under 42 U.S.C. § 1983.”) (citations omitted); *Ortiz v. Stambach*, 137 F.4th 48, 67 (2d Cir. 2025) (“In order to prevail on a Section 1983 fabrication of evidence claim, a plaintiff must demonstrate that ‘(1) [an] investigating official (2) fabricat[ed] information (3) that is likely to influence a jury’s verdict, (4) forward[ed] that information to prosecutors, and (5) the plaintiff suffer[ed] a deprivation of life, liberty, or property as a result.’”) (alterations in original) (quoting *Garnett v. Undercover Officer C0039*, 838 F.3d 265, 279 (2d Cir. 2016)). Plaintiff alleges the existence of no such proceeding, nor any constitutional deprivation as a result of the purportedly false statements Defendant Buttino made in the course of civil litigation brought by Plaintiff. Ultimately, Plaintiff’s disagreement with certain of Defendant Buttino’s arguments in State Court provides no basis for a constitutional claim in federal court. *See also Parent v. New York*, 786 F. Supp. 2d 516, 540-41 (N.D.N.Y. 2011) (“In New York, ‘in the context of a legal proceeding, statements by parties and their attorneys are absolutely privileged if, by any view, or under any circumstances, they are pertinent to the litigation.’”) (quotations omitted) (quoting *Lipin v. Nat’l Union Fire Ins. Co. of Pittsburgh*, 202 F. Supp. 2d 126, 137 (S.D.N.Y. 2002)).

Plaintiff has also not stated a claim for “Denial of Access To The Courts[.]” Dkt. No. 1 at ¶¶ 114-117. “A plaintiff’s ‘constitutional right of access to the courts is violated where government officials obstruct legitimate efforts to seek judicial redress.’” *Friedman v. Bloomberg L.P.*, 884 F.3d 83, 90 (2d Cir. 2017) (citations omitted). As an initial matter, Plaintiff is presently and actively litigating his related claims in two separate courts. Plaintiff alleges that the DEC improperly denied the FOIL request he submitted during the pendency of the State Court Action, and that

Defendant Butino made false statements in the State Court Action. *See, e.g.*, Dkt. No. 1 at ¶ 117 (“By withholding 148 internal emails, [and] misrepresenting facts to the court, Defendants obstructed Plaintiff’s ability to fairly present his claims.”). This claim appears to be a backward-looking right-to-access claim. *See, e.g., Sousa v. Marquez*, 702 F.3d 124, 128 (2d Cir. 2012) (“The viability of backward-looking right-of-access claims is far from clear in this Circuit[.]”). Even if this claim is viable, “such claims are available only if a judicial remedy was ‘completely foreclosed’ by the false statement or nondisclosure.” *Id.* (citation omitted). The alleged conduct about which Plaintiff complains fails to meet that standard. *Id.* at 128 (“That is because a plaintiff who has knowledge of the facts giving rise to his claim and an opportunity to rebut opposing evidence *does* have adequate access to a judicial remedy.”); *see also Parent*, 786 F. Supp. 2d at 540-41.

Finally, Plaintiff has not stated a “Stigma-Plus Constitutional Tort” claim. Dkt. No. 1 at ¶¶ 90-95. The Complaint alleges that, as a result of the DEC’s public comment and public meeting notice in or about March 2025, Plaintiff suffered “reputational stigma, and economic harm[.]” *Id.* at ¶ 40; *see also id.* at ¶¶ 59-60, 94. Plaintiff’s submission clarifies that he “does not seek retrospective compensation or relief sounding in tort.” Dkt. No. 15 at 11; *see also id.* at 12, 31. As a result, Plaintiff does not appear to be pursuing a tort claim based on any allegedly defamatory statements by Defendants. *Vega v. Luntz*, 596 F.3d 77, 81 (2d Cir. 2010) (“Generally, defamation is an issue of state, not of federal constitutional law. . . . However, under limited circumstances, federal constitutional relief is available for defamation committed by government officials.”) (citations omitted). To the extent that Plaintiff is nonetheless pursuing a stigma-plus claim for non-monetary relief, his allegations fail to establish “(1) ‘the utterance of a statement sufficiently derogatory to injure his or her reputation, that is capable of being proved false, and that he or she

claims is false,’ and (2) ‘a material state-imposed burden or state-imposed alteration of the plaintiff’s status or rights.’” *Id.* (citation omitted).

For all of these reasons, Plaintiff has failed to state any claim against any Defendant.⁶

E. Reconsideration

Plaintiff appears to seek reconsideration of the Court’s denial of his application for emergency relief. *See generally* Dkt. Nos. 10, 15. After carefully considering Plaintiff’s submissions, the Court finds that Plaintiff has offered no basis that could warrant reconsideration. *See, e.g., Commerzbank AG v. U.S. Bank, N.A.*, 100 F.4th 362, 377 (2d Cir. 2024) (“‘The major grounds justifying reconsideration are an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.’” . . . Accordingly, the standard for granting a motion for reconsideration is ‘strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court.’”) (citations omitted). Additionally, for all the reasons stated above, Plaintiff has failed to allege a viable claim that could entitle him to emergency or injunctive relief. *See supra* Section IV.A-D.

F. Leave to Amend

The Court has carefully considered whether to grant Plaintiff leave to amend, particularly given that he is proceeding *pro se*. But Plaintiff’s claims suffer from a host of substantive defects,⁷

⁶ Neither the Complaint nor Plaintiff’s submission indicate that he is pursuing any state law claims in this federal action. *See generally* Dkt. Nos. 1, 15. Regardless, given the absence of a viable federal claim, the Court would lack jurisdiction over any state law claim against non-diverse parties. 28 U.S.C. § 1367.

⁷ Given the numerous defects already detailed, the Court does not reach the additional potential defects set forth in the Order. Dkt. No. 11 at 3-4.

as detailed above. Because numerous substantive defects could not be cured with better pleading, leave to amend is denied as futile. *Terry v. Inc. Vill. of Patchogue*, 826 F.3d 631, 633 (2d Cir. 2016) (“Although district judges should, as a general matter, liberally permit *pro se* litigants to amend their pleadings, leave to amend need not be granted when amendment would be futile.”) (citing *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000)).

Finally, while Plaintiff is not proceeding *in forma pauperis* in this action, the Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that any *in forma pauperis* appeal from this Memorandum-Decision and Order would not be taken in good faith.

V. Conclusion

Accordingly, the Court hereby

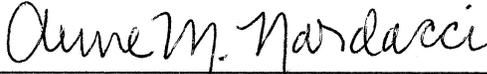
ORDERS that the Complaint is **DISMISSED sua sponte, without leave to amend**; and the Court further

ORDERS that Plaintiff’s additional pending motions, Dkt. Nos. 7, 22, 26, are **TERMINATED as moot**; and the Court further

ORDERS that the Clerk serve a copy of this Order on all parties in accordance with the Local Rules.⁸

IT IS SO ORDERED.

Dated: February 2, 2026
Albany, New York



Anne M. Nardacci
U.S. District Judge

⁸ The Clerk shall also provide Plaintiff with copies of all unreported decisions cited herein that have not been previously provided to him.

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Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

Michael John MURRAY, Plaintiff,

v.

The State of NEW YORK, et al., Defendants.

1:24-cv-08015-GHW

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Signed December 6, 2024

Attorneys and Law Firms

Michael John Murray, Bronx, NY, Pro Se.

Mark Robert Ferguson, NYS Office of The Attorney General,
New York, NY, for Defendants.

ORDER OF DISMISSAL WITH LEAVE TO AMEND

GREGORY H. WOODS, United States District Judge:

*1 Plaintiff Michael John Murray brings this action *pro se*. He has paid the fees to bring this action. Plaintiff seeks damages and injunctive relief pursuant to claims under the Thirteenth Amendment and Fourteenth Amendment. Construed liberally, Plaintiff's complaint sues: (1) Governor Kathy Hochul; (2) Attorney General Letitia James; (3) Leila Bozorg; (4) Derek Davis; (5) Georgette Murray; (6) the State of New York; (7) the New York City Housing Authority ("NYCHA"); and (8) the Graduate Center of the City University of New York ("CUNY"). For the reasons set forth below, the Court dismisses this action *sua sponte* and grants Plaintiff leave to amend his complaint within thirty (30) days of this order.

I. STANDARD OF REVIEW

The Court has the authority to dismiss a pro se complaint *sua sponte* if the Court determines that the action is frivolous, even where the plaintiff has paid the fees to bring a civil action. See *Fitzgerald v. First E. Seventh Tenants Corp.*, 221 F.3d 362, 363–64 (2d Cir. 2000). "An action is 'frivolous' when either: (1) 'the 'factual contentions are clearly baseless,' such as when allegations are the product of delusion or fantasy;' or (2) 'the claim is based on an indisputably meritless legal theory.'" *Livingston v. Adirondack Beverage Co.*, 141 F.3d 434, 437 (2d Cir. 1998) (quoting *Nance v. Kelly*, 912 F.2d 605,

606 (2d Cir. 1990) (per curiam)). The Court must also dismiss an action *sua sponte* where it lacks subject matter jurisdiction. See *Fed. R. Civ. P. 12(h)(3)*; *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999). Finally, the Court may dismiss an action *sua sponte* for failure to state a claim on which relief may be granted "so long as the plaintiff is given notice and an opportunity to be heard." *Wachtler v. Cnty. of Herkimer*, 35 F.3d 77, 82 (2d Cir. 1994) (citation and internal quotation marks omitted), *abrogated on other grounds*, *Murphy v. Hughson*, 82 F.4th 177 (2d Cir. 2023).

Where, as here, the plaintiff proceeds pro se, the Court construes the complaint "liberally," *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009), and interprets the complaint's allegations to raise the "strongest [claims] that they suggest." *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006) (internal quotation marks and citations omitted). Still, the Court's "special solicitude" in pro se cases, *id.* at 475, does not absolve a pro se plaintiff of the requirement under Rule 8 of the Federal Rules of Civil Procedure that his complaint provide a "short and plain statement ... showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*; accord *Salahuddin v. Cuomo*, 861 F.2d 40, 41 (2d Cir. 1988).

Rule 8 requires a complaint to allege "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. 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." *Id.* In reviewing a motion to dismiss, the Court "accept[s] all factual allegations as true, and draw[s] all reasonable inferences in the plaintiff's favor." *Austin v. Town of Farmington*, 826 F.3d 622, 625 (2d Cir. 2016).

II. BACKGROUND

*2 Plaintiff brought this pro se action on October 22, 2024, and paid the requisite filing fee on the same day. Dkt. No. 1. On October 25, 2026, Plaintiff filed the operative amended complaint. Dkt. No. 4 ("Amended Complaint"). The Amended Complaint names eight defendants: The State of New York; NYCHA; Leila Bozorg, the Executive Director of Housing at NYCHA; CUNY; Derek Davis, General Counsel at CUNY; New York Governor Kathy Hochul; New York Attorney General Letitia James; and Georgette Banks Murray, who appears to be Plaintiff's ex-wife. The Amended Complaint brings claims against these defendants under the

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Thirteenth and Fourteenth Amendments to the United States Constitution. *Id.* at 2.

Plaintiff alleges that the State of New York violated his rights because (1) in 1996, the New York State Secretary of State issued correspondence stating that there was no record of Plaintiff having a Real Estate Salesman license; (2) in or around 1995, the State of New York Department of Education did not address Plaintiff's administrative claims against CUNY; (3) in 1980, the People of the State of New York engaged in "questionable Estoppel upon proprietorship endeavors" after Plaintiff inquired about "legal procedures to raise capital"; and (4) in 1998, the Supreme Court of the State of New York improperly entered a default divorce judgment. *Id.* at 5A.

As to Defendant NYCHA, Plaintiff alleges that, in 1987, NYCHA improperly issued an Income Execution Order against him, which the Plaintiff claims he has "attempted to resolve by issuing a check to the creditor's attorney to cover legal and clerical fees." *Id.*

As to Defendant CUNY, Plaintiff alleges that (1) in 1962, CUNY misused his social security account number; and (2) in 1994, CUNY wrongfully terminated Plaintiff as a student after Plaintiff warned that CUNY was in possession of copyrighted materials." *Id.* at 5B.

Finally, Plaintiff alleges that Georgette Murray, in 1998, engaged in "[i]rregularities in the process serving of divorce summons" against him. *Id.* Plaintiff alleges that the "default divorce judgment" Ms. Murray obtained is therefore invalid. *Id.*

The Amended Complaint makes no allegations regarding Governor Hochul, Attorney General James, Ms. Bozorg, and Mr. Davis. *See id.* at 5A-5B.

Plaintiff seeks (1) declaratory judgment "to correct all 'State Agency Purview Judgements' which are errors to actuarial records"; (2) vacatur of the 1998 divorce judgment against him; (3) repayment of all military and welfare amounts for "parents' time in government service"; (4) repayment of Plaintiff's "pension input into [his] wife's public agency occupation"; (5) repayment of Plaintiff's "input into New York City municipal and union death benefit insurance"; and (6) retrieval of his CUNY undergraduate papers. *Id.* at 6B.

III. DISCUSSION

Because Plaintiff seeks redress for violations of his rights under the Thirteenth and Fourteenth Amendments to the United States Constitution, the Court construes Plaintiff's Amended Complaint as asserting claims under 42 U.S.C. § 1983. *See, e.g., Connecticut Citizens Def. League, Inc. v. Thody*, 664 F. Supp. 3d 235, 246 (D. Conn. 2023), *aff'd*, No. 23-724-CV, 2024 WL 177707 (2d Cir. Jan. 17, 2024) ("An action taken directly from the Constitution ... is impermissible. Section 1983 is the exclusive federal remedy for violations of constitutional rights."). Plaintiff's claims against the State of New York and CUNY are barred by the Eleventh Amendment. Plaintiff's claims against Governor Hochul, Attorney General James, NYCHA, Leila Bozorg, and Derek Davis are barred by Section 1983's statute of limitations. Plaintiff's claim against Ms. Murray fails because he has not alleged that her actions are attributable to the state, as required for a claim under Section 1983.

a. Plaintiff's Claims Against the State of New York and CUNY Are Barred by the Eleventh Amendment

*3 The Eleventh Amendment to the United States Constitution "bars a suit in law or equity in federal court against a State absent the State's consent to such a suit or congressional abrogation of immunity." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996). "[T]he immunity recognized by the Eleventh Amendment extends beyond the states themselves to state agents and state instrumentalities that are, effectively, arms of a state." *Gollomp v. Spitzer*, 568 F.3d 355, 366 (2d Cir. 2009). CUNY is an arm of the state to which Eleventh Amendment immunity applies. *See Clissuras v. City Univ. of New York*, 359 F.3d 79, 83 (2d Cir.), *supplemented sub nom. Clissuras v. City of Univ. of New York*, 90 F. App'x 566 (2d Cir. 2004). The State of New York has not waived its Eleventh Amendment immunity for suits under Section 1983, *Trotman v. Palisades Interstate Park Comm'n*, 557 F.2d 35, 40 (2d Cir. 1977), and Congress has not abrogated the States' immunity for claims under Section 1983, *Dube v. State Univ. of N.Y.*, 900 F.2d 587, 594 (2d Cir. 1990). Accordingly, the Eleventh Amendment bars Plaintiff's claims against the State of New York and CUNY. Plaintiff's claims against the State of New York and CUNY are thus dismissed.

Plaintiff's claims against the State of New York and CUNY are likely to be futile in light of the Eleventh Amendment. However, Plaintiff is proceeding pro se, and the Second Circuit has "repeatedly cautioned against *sua sponte* dismissals of pro se complaints prior to requiring

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the defendants to answer” without first granting “leave to amend.” *Salahuddin*, 861 F.2d at 42–43; *see also Wachtler*, 35 F.3d at 82 (“The district court has the power to dismiss a complaint sua sponte for failure to state a claim ... so long as the plaintiff is given notice and an opportunity to be heard.” (internal quotation marks and citations omitted)). Accordingly, Plaintiff’s claims against the State of New York and CUNY are dismissed with leave to amend his Amended Complaint within 30 days.

b. Plaintiff’s Section 1983 Claims Against NYCHA, Leila Bozorg, Governor Hochul, Attorney General James, and Derek Davis Are Time-Barred

“Section 1983 claims based on events that occurred within New York State have 3-year statute of limitations.” *Holden v. Port Auth. of New York & New Jersey*, 521 F. Supp. 3d 415, 433 (S.D.N.Y. 2021); *accord Hogan v. Fischer*, 738 F.3d 509, 517 (2d Cir. 2013) (“Section 1983 actions filed in New York are ... subject to a three-year statute of limitations.”). That is because “[i]n section 1983 actions, the applicable limitations period is found in the ‘general or residual [state] statute [of limitations] for personal injury actions,’ ” *Pearl v. City of Long Beach*, 296 F.3d 76, 79 (2d Cir. 2002) (quoting *Owens v. Okure*, 488 U.S. 235, 249–50 (1989)) (alterations in original), which in New York is three years, N.Y. C.P.L.R. § 214(5).

The three-year statute of limitations on Section 1983 claims begins to run “once the plaintiff knows or has reason to know of the injury which is the basis of his action.” *Veal v. Geraci*, 23 F.3d 722, 724 (2d Cir. 1994) (internal quotation marks and citations omitted). The limitations period may be tolled in accordance with “state tolling rules ... unless state tolling rules would ‘defeat the goals’ of section 1983.” *Abbas v. Dixon*, 480 F.3d 636, 641 (2d Cir. 2007) (quoting *Pearl*, 296 F.3d at 80).

“[T]he statute of limitations is ordinarily an affirmative defense that must be raised in the answer.” *Ellul v. Congregation of Christian Bros.*, 774 F.3d 791, 798 n.12 (2d Cir. 2014). Still, “an affirmative defense appearing on the face of a complaint may ... be the basis for a sua sponte dismissal.” *Pino v. Ryan*, 49 F.3d 51, 54 (2d Cir. 1995) (affirming sua sponte dismissal of untimely pro se Section 1983 action). Here, “it is clear from the face of the complaint ... that the plaintiff’s claims are barred as a matter of law” as to NYCHA, Leila Bozorg, Governor Hochul, Attorney General James, and Derek Davis. *Michael Grecco Prods., Inc. v. RADesign, Inc.*, 112 F.4th 144, 150 (2d Cir. 2024) (quoting

Sewell v. Bernardin, 795 F.3d 337, 339 (2d Cir. 2015)). Plaintiff’s Section 1983 claims against these defendants are therefore dismissed without prejudice to amend his Amended Complaint.

*4 To start, it is clear from the face of Plaintiff’s pro se pleading that his Section 1983 claim against NYCHA is time-barred. The allegedly improper Income Execution Order that grounds Plaintiff’s claims against NYCHA was issued in 1987, Amended Complaint at 5A, well outside of the three-year statute of limitations on Section 1983 actions in New York, *see Hogan*, 738 F.3d at 517. The injury from an income execution order would ordinarily be felt almost immediately, when the plaintiff receives their next paycheck. Plaintiff does not provide allegations that he did not know, or had no reason to know, of his injury from the Income Execution Order until a later date. *See Veal*, 23 F.3d at 724. Nor does he provide allegations suggesting that the limitations period would be tolled. *See Abbas*, 480 F.3d at 641. Plaintiff alleges only that he “has attempted to resolve the issue by issuing a check to creditor’s attorney in order to cover legal and clerical fees connected with” the Income Execution Order. Amended Complaint at 5A. This bare allegation does not permit an inference that the statute of limitations has not run on Plaintiff’s claim against NYCHA. *See Borrero v. Colvin*, No. 14CV5304-LTS-SN, 2015 WL 1262276, at *4–5 (S.D.N.Y. Mar. 19, 2015) (dismissing pro se complaint because plaintiff had not met his burden of demonstrating that statute of limitations was tolled); *see also Abbas*, 480 F.3d at 640–41 (affirming dismissal of pro se complaint after finding that statute of limitations was not tolled). Accordingly, it is clear from the face of the Amended Complaint that Plaintiff’s Section 1983 claim against NYCHA is time-barred. “In light of Plaintiff’s pro se status, however, the Court grants Plaintiff 30 days’ leave to replead” this claim “in an amended complaint in which he alleges facts showing why [his] claims are timely or why the applicable limitation periods should be equitably tolled.” *Garnes v. ABM Janitorial Servs., Inc.*, No. 1:22-CV-2078 (LTS), 2022 WL 1156154, at *4 (S.D.N.Y. Apr. 18, 2022) (dismissing untimely pro se claim sua sponte, with leave to replead).

It is also clear from the face of the Amended Complaint that any implied Section 1983 claim against Leila Bozorg is time-barred. Plaintiff makes no allegations regarding Ms. Bozorg, but Ms. Bozorg is the Executive Director for Housing at NYCHA, Amended Complaint at 4, and Plaintiff’s pleading, construed liberally, may be interpreted to bring claims for injunctive relief against Ms. Bozorg in her official capacity as

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a NYCHA official, *see Edelman v. Jordan*, 415 U.S. 651, 677 (1974), or for damages against Ms. Bozorg in her personal capacity, *see Davis v. New York City Hous. Auth.*, 379 F. Supp. 3d 237, 257 (S.D.N.Y. 2019) (sustaining Section 1983 damages claim against NYCHA official). However, in the absence of any additional allegations against Ms. Bozorg, it is clear from the face of the Amended Complaint that any Section 1983 claims against her are time-barred because any constitutional deprivations alleged against NYCHA are time-barred. Plaintiff's implied Section 1983 claims against Ms. Bozorg are therefore dismissed, with leave to amend his Amended Complaint within 30 days to include allegations "showing why those claims are timely or why the applicable limitation periods should be equitably tolled." *Garnes*, 2022 WL 1156154, at *4.

It is also clear from the face of the Amended Complaint that any implied Section 1983 claims against Governor Hochul and Attorney General James are time-barred. Plaintiff makes no allegations regarding Governor Hochul or Attorney General James. But Plaintiff's pleading, construed liberally, may be interpreted to bring claims for injunctive relief against Governor Hochul and Attorney General James in their official capacities as New York State officials, *see Edelman*, 415 U.S. at 677, or for damages in their personal capacities, *see Bryant v. New York State Dep't of Correction Servs. Albany*, 146 F. Supp. 2d 422, 426 (S.D.N.Y. 2001). However, in the absence of any additional allegations against Governor Hochul or Attorney General James, it is clear from the face of the Amended Complaint that any Section 1983 claims against them are time-barred because any constitutional deprivations alleged against the State of New York are time-barred. The alleged constitutional violations that Plaintiff attributes to the State of New York occurred between 1980 and 1998, *see* Amended Complaint at 5A, well outside the three-year statute of limitations for Section 1983 actions, *Hogan*, 738 F.3d at 517. Plaintiff does not provide allegations that he did not know, or had no reason to know, of his injuries from these alleged deprivations until a later date. *See Veal*, 23 F.3d at 724. Plaintiff does allege that New York State's improper entry of a default divorce judgment in 1998 included an "incorrect address" which caused "a twenty year delay to request 'show cause.'" Amended Complaint at 5A. However, a twenty-year delay would mean Plaintiff knew of the divorce by 2018, still more than three years before this action was filed in 2024. *Id.* at 1. Plaintiff provides no allegations suggesting that the limitations period should be tolled. *See Abbas*, 480 F.3d at 641. Accordingly, it is clear from the face of the Amended Complaint, as currently alleged, that any

implied Section 1983 claims against Governor Hochul and Attorney General James are time-barred. Plaintiff's implied Section 1983 claims against Governor Hochul and Attorney General James are therefore dismissed, with leave to amend his Amended Complaint within 30 days to include allegations "showing why those claims are timely or why the applicable limitation periods should be equitably tolled." *Garnes*, 2022 WL 1156154, at *4.

*5 Finally, it is clear from the face of the Amended Complaint that any implied Section 1983 claims against Derek Davis are time-barred. Plaintiff makes no allegations regarding Mr. Davis, but Mr. Davis is the general counsel at CUNY, Amended Complaint at 5, and Plaintiff's pleading, construed liberally, may be interpreted to bring claims for injunctive relief Mr. Davis in his official capacity as a CUNY official, *see Edelman*, 415 U.S. at 677, or for damages against Mr. Davis in his personal capacity, *Goonewardena v. New York*, 475 F. Supp. 2d 310, 330 (S.D.N.Y. 2007) (sustaining Section 1983 damages claim against CUNY official). However, in the absence of any additional allegations against Mr. Davis, it is clear from the face of the Amended Complaint that any Section 1983 claims against him are time-barred because any constitutional deprivations alleged against CUNY are time-barred. The alleged constitutional violations that Plaintiff attributes to CUNY occurred between 1962 and 1995, *see* Amended Complaint at 5B, well outside of the three-year statute of limitations for Section 1983 actions, *Hogan*, 738 F.3d at 517. Plaintiff provides no allegations that he did not know, or had no reason to know, of his injuries from these alleged deprivations until a later date, *see Veal*, 23 F.3d at 724, nor does he provide allegations suggesting that the limitations period should be tolled, *see Abbas*, 480 F.3d at 641. Plaintiff's implied Section 1983 claims against Mr. Davis are therefore dismissed, with leave to amend his Amended Complaint within 30 days to include allegations "showing why those claims are timely or why the applicable limitation periods should be equitably tolled." *Garnes*, 2022 WL 1156154, at *4.

c. Plaintiff's Section 1983 Claim Against Ms. Murray Fails because the Amended Complaint Does Not Allege that Her Conduct is Attributable to the State

"Because the United States Constitution regulates only the Government, not private parties, a litigant claiming that his constitutional rights have been violated must first establish that the challenged conduct constitutes state action."

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Fabrikant v. French, 691 F.3d 193, 206 (2d Cir. 2012) (quoting *Flagg v. Yonkers Sav. & Loan Ass'n*, 396 F.3d 178, 186 (2d Cir. 2005)). “A plaintiff pressing a claim of violation of his constitutional rights under [Section] 1983 is thus required to show state action.” *Id.* (quoting *Tancredi v. Metro. Life Ins. Co.*, 316 F.3d 308, 312 (2d Cir. 2003)). State action requires, among other things, that “the party charged with the deprivation must be a person who may fairly be said to be a state actor.” *Id.* (quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999)).

Ms. Murray is a private citizen. Accordingly, her actions may be attributable to the state only in “limited circumstances.” See *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 809 (2019); see also *Lurch v. City of New York*, No. 19-CV-11253 (AJN), 2021 WL 1226927, at *3 (S.D.N.Y. Mar. 31, 2021) (“[H]olding a private actor liable for constitutional violations is a high bar”). “Three main tests have emerged” to determine whether the actions of a private party may be “attributable to the state.” They are:

- (1) [when] the entity acts pursuant to the coercive power of the state or is controlled by the state (“the compulsion test”);
- (2) when the state provides significant encouragement to the entity, the entity is a willful participant in joint activity with the state, or the entity’s functions are entwined with state policies (“the joint action test” or “close nexus test”);
- or
- (3) when the entity has been delegated a public function by the state (“the public function test”).

Id. at 207 (quoting *Sybalski v. Indep. Grp. Home Living Program, Inc.*, 546 F.3d 255, 257 (2d Cir. 2008)). “Mere approval of or acquiescence in the initiatives of a private party” will not suffice to meet these tests. See *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). “The fundamental question under each test is whether the private entity’s challenged actions are ‘fairly attributable’ to the state.” *Fabrikant*, 691 F.3d at 207 (quoting *Sullivan*, 526 U.S. at 50).

The Amended Complaint does not allege facts supporting an inference that Ms. Murray’s actions are attributable to the state. The Amended Complaint alleges, at most, that

Ms. Murray did not properly serve Plaintiff with a divorce summons in 1998, and that Plaintiff had no “recourse to Church counsel” because the divorce violated scripture. Amended Complaint at 5B. Even construed liberally, those allegations do not support an inference that the state compelled Ms. Banks’s actions, that the state acted jointly with her, or that Ms. Banks was acting pursuant to a delegation of a public function. See *Fabrikant*, 691 F.3d at 207. Accordingly, Plaintiff’s claims under Section 1983 against Ms. Murray are dismissed for failure to allege state action, without prejudice to amend his Amended Complaint within thirty days of the entry of this order.

IV. IMPLIED STATE LAW CLAIMS

*6 To the extent that Plaintiff’s pleading can be interpreted to bring claims under state law, see *Triestman*, 470 F.3d at 474 (noting that pro se pleadings must be interpreted “to raise the strongest arguments that they suggest” (internal quotation marks and emphasis omitted)), the Court declines to exercise supplemental jurisdiction over those claims. A federal district court may decline to exercise supplemental jurisdiction over claims under state law when it “has dismissed all claims over which it has original jurisdiction.” 28 U.S.C. § 1367(c) (3). Generally, “when the federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain, the federal court should decline the exercise of jurisdiction.” *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988). Accordingly, having dismissed Plaintiff’s federal claims, the Court declines to exercise supplemental jurisdiction over any claims under state law that may be implied from Plaintiff’s pro se pleading. See *Kolari v. New York-Presbyterian Hosp.*, 455 F.3d 118, 122 (2d Cir. 2006) (noting the “discretionary nature” of the exercise of supplemental jurisdiction).

V. LEAVE TO AMEND GRANTED

Plaintiff’s claims are dismissed without prejudice. It is the “usual practice” upon dismissing a complaint “to allow leave to replead.” *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991); see also Fed. R. Civ. P. 15(a) (2) (“The court should freely give leave when justice so requires.”). That is especially true where, as here, a plaintiff has not yet had the opportunity to amend the complaint with the benefit of a ruling from the Court, see *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, 797 F.3d 160, 190 (2d Cir. 2015) (“Without the benefit of a ruling, many a plaintiff will not see the necessity of amendment or be in a position to weigh the practicality and possible means

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of curing specific deficiencies.”), and where a plaintiff is proceeding pro se and his complaint is dismissed *sua sponte*, see *Salahuddin*, 861 F.2d at 42–43; *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000) (explaining that courts “should not dismiss [a pro se complaint] without granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated”). The Court cannot determine, at this early stage, that the pleading deficiencies in the Amended Complaint cannot be corrected, such that amendment would be futile. Accordingly, Plaintiff is granted leave to amend the Amended Complaint.

Any amended complaint must be filed within thirty (30) days from the date of this order. If Plaintiff does not file an amended complaint within the time allowed, the Court will direct the Clerk of Court to enter a judgment dismissing this action for the reasons set forth in this order.

VI. CONCLUSION

For the foregoing reasons, the Court dismisses *sua sponte* the Amended Complaint, without prejudice to amend within thirty (30) days from the date of this order.

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 an appeal. See *Coppedge v. United States*, 369 U.S. 438, 444-45 (1962).

SO ORDERED.

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2025 WL 3239753

2025 WL 3239753

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RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

United States Court of Appeals, Second Circuit.

Sam Albert METELLUS, Plaintiff-Appellant,

v.

Anne-Marie JOLLY, dba Anne-Marie Jolly,

Katerina Contaratos, Gilbert Taylor, all

Successors and Assigns, Defendants-Appellees.

24-2546

|

November 20, 2025

Appeal from a judgment of the United States District Court for the Eastern District of New York (*Gujarati, J.*; Bloom, *M.J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Attorneys and Law Firms

FOR PLAINTIFF-APPELLANT: Sam Albert Metellus, pro se, Saint Albans, NY.

FOR DEFENDANTS-APPELLEES: [David Lawrence III](#), Assistant Solicitor General, ([Barbara D. Underwood](#), Solicitor General, [Ester Murdukhayeva](#), Deputy Solicitor General, on the brief), for Letitia James, Attorney General for the State of New York, New York, NY.

PRESENT: [DEBRA ANN LIVINGSTON](#), Chief Judge, [REENA RAGGI](#), [MICHAEL H. PARK](#), Circuit Judges.

SUMMARY ORDER

*1 Sam Albert Metellus, proceeding *pro se*, appeals from the district court's judgment *sua sponte* dismissing his trademark infringement action. Metellus sued Queens County Family Court judges and a support magistrate, alleging that they violated federal trademark law by using his trademark "SAM ALBERT METELLUS" in court filings and orders without permission. A magistrate judge recommended *sua sponte* dismissing the action as frivolous, or alternatively, for lack of subject matter jurisdiction. *Metellus v. Jolly*, No. 23-cv-6147, 2024 WL 4250315 (E.D.N.Y. Aug. 5, 2024). The district court adopted the recommendation to dismiss for lack of subject matter jurisdiction and *sua sponte* dismissed the action without prejudice. The district court also confirmed that even if it had jurisdiction, the court would dismiss the action for the additional reasons in the recommendation. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

We review *de novo* the *sua sponte* dismissal of a complaint for lack of subject matter jurisdiction, *see Digitel, Inc. v. MCI Worldcom, Inc.*, 239 F.3d 187, 190 (2d Cir. 2001), and failure to state a claim. *See Fed. Defs. of New York, Inc. v. Fed. Bureau of Prisons*, 954 F.3d 118, 125 (2d Cir. 2020). "[D]istrict courts may dismiss a frivolous complaint *sua sponte* even when the plaintiff has paid the required filing fee." *Fitzgerald v. First E. Seventh St. Tenants Corp.*, 221 F.3d 362, 364 (2d Cir. 2000) (*per curiam*). However, this Court has not yet decided whether such dismissals are reviewed *de novo* or for abuse of discretion. *Id.* at 364 n.2. Because Metellus "has been *pro se* throughout, his pleadings and other filings are interpreted to raise the strongest claims they suggest." *See Sharikov v. Philips Med. Sys. MR, Inc.*, 103 F.4th 159, 166 (2d Cir. 2024).

The district court erred in concluding that it lacked subject matter jurisdiction, but even under *de novo* review, we agree with the district court that Metellus's complaint was frivolous and failed to state a claim.¹

*2 The court concluded that it lacked subject matter jurisdiction because Metellus did not allege that he had any federally registered trademark or copyrights that would be protected by federal laws. However, the question of whether Metellus's infringement claims were based on a state or federal trademark more appropriately went to whether

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Metellus stated a claim rather than the court's jurisdiction. See *Dieujuste v. Sin*, 125 F.4th 397, 399–400 (2d Cir. 2025) (discussing similar trademark infringement claim on the merits, including that the plaintiff had only alleged registration of the mark with the State, not the USPTO); see generally *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 511 (2006) (discussing the “the subject-matter jurisdiction/ingredient-of-claim-for-relief dichotomy”).

Metellus's complaint should nonetheless be dismissed because it was frivolous and failed to state a claim for relief.

Metellus's claims for damages are frivolous because it is clear on the face of the complaint that his claims are barred by absolute judicial immunity and the Eleventh Amendment. Cf. *Livingston v. Adirondack Beverage Co.*, 141 F.3d 434, 437 (2d Cir. 1998) (explaining that, in the context of an *in forma pauperis* complaint, a claim is frivolous when it “lacks an arguable basis in law” or “a dispositive defense clearly exists on the face of the complaint”). “It is well settled that judges generally have absolute immunity from suits for money damages for their judicial actions.” *Bliven v. Hunt*, 579 F.3d 204, 209 (2d Cir. 2009). Here, Metellus sued family court judges and a support magistrate for their judicial actions in child support proceedings against Metellus. The defendants are therefore entitled to absolute immunity from Metellus's claims for damages.

As the court further reasoned, Metellus's claims for damages against the defendants in their official capacities are barred by the Eleventh Amendment. “The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court.” *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001). “Congress may abrogate the States’ Eleventh Amendment immunity

when it both unequivocally intends to do so and acts pursuant to a valid grant of constitutional authority.” *Id.* (alterations accepted) (internal quotation marks and citation omitted). As relevant here, the Lanham Act did not abrogate New York's immunity. See *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 691 (1999).

We also agree with the district court that Metellus failed to state a claim for declaratory or injunctive relief. Metellus sought injunctions and declarations related to the defendants’ alleged infringement of his trademarked name. To prevail on a claim for trademark infringement under the Lanham Act, “a plaintiff must establish that (1) [he] has a valid mark that is entitled to protection under the Lanham Act; and that (2) the defendant used the mark, (3) in commerce, (4) in connection with the sale ... or advertising of goods or services, (5) without the plaintiff’s consent.” *1-800 Contacts, Inc. v. WhenU.Com, Inc.*, 414 F.3d 400, 406–07 (2d Cir. 2005) (internal quotation marks and citations omitted). Here, Metellus did not plausibly allege that the defendants “used his claimed mark in commerce.” *Dieujuste*, 125 F.4th at 400 (internal quotation marks omitted). Moreover, to the extent that Metellus's complaint alleges copyright infringement, he failed to state a claim because “federal copyright law protects ‘original works of authorship fixed in any tangible medium of expression,’ not facts such as one's name.” *Id.* at 399 (quoting 17 U.S.C. § 102(a)).

*3 We have considered all of Metellus's arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

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Footnotes

- 1 Metellus failed to object to the magistrate judge's report and recommendation. However, the docket reflected that the report and recommendation was returned to the district court as undeliverable to Metellus's address. Metellus asserted that, as a result, he never received the opportunity to object. We therefore decline to conclude that he waived further judicial review by failing to object. See *Small v. Sec'y of Health & Human Servs.*, 892 F.2d 15, 16 (2d Cir. 1989) (describing notice requirements for *pro se* litigants); see also *Miller v. Brightstar Asia, Ltd.*, 43 F.4th 112, 121 (2d Cir. 2022) (explaining that waiver rule is non-jurisdictional and may be excused in the interest of justice). Given the notice issue, the district court likely erred in reviewing the report and recommendation for clear error. However, *de novo* review reflects that *sua sponte* dismissal

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of the action was warranted. Accordingly, the district court's failure to conduct *de novo* review of the report and recommendation was harmless. See [Nambiar v. C. Orthopedic Grp.](#), — F.4th —, 2025 WL 3007285, at *1 (2d. Cir. 2025).

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2023 WL 382950

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Only the Westlaw citation is currently available.
United States Court of Appeals, Second Circuit.

Ikemefuna Stephen NWOYE, Plaintiff-Appellant,
v.

Barack Hussein OBAMA, Former President of the United States of America/Senior Citizen, Michelle LaVaughn Robinson Obama, Former First Lady of the United States of America/Senior Citizen, Defendants-Appellees.

22-1253

January 25, 2023

Appeal from a judgment of the United States District Court for the Southern District of New York (*Caproni, J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is **VACATED** and the case is **REMANDED** for further proceedings consistent with this order.

Attorneys and Law Firms

FOR PLAINTIFF-APPELLANT: Ikemefuna Stephen Nwoye, pro se, Philadelphia, PA.

FOR DEFENDANTS-APPELLEES: No appearance.

PRESENT: GUIDO CALABRESI, MYRNA PÉREZ, ALISON J. NATHAN, Circuit Judges.

SUMMARY ORDER

*1 Appellant Ikemefuna Stephen Nwoye, who is proceeding *pro se*, sued Barack and Michelle Obama for breach of contract, quantum meruit, and unjust enrichment. Nwoye's complaint alleged that by discussing two programs (the 2015 Global Entrepreneurship Summit and Power Africa Initiative) with a partner at Sidley Austin LLP, he entered into an implied consultancy contract with the Obamas, and he was never compensated under the contract. He also alleged that the Obamas were unjustly enriched by his work in Sidley Austin's Africa-Asia Agricultural Enterprise Pro Bono Program. Without providing prior notice or warning, the district court dismissed the complaint *sua sponte*, reasoning that the Obamas were likely absolutely immune from suit. The

district court also concluded that even if absolute immunity did not apply to Michelle Obama, Nwoye failed to state a claim against her because he did not establish a link between his claims and her conduct.

We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal, which we discuss only as necessary to explain our decision.

I. Recusal

As a threshold matter, Nwoye argues that the district court judge should have recused herself because she was appointed by President Obama.

This Court has rejected the claim that “a judge is not impartial solely because an attorney is embroiled in a controversy with the administration that appointed the judge.” *MacDraw, Inc. v. CIT Grp. Equip. Fin., Inc.*, 138 F.3d 33, 38 (2d Cir. 1998). “Judges generally have political backgrounds to one degree or another but must be presumed, absent more, to be impartial.” *Id.* “Neither 28 U.S.C. § 455(a) nor Canon 2A of the Code of Conduct for United States Judges requires recusal,” because a judge hearing a case involving the conduct of the president who appointed them does not “create in reasonable minds” a perception of partiality in the judiciary. *In re Exec. Off. of the President*, 215 F.3d 25, 25–26 (D.C. Cir. 2000) (published single-judge order).

The district court judge need not have recused herself because she was appointed by President Obama. *See id.* (explaining that judge's lifetime appointment and duty to impartially discharge duties dispelled any doubt that judge was partial to appointing president). Moreover, the record does not reflect any actions by the district court that would warrant recusal. The fact that the district court dismissed Nwoye's complaint is not evidence of bias. *See Liteky v. United States*, 510 U.S. 540, 555, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994) (holding that an adverse ruling is “almost never” evidence of bias).

II. Notice and an Opportunity to Be Heard

Although a court may *sua sponte* dismiss a complaint as frivolous or for failure to state a claim, it generally should not do so without providing notice and an opportunity to be heard. *See Wachtler v. Cnty. of Herkimer*, 35 F.3d 77, 82 (2d Cir. 1994); *Catzin v. Thank You & Good Luck Corp.*, 899 F.3d 77, 82 (2d Cir. 2018); *Ethridge v. Bell*, 49 F.4th 674, 682 (2d Cir. 2022). We have recognized narrow exceptions to this rule “in cases involving frivolous *in forma pauperis*

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complaints ... or frivolous habeas petitions,” *Perez v. Ortiz*, 849 F.2d 793, 797 (2d Cir. 1988) (citation omitted), or “in the context of *sua sponte* dismissals without notice for lack of subject matter jurisdiction,” *Catzin*, 899 F.3d at 82. But even then, it must be “unmistakably clear that the court lacks jurisdiction, or that the complaint lacks merit or is otherwise defective.” *Snider v. Melindez*, 199 F.3d 108, 113 (2d Cir. 1999). “A hasty dismissal without notice can backfire by leading to appeals and remands in cases where, had notice been provided, we otherwise might affirm.” *Moroshkin v. Dietsche*, No. 22-487-cv, 2022 WL 16570779 at *1, 2022 U.S. App. LEXIS 30262 at *2 (2d Cir. Nov. 1, 2022) (cleaned up). The issuance, for example, of an order to show cause why a complaint should not be dismissed *sua sponte* for a stated reason, will typically suffice to provide notice and an opportunity to be heard. *See, e.g., Catzin*, 899 F.3d at 83 (“Hearing from the parties either in person or on the papers ... goes a long way towards reasoned decisionmaking

and enhances the fairness of the proceedings.”); *Andrews v. Hall*, No. 22-1298, 2023 WL 309609 at *1, 2023 U.S. App. LEXIS 1262 at *2 (2d Cir. Jan. 19, 2023) (“[T]he district court satisfied this requirement by warning [plaintiff] that his claims were vulnerable to dismissal on [a stated] basis ... and inviting his response.”).

*2 Following these cases, we conclude that the district court should have given Nwoye notice and an opportunity to be heard before dismissing his complaint.

For the foregoing reasons, we **VACATE** the judgment of the district court and **REMAND** for further proceedings consistent with this order.

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2022 WL 6832280

2022 WL 6832280

Only the Westlaw citation is currently available.
United States Court of Appeals, Second Circuit.

Andres C. BRYAN, Plaintiff-Appellant,
v.
FLEETBANK N.A., Department of Finance,
Tampa, Florida, Defendants-Appellees.

21-2143

I

October 12, 2022

Appeal from a judgment of the United States District Court for the Eastern District of New York ([Donnelly, J.](#)).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Attorneys and Law Firms

FOR PLAINTIFF-APPELLANT: Andres C. Bryan, pro se, Brooklyn, NY.

FOR DEFENDANTS-APPELLEES: No appearance.

PRESENT: [JON O. NEWMAN](#), [JOHN M. WALKER, JR.](#), [EUNICE C. LEE](#), Circuit Judges.

SUMMARY ORDER

*1 Appellant Andres Bryan, proceeding pro se, appeals the district court's judgment dismissing his complaint *sua sponte* as frivolous. Bryan alleged that he had won \$11 million from American Family Publishers ("AFP") in 1998 and had not been paid, and he sought payment of those winnings. We assume the parties' familiarity with the underlying facts, the procedural history, and the issues on appeal.

District courts have inherent authority to "dismiss a frivolous complaint *sua sponte* even when the plaintiff has paid the required filing fee." [Fitzgerald v. First East Seventh Street Tenants Corp.](#), 221 F.3d 362, 364 (2d Cir. 2000). We have not yet decided whether such dismissals are reviewed de novo or for abuse of discretion, but it is not necessary to decide that issue if, as here, "the District Court's decision easily passes muster under the more rigorous *de novo* review." *Id.* at 364 n.2.

An action is frivolous if it lacks an arguable basis in law or fact—that is, where it is "based on an indisputably meritless legal theory" or presents "factual contentions [that] are clearly baseless." [Neitzke v. Williams](#), 490 U.S. 319, 327 (1989); see also [Gallop v. Cheney](#), 642 F.3d 364, 368 (2d Cir. 2011). A complaint must plead sufficient 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 complaint is "deemed to include any written instrument attached to it as an exhibit." [L-7 Designs, Inc. v. Old Navy, LLC](#), 647 F.3d 419, 422 (2d Cir. 2011) (internal quotation marks omitted). Factual allegations in the complaint are generally assumed to be true, [Ashcroft v. Iqbal](#), 556 U.S. 662, 678 (2009), and pro se filings "must be construed liberally and interpreted to raise the strongest arguments that they suggest," [Triestman v. Fed. Bureau of Prisons](#), 470 F.3d 471, 474 (2d Cir. 2006) (per curiam) (internal quotation marks and emphasis omitted).

We agree with the district court that the principal allegation underlying Bryan's claim—that he won AFP's \$11 million prize—is contradicted by the mailings attached to the complaint, which show that the prize was conditioned on the number assigned to Bryan in the mailings matching a "secretly preselected winning number." Although Bryan alleged that he was informed that he was the "winner" and that he had the "winning number," he appears to be referring only to those mailings, and he does not allege that his number also matched the "secretly preselected winning number." Although, as noted above, factual allegations are generally assumed to be true, the court was not required to credit allegations that were "contradicted by ... documentary evidence" attached to the complaint. [L-7 Designs](#), 647 F.3d at 422; see [Blue Tree Hotels Inv. \(Canada\), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc.](#), 369 F.3d 212, 222 (2d Cir. 2004) (declining to draw inference "belied" by letters attached to the complaint).

Nor could it be inferred from this complaint, given the conditional language in the attached mailings, that Bryan reasonably believed that he had won. *Cf.* [Sharpe v. Am. Fam. Publishers](#), 25 F.3d 1040, 1994 WL 224180 (4th Cir. 1994) (unpublished disposition) (even assuming AFP mailer's envelope falsely represented that the addressee had won a contest, plaintiffs could not have reasonably relied on that misrepresentation where the enclosed documents "explained that the addressee had to return the entry card to discover whether she had won the contest"). Bryan also alleged that he had a conversation with Dick Clark, but Clark's alleged

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statements—that “he’s the one” and “the lady will take care of you”—were vague, and do not reflect a promise to Bryan.

*2 In any event, even if Bryan had plausibly alleged the existence of an agreement to pay him \$11 million and other necessary elements of a breach-of-contract claim, and regardless of whether New York or Florida law applied, such a claim would be time-barred. See *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 114 (2d Cir. 2005) (“[W]e may affirm on any ground supported by the record.” (internal quotation marks omitted)); see also *Pino v. Ryan*, 49 F.3d 51, 53–54 (2d Cir. 1995) (holding that a court may dismiss a complaint *sua sponte* as time-barred if that defense is clear from the face of the complaint). The events in question occurred in 1998. The statute of limitations on a New York contract claim is six

years; in Florida, it is five years. See N.Y. C.P.L.R. § 213(2); Fla. Stat. § 95.11(2)(b). The statute of limitations would be the same or even shorter if the complaint were construed to raise a fraud claim. See N.Y. C.P.L.R. § 213(8) (six years); Fla. Stat. § 95.11(3)(j) (four years). Accordingly, at the latest, Bryan would have had to file his complaint in 2004, and his 2021 complaint was untimely by many years.

We have considered Bryan’s remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

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2025 WL 2607661

2025 WL 2607661

Only the Westlaw citation is currently available.
United States District Court, N.D. New York.

Robert HOTALING, Plaintiff,
v.

Daniel MARTUSCELLO, Kelly Ahearn, Defendants.

1:24-cv-01216 (AMN/PJE)

Signed September 9, 2025

Attorneys and Law Firms

ROBERT HOTALING, 61 Hurst Ave., Albany, New York 12208, Plaintiff, pro se.

MARK J. DOLAN, ESQ., Assistant Attorney General, HON. LETITIA JAMES, New York State Attorney General, The Capitol, Albany, New York 12224, Attorneys for Defendants.

MEMORANDUM-DECISION AND ORDER

Anne M. Nardacci, United States District Judge:

I. INTRODUCTION

*1 On October 3, 2024, *pro se* Plaintiff Robert Hotaling commenced this action against Daniel Martuscello, Commissioner of the New York State Department of Corrections and Community Supervision (“DOCCS”), and Kelly Ahearn,¹ DOCCS Director of Personnel (collectively, “Defendants”), pursuant to 42 U.S.C. § 1983, alleging that they wrongfully withheld Plaintiff’s “mandatory retirement package” with no explanation after Plaintiff voluntarily retired from employment with DOCCS amid an ongoing disciplinary investigation. *See generally* Dkt. No. 1 (“Complaint”). On January 3, 2025, Defendants moved to dismiss the Complaint pursuant to Fed. R. Civ. P. 8 and Fed. R. Civ. P. 12(b)(6). *See* Dkt. No. 13 (“Motion”). On January 26, 2025, Plaintiff filed a response in opposition to the Motion, *see* Dkt. No. 19, and on February 11, 2025, Defendants filed a reply in further support of the Motion, *see* Dkt. No. 20. Accordingly, the Motion is now ripe for adjudication.

For the reasons that follow, the Motion is granted, and the Complaint is dismissed without prejudice.

II. BACKGROUND

Unless otherwise noted, the following facts are drawn from the Complaint, its attachments, or materials it incorporates by reference, and Plaintiff’s opposition to Defendants’ motion to dismiss. *See Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002) (On a motion to dismiss, “the complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference” (citation omitted)); *see also Walker v. Schult*, 717 F.3d 119, 122 n.1 (2d Cir. 2013) (“A district court deciding a motion to dismiss may consider factual allegations made by a *pro se* party in his papers opposing the motion.”); *Sommersett v. City of N.Y.*, No. 09-CIV-5916, 2011 WL 2565301, at *3 (S.D.N.Y. June 28, 2011) (“[W]here a *pro se* plaintiff has submitted other papers to the Court, such as legal memoranda, the Court may consider statements in such papers to supplement or clarify the plaintiff’s pleaded allegations.” (citation omitted)). The allegations are assumed to be true for purposes of ruling on the Motion, *see Div. 1181 Amalgamated Transit Union-N.Y. Emps. Pension Fund v. N.Y.C. Dep’t of Educ.*, 9 F.4th 91, 94 (2d Cir. 2021) (*per curiam*), or are otherwise matters of public record, *Williams v. N.Y.C. Hous. Auth.*, 816 Fed. Appx. 532, 534 (2d Cir. 2020).

A. The Complaint

Plaintiff alleges that, on September 27, 2021, he was placed on administrative leave from his position as a Lieutenant at Cossackie Correctional Facility and barred from carrying a firearm without explanation. *See* Dkt. No. 1 at 5, 6.² Soon thereafter, on October 12, 2021, Plaintiff attended a “Q&A session” at DOCCS’s Albany Training Academy, which was conducted by the New York Governor’s Office of Employee Relations (“GOER”) and DOCCS’s Office of Special Investigation (“OSI”), wherein Plaintiff learned that a female civilian at Cossackie Correctional Facility had accused him of sexual harassment. *Id.* Plaintiff claims to have answered all questions that were posed to him during the Q&A session and informed the representatives from GOER and OSI that the allegations were “a big misunderstanding” because Plaintiff is gay. *Id.* In response, a representative from GOER asked if Plaintiff was bisexual “and not totally gay,” to which Plaintiff responded in the negative. *Id.* The following day, instead of formally disputing the allegations made by the female civilian, Plaintiff submitted retirement paperwork to the New York State Retirement System “because [he] could not believe this allegation was being entertained, based on [his] openly gay status among [his] colleagues.” *Id.*

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*2 On October 28, 2021, Plaintiff received an email from Coxsackie Correctional Facility employee Katrina Miller informing him that he would need to go to DOCCS Central Office to obtain his “retirement I.D. and badge.” *Id.* However, on November 8, 2021, Ms. Miller emailed Plaintiff again, this time to inform him that Defendant Ahearn had denied Plaintiff’s request for a “retirement package” and that Plaintiff would “not be receiving a letter, certificate, or a retirement badge and ID.” *Id.* Plaintiff notified Defendant Martuscello when he learned that he was not going to receive his retirement package, at which point Defendant Martuscello informed Plaintiff that he would investigate the issue. *Id.* at 6. On October 21, 2023, Defendant Martuscello notified Plaintiff that, following a review of the matter, he would be “upholding the original determination” to withhold Plaintiff’s retirement package and did not provide Plaintiff with any explanation as to why. *Id.*

Plaintiff asserts that it is customary for a retired employee to receive a retirement identification, as well as a “certificate of service,” and that the failure to provide Plaintiff with this “retirement package” violates the Law Enforcement Officers Safety Act (“LEOSA”). *Id.* at 5.³ Plaintiff further states that, had he known that DOCCS was going to withhold his retirement package, he would not have retired and would have instead contested the sexual harassment allegations. *Id.* 6. He takes issue with the process by which the allegations were handled, asserting that it “has been abused by Labor Relations and [DOCCS], in affording guilt before innocence.” *Id.* Plaintiff surmises that the reason that his retirement materials were withheld is because he is gay, given that he knows of other individuals who were disciplined by DOCCS and were still issued their retirement materials, and given Plaintiff’s alleged “record of excelling ... as witnessed by [his] promotion to Lieutenant as well as an outstanding offer of Captain.” *Id.*

Plaintiff seeks the immediate issuance of his retirement package and credentials pursuant to LEOSA, and requests “some sort of answer or investigation related to the way this incident took place.” *Id.* at 4, 6.

B. The Motion

Defendants move to dismiss the Complaint on several grounds. First, Defendants argue that the Complaint violates *Fed. R. Civ. P. 8* because it fails to identify any causes of action brought against Defendants and contains only “a conclusory summary of events that does not set forth a

coherent claim based on an alleged violation of” *42 U.S.C. § 1983*. Dkt. No. 13-7 at 8. Second, Defendants contend that the Complaint should be dismissed pursuant to *Fed. R. Civ. P. 12(b)(6)* because LEOSA does not provide for a private right of action. *Id.* at 9-11. Third, Defendants argue in the alternative that, even if the Court found that a private right of action exists under LEOSA, Plaintiff fails to state a claim because the statute affords states the right to establish their own standards for the certification of qualified retired law enforcement officers and that, under DOCCS’s standards, Plaintiff does not qualify for such a status since, at the time of his retirement, he was on administrative leave while under investigation regarding allegations that were subsequently substantiated. *Id.* at 11-15. Finally, Defendants seek dismissal of the Complaint on the grounds that LEOSA does not compel Defendants to issue retirement packages and that such a decision is left to DOCCS’s discretion. *Id.* at 14-15.

In opposition, Plaintiff states that he was never notified that the allegations made against him prior to his retirement were substantiated and that he was never afforded the opportunity “to depose anyone, witnesses or complainant, myself or by an attorney.” Dkt. No. 19 at 1. Moreover, Plaintiff contends that he meets all the criteria set forth in the relevant DOCCS directives to qualify for a retirement package, and that “being on weapons prohibition or administrative leave is not a reason for denial of a retirement ID or badge per DOCCS[’s] own manual procedure.” *Id.* at 2. Plaintiff also states that “similarly situated employees” were provided with a retirement package while undergoing disciplinary “situations.” *Id.*

III. STANDARD OF REVIEW

*3 To survive a motion to dismiss, a party need only plead “a short and plain statement of the claim,” *Fed. R. Civ. P. 8(a)(2)*, with sufficient factual “heft to sho[w] that the pleader is entitled to relief,” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007) (alteration in original) (quotation omitted). Under this standard, a pleading’s “[f]actual allegations must be enough to raise a right to relief above the speculative level,” *id.* at 555 (citation omitted), and present claims that are “plausible on [their] face,” *id.* at 570. “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 556 U.S. at 678 (citation omitted). “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of ‘entitlement to relief.’ ” *Id.* (quoting *Twombly*, 550 U.S. at 557). Ultimately, “when the allegations in a complaint, however true, could not raise a

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claim of entitlement to relief,” *Twombly*, 550 U.S. at 558, or where a plaintiff has “not nudged [his or her] claims across the line from conceivable to plausible, [the] complaint must be dismissed,” *id.* at 570.

A motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) tests the legal sufficiency of a party's claim for relief. See *Patane v. Clark*, 508 F.3d 106, 111-12 (2d Cir. 2007). In considering legal sufficiency, a court must accept as true all well-pled facts in the complaint and draw all reasonable inferences in the pleader's favor. See *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007). This presumption, however, does not extend to legal conclusions. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Although a court's review of a motion to dismiss is generally limited to the facts presented in the pleadings, the court may consider documents that are “integral” to the pleadings even if they are neither physically attached to, nor incorporated by reference into, the pleadings. See *Mangiafico v. Blumenthal*, 471 F.3d 391, 398 (2d Cir. 2006) (quoting *Chambers*, 282 F.3d at 152-53).

“[I]n a *pro se* case ... the court must view the submissions by a more lenient standard than that accorded to ‘formal pleadings drafted by lawyers.’ ” *Govan v. Campbell*, 289 F. Supp. 2d 289, 295 (N.D.N.Y. 2003) (quoting, *inter alia*, *Haines v. Kerner*, 404 U.S. 519, 520 (1972)). The Second Circuit has held that courts are obligated to “ ‘make reasonable allowances to protect *pro se* litigants’ ” from inadvertently forfeiting legal rights merely because they lack a legal education. *Id.* (quoting *Traguth v. Zuck*, 710 F.2d 90, 95 (2d Cir. 1983)).

IV. DISCUSSION

A. Fed. R. Civ. P. 8

The Court first addresses Defendants’ argument that the Complaint should be dismissed pursuant to Fed. R. Civ. P. 8.

Rule 8 requires that a pleading contain, *inter alia*, “a short and plain statement of the claim showing that the pleader is entitled to relief ...” Fed. R. Civ. P. 8(a)(2). “The purpose of [Rule 8] is to give fair notice of the claim being asserted so as to permit the adverse party the opportunity to file a responsive answer, prepare an adequate defense and determine whether the doctrine of *res judicata* is applicable.” *Flores v. Graphitex*, 189 F.R.D. 54, 55 (N.D.N.Y. 1999) (internal quotations and citations omitted). “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) (quoting *Twombly*, 550 U.S. at 570). The statement of the claim must do more than present “an unadorned, the-defendant-harmed-me accusation.” *Id.* “Dismissal, however, is usually reserved for those cases in which the complaint is so confused, ambiguous, vague, or otherwise unintelligible that its true substance, if any, is well disguised.” *Laspisa v. Citifinancial Does 1 to 20*, 269 F. Supp. 3d 11, 13-14 (N.D.N.Y. 2017) (quoting *Hudson v. Artuz*, No. 95-CIV-4768, 1998 WL 832708, at *2 (S.D.N.Y. Nov. 30, 1998)).

*4 Plaintiff brings this action pursuant to 42 U.S.C. § 1983, which establishes a cause of action for “the deprivation of any rights, privileges, or immunities secured by the Constitution and laws of the United States.” *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 508 (1990), *abrogated on other grounds*, 145 S.Ct. 2219 (2025) (internal quotations and citations omitted). While Defendants take issue with the fact that Plaintiff used a pre-printed form complaint and only outlined his allegations in an attached affidavit, the Second Circuit has made clear that dismissal based on a “complaint's deviation from the relevant formatting rules” is inappropriate. *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 192 (2d Cir. 2008). The fact that Plaintiff chose to summarize his case in an affidavit, rather than filling out the delineated sections in the form complaint, is not a proper basis for dismissal.

The Court similarly finds unpersuasive Defendants’ argument that the Complaint “fails to describe the alleged causes of action being asserted against individual defendant and merely contains a conclusory summary of events.” Dkt. No. 13-7 at 8. Viewing the allegations in the light most favorable to Plaintiff, the Complaint and accompanying affidavit explicitly refer to Defendants’ purported violation of LEOSA. For example, Plaintiff asserts that Defendants’ withholding of Plaintiff's retirement package infringed on Plaintiff's rights guaranteed under that statute. See, e.g., Dkt. No. 1 at 5 (“failure to provide me with this retirement package is a violation of federal law [] [p]ursuant to the Law Enforcement Officers Safety Act (LEOSA)”). Additionally, Plaintiff's prayer for relief seeks the issuance of his retirement package “as is clearly stated in the Law Enforcement Officers Safety Act.” *Id.* at 4. The pleading provides dates, locations, and the individuals involved in the purported LEOSA violation, including the role that Defendants allegedly played. See, e.g., *id.* at 5 (noting that, on November 8, 2021, Plaintiff was informed that Defendant Ahearn denied his request for a retirement package). Thus, the allegations are sufficient

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to give Defendants’ fair notice that Plaintiff brings a claim against them pursuant to [Section 1983](#) seeking to vindicate an alleged violation of his rights under LEOSA. *See Simmons v. Abruzzo*, 49 F.3d 83, 87 (2d Cir. 1995) (reversing dismissal of a claim where the complaint gave a timeframe, location, and description of the alleged violations).

Accordingly, the Court declines to dismiss the Complaint pursuant to [Rule 8](#).

B. Fed. R. Civ. P. 12(b)(6)

The Court reaches a different conclusion, however, with respect to whether the Complaint should be dismissed pursuant to [Rule 12\(b\)\(6\)](#).

LEOSA states:

(a) Notwithstanding any other provision of the law of any State or any political subdivision thereof, an individual who is a qualified retired law enforcement officer and who is carrying the identification required by subsection (d) may carry a concealed firearm that has been shipped or transported in interstate or foreign commerce, subject to subsection (b).

[18 U.S.C. § 926C](#). Said otherwise, LEOSA permits qualified retired law enforcement officers with proper identification to carry concealed firearms across state lines. The purpose of the statute is “to protect officers and their families from vindictive criminals, and to allow thousands of equipped trained and certified law enforcement officers, whether on-duty, off-duty or retired, to carry concealed firearms in situations where they can respond immediately to a crime across state and other jurisdictional lines.” *S. Rep. No. 108-29, at 4 (2003), available at 2003 WL 1609540*. LEOSA achieves this purpose by establishing “a mechanism by which law enforcement officers may travel interstate with a firearm.” *Id.* An individual is considered a “qualified retired law enforcement officer” if they (1) separated in good standing after at least ten years as a law enforcement officer; (2) met the standards for qualification in firearms training set forth by their former agency; (3) were not under the influence of drugs or alcohol; (4) were not prohibited by federal law from

owning a firearm; and (4) were not found to be unqualified by a medical professional for reasons related to mental health. *See 18 U.S.C. § 926C(c)*. As to identification, LEOSA allows separated officers to satisfy the identification requirement in one of two ways. Relevant here, under [§ 926C\(d\)\(2\)](#), a former officer can use a photographic identification issued by the agency that identifies him or her as a former officer and a certifies their requisite firearms qualifications.

*5 Plaintiff alleges that Defendants’ failure to provide him with a retirement package, including particularly the identification contemplated in subsection (d) of LEOSA to receive concealed firearm protections, violates his rights under the statute. *See* Dkt. No. 1 at 5. However, as Defendants point out, courts within the Second Circuit have historically held that there is no private cause of action under LEOSA to compel the issuance of a LEOSA identification. *See Johnson v. N.Y. State Dep’t of Corr. Servs.*, 709 F. Supp. 2d 178, 186 (N.D.N.Y. 2010); *see also Ramirez v. Port Auth. of N.Y. & N.J. (PANYNJ)*, No. 15-CV-3225, 2015 WL 9463185, at *6 (S.D.N.Y. Dec. 28, 2015) (“Congress did not intend to make [LEOSA’s] violation actionable under [§ 1983](#).”). This is because LEOSA has been interpreted to “leave the standards and procedures for issuing the required photographic identification ... to the states.” *D’Aureli v. Harvey*, No. 1:17-cv-363, 2018 WL 704733, at *4 (N.D.N.Y. Feb. 2, 2018) (citation omitted); *see also Carey v. Throwe*, 957 F.3d 468, 480 (4th Cir. 2020) (“LEOSA contains no language—none—obligating states to issue any identification at all. In fact, the plain text of LEOSA conveys the exact opposite, committing entirely to the discretion of the states the decision of *whether* to issue identification and, should they choose to do so, *what* they may require of individuals seeking such a credential.”) (emphasis in original). Therefore, in this case, as DOCCS is the agency of New York State tasked with making Plaintiff’s retirement determinations, the decision not to grant Plaintiff a LEOSA identification upon his retirement was within DOCCS’s discretion as outlined in the relevant DOCCS Directives. *See Johnson*, 709 F. Supp. 2d at 185 (“Congress’s decision to allow the states to establish their own firearm permit standards and to issue their own concealed firearm certifications is directly at odds with plaintiffs’ argument that Congress implicitly intended to create a private cause of action by which retired law enforcement officers could compel state agencies to issue the identification required under LEOSA.”); *see also* Dkt. No. 13-2 (describing DOCCS guidelines for issuing retirement packages).⁴ As Plaintiff cannot assert a private right of

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action under LEOSA to compel the issuance of a LEOSA identification, his [Section 1983](#) claim is dismissed.⁵

V. CONCLUSION

Accordingly, the Court hereby

ORDERS that Defendants' motion to dismiss, Dkt. No. 13, is **GRANTED**; and the Court further

ORDERS that the Complaint, Dkt. No. 1, is **DISMISSED without prejudice**; and the Court further

ORDERS that the Clerk serve a copy of this Memorandum-Decision and Order on the Parties in accordance with the Local Rules.⁶

IT IS SO ORDERED.

All Citations

Slip Copy, 2025 WL 2607661

Footnotes

- 1 While the Complaint names "Kelly Ahern," Defendants acknowledge and the Court's independent review confirms that the correct spelling of this Defendant's name is "Kelly Ahearn." The Clerk of the Court is directed to modify the case caption accordingly.
- 2 Citations to docket entries utilize the pagination generated by CM/ECF, the Court's electronic filing system, and not the documents' internal pagination.
- 3 Since Plaintiff seeks the issuance of his "retirement materials and credentials as is clearly stated in Law Enforcement Officers Safety Act ("LEOSA")," Dkt. No. 1 at 4, the Court infers that the Complaint concerns the photographic identification contemplated by subsection (d) of LEOSA, which allows qualified retired law enforcement officers to carry concealed weapons across state lines. See [18 U.S.C. § 926C\(d\)](#).
- 4 To the extent that Plaintiff seeks the issuance of retirement materials other than the identification contemplated by subsection (d) of LEOSA, the Court is unaware of, and Plaintiff does not cite to, authority establishing that LEOSA can be used as a mechanism to recover those materials.
- 5 Notwithstanding the fact that any amended Complaint brought pursuant to LEOSA would be futile, considering Plaintiff's *pro se* status, and the Complaint's vague references to potential constitutional violations, the Court chooses to exercise its discretion and dismiss the Complaint without prejudice. See, e.g., [Lightner v. Wenderlich](#), 271 F. Supp. 3d 445, 457 (W.D.N.Y. 2017) ("Pursuant to the policy of providing *pro se* litigants with 'every opportunity' to put forth a valid claim, ... causes of action 20 and 23 are dismissed, although the Court exercises its discretion and the claims are dismissed without prejudice.").
- 6 The Clerk shall also provide Plaintiff with copies of all unreported decisions herein.

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For Online Publication Only

United States District Court, E.D. New York.

Terence C. POWELL, Plaintiff,

v.

LAB CORPORATION, Mr. & Mrs. Kevin

Napier, New York State Unified Court System,

National Grid, and [IBEW Local 1049](#), Defendants.

17-CV-3632 (JMA)(GRB)

|

Signed 12/27/2018

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MEMORANDUM AND ORDER

[Joan M. Azrack](#), United States District Judge

*1 Plaintiff Terence C. Powell (“plaintiff”), acting pro se, commenced this action on June 16, 2017 against Lab Corporation¹ (“LabCorp”), Mr. Kevin Napier (“Kevin Napier”), Mrs. Inez Napier (“Inez Napier”), the New York State Unified Court System (“NYSUCS”), National Grid and IBEW Local 1049 (the “Union”), (collectively, “defendants”). Specifically, construing plaintiff’s complaint liberally, plaintiff brings claims against all defendants

pursuant to [42 U.S.C. § 1983](#) (“Section 1983”) alleging violations of his federal civil rights under the Fourth, Sixth and Fourteenth Amendments of the United States Constitution. Plaintiff also alleges conspiracy, and violations of Title VII of the Civil Rights Act of 1964 (“Title VII”), and the Genetic Information Nondiscrimination Act of 2008 (“GINA”). (Compl. at 4-8, ECF No. 1.)² Additionally, plaintiff alleges state law claims for “paternity fraud,” harassment, false arrest, malicious prosecution, defamation and intentional infliction of emotional distress. (*Id.* at 9-10.) Before the Court are motions to dismiss filed by LabCorp, Kevin Napier and Inez Napier (together, “the Napiers”), the NYSUCS, and National Grid pursuant to [Rules 12\(b\)\(1\) and 12\(b\)\(6\) of the Federal Rules of Civil Procedure](#). For the reasons discussed below, the Court grants defendants’ motions.

I. BACKGROUND

The following facts are taken from plaintiff’s complaint and the record before the Court. In deciding a motion to dismiss, the Court may take judicial notice of public records, including state court filings. [Blue Tree Hotels Inv. \(Canada\), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc.](#), 369 F.3d 212, 217 (2d Cir. 2004). The Court also considers exhibits which are attached or integral to the complaint. [Sira v. Morton](#), 380 F.3d 57, 67 (2d Cir. 2004).

A. Paternity Proceedings

The allegations in the complaint stem from plaintiff’s long-time claim of paternity to Durelle Napier (“D. Napier”), the son of his ex-girlfriend, defendant, Inez Napier. On October 13, 1994, an order of filiation was entered adjudicating defendant Kevin Napier the father of D. Napier. (Pl.’s Notice of Additional Facts about the Case (“Pl.’s Notice”), Ex. G August 26, 2013 Suffolk County Family Court Dismissal Order, ECF No. 16.) Plaintiff alleges that on April 26, 1999, he petitioned the Suffolk County Family Court for a paternity test of D. Napier. (Compl. at 12.) On May 27, 1999, the court ordered a DNA blood test, (Pl.’s Notice, Ex. A May 27, 1999 Order), and on July 3, 1999, plaintiff received the DNA test results from LabCorp and the court indicating that he was not the father of D. Napier and his paternity petition was thereafter dismissed. (*Id.*; Pl.’s Notice, Ex. G.)

Subsequently, in 2012, plaintiff filed a paternity petition in Queens County Family Court seeking another DNA test on

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D. Napier. (Compl. at 13.) On August 3, 2012, that court dismissed plaintiff's de novo paternity petition finding the proper remedy was for plaintiff to file a motion to vacate the order of filiation entered in Suffolk County Family Court. (Id.; Pl.'s Notice, Ex. G.)

*2 Yet again, on March 15, 2013, plaintiff filed a de novo paternity petition in Suffolk County Family Court seeking an order of filiation adjudicating him to be the father of D. Napier. (Pl.'s Notice, Ex. G.) According to the court's order, in that petition, plaintiff "swore that 'no individual ha[d] been adjudicated the father of this child' despite [plaintiff's] clear knowledge of the existing order of filiation." (Id.) Plaintiff claims that on March 19, 2013, he informed the Suffolk County Family Court that some of the prior court proceedings were omitted from the court transcript. (Compl. at 13.)³ On August 26, 2013, the court dismissed plaintiff's paternity petition under the doctrine of collateral estoppel. (Pl.'s Notice, Ex. G.) Plaintiff claims that he received an unsigned and unstamped copy of this dismissal order. (Compl. at 8, 14.)

B. Plaintiff's Arrests

Plaintiff alleges that in 2004 he was arrested by Suffolk County police and "charged with stalking by Mrs. Inez Napier at a day care center." (Id. at 12.) He claims that the charge was dismissed on November 22, 2004. (Id.) That same day, a temporary order of protection was issued against plaintiff for both Inez Napier and D. Napier. (Pl.'s Notice, Ex. C, September 22, 2004 Order of Protection.) Plaintiff alleges that he was arrested on April 27, 2006 by Nassau County police and "charged with breaking order of protection by National Grid Security and Mrs. Inez Napier for saying hello to [third] party Subrena Burwell at [his] place of employment National Grid" and for telling her to say hello to Mrs. Napier. (Compl. at 12; Pl.'s Notice, Ex. D, May 2, 2006 Statement of Terrence Powell.) He claims that this charge was dismissed on May 1, 2006. (Compl. at 12.)

On July 25, 2006, plaintiff filed a complaint against defendant Inez Napier in Suffolk County small claims court to reimburse him \$4,000 in attorney fees. (Pl.'s Opp. Mem. to Napiers' Mot. to Dismiss, ECF No. 34 at 7, Ex. K, Suffolk County District Court Complaint Form.) Plaintiff claims that on October 25, 2007 he was arrested by a Suffolk County police officer and "charged with assault by Mr. Kevin Napier at Saint Anthony's High School but that the charge was dismissed. (Compl. at 12.) In exchange for the dismissal of his small claims case, plaintiff alleges that he "was suppose[d] to receive a DNA

[t]est in return I would drop the [a]ttorney fee charge for the false arrest charged by Mr. Kevin Napier. I'm still waiting to receive the DNA test for my son Durelle Napier." (Pl.'s Opp. Mem. to Napiers' Mot. to Dismiss at 7-8, Ex. K.)

C. Plaintiff's Employment and Termination

Plaintiff was employed by National Grid from at least 2006 through April 7, 2011 when he was terminated following his second violation of National Grid's Anti-Drug/Alcohol Program. (Compl. at 7, 12; Affirmation of Christina M. Schmid ("Schmid Aff."), Ex. C, Termination Letter, ECF No. 29-2.) Plaintiff alleges that from November 2008 to March 2011 he was subjected to drug testing by National Grid a total of sixteen times "without the computer selection process," including when he was "discharged from National Grid for a drug test that was not random." (Compl. at 7, 12, 13.) Plaintiff claims his call to the business office of IBEW 1049 for documentation on National Grid's random drug testing program was ignored on several occasions. (Id. at 12-13.) He claims that after he contacted the National Labor Relations Board he received documentation that stated that all testing must be random. (Id.)

D. Plaintiff's Allegations

Though framed as a [Section 1983](#) claim, it appears that plaintiff's complaint is yet another feeble attempt to claim paternity to the Napiers' son, D. Napier. Plaintiff alleges that defendants LabCorp, National Grid and the NYSUCS conspired against plaintiff to keep him from fatherhood. (Id. at 7, 9.) Plaintiff further alleges that defendants National Grid, LabCorp and NYSUCS are "business associates" because National Grid and NYSUCS both utilized LabCorp for testing purposes. (Id. at 7.) Plaintiff claims that these three defendants "collu[ded]" and "conspired" with one another in the administration and reporting of his drug and paternity testing. He claims further that he was subjected to drug testing that was not random. (Id. at 7, 9.) Finally, he claims that the Napiers "collu[ded]" with the NYSUCS in making false police reports, having him falsely arrested and maliciously prosecuted. (See Pl.'s Opp. Mem. to Napiers' Mot. to Dismiss at 2-9.)

*3 Plaintiff alleges that he has been injured in the following manner: "loss of enjoyment of life, lost earning capacity, lost wages, mental anguish, inconvenience, injury to professional standing, injury to character and reputation, injury to credit standing, emotional distress, mental distress." (Compl. at 9.) He seeks the "HELP of the court to make these corporations

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understand that family is business also. Fatherhood is a civil and natural right and that you conspired to keep me from these rights, so you must pay.” (*Id.*) Specifically, plaintiff seeks the following relief and alleges the following claims against the specific defendants: (1) LabCorp: twenty-five million dollars for “paternity fraud, illegal random testing, and conspiracy”; (2) NYSUCS: ten million dollars for “paternity fraud, false arrest, conspiracy, omitting evidence from transcript, denial of justice, defamation of character, unsigned and unstamped dismissal for a DNA test for my son, and speedy trial”; (3) the Napiers: one-hundred thousand dollars for “false arrest, paternity fraud, conspiracy, defamation of character, and harassment”; (4) National Grid: ten million dollars in backpay for “false arrest, conspiracy, illegal random testing policies, harassment, defamation of character”; and (5) IBEW Local 1049: ten million dollars for “withholding drug testing documentation, conspiracy, harassment, defamation of character, illegal random drug testing policies.” (*Id.* at 9, 10.)

E. Procedural History

On June 16, 2017, plaintiff filed a handwritten complaint with this Court, (ECF No. 1.), and on September 24, 2017, plaintiff filed a handwritten notice of additional facts about the case. (ECF No. 16.) The NYSUCS filed its motion to dismiss for lack of jurisdiction and for failure to state a claim on November 10, 2017. (ECF No. 25.) Defendants LabCorp and National Grid filed individual motions to dismiss on November 17, 2017. (ECF No. 27, 29.) Plaintiff filed a single opposition to the motions of the NYSUCS, LabCorp and National Grid. (ECF No. 29-3.) On June 12, 2018, the Court denied the defendants' motions to dismiss without prejudice subject to reinstatement after the Napiers filed their motion to dismiss. On July 11, 2018, the Napiers, proceeding *pro se*, filed a motion to dismiss the complaint (ECF No. 33), and on July 23, 2018, plaintiff filed his opposition to the Napiers' motion. (ECF No. 34.) The Union was served, (ECF No. 12), but has not appeared in this case.

II. DISCUSSION

A. Standard of Review

The court is mindful that when considering a motion to dismiss a *pro se* complaint, the court must construe the complaint liberally and interpret the complaint “to raise the strongest arguments they suggest.” [Triestman v. Federal Bureau of Prisons](#), 470 F.3d 471, 474 (2d Cir. 2006). 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); see also [Harris v. Mills](#), 572 F.3d 66, 72 (2d Cir. 2009).

1. Fed. R. Civ. P. 12(b)(1)

Federal Rule of Civil Procedure 12(b)(1) requires the dismissal of a claim when there is a “lack of subject-matter jurisdiction.” Fed. R. Civ. P. 12(b)(1). A case is properly dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) “when the district court lacks the statutory or constitutional power to adjudicate it.” [Makarova v. United States](#), 201 F.3d 110, 113 (2d Cir. 2000); see *id.* In reviewing a motion to dismiss under this Rule, the Court accepts all factual allegations in the complaint as true. [Shipping Fin. Servs. Corp. v. Drakos](#), 140 F.3d 129, 131 (2d Cir. 1998). However, the Court should not draw inferences favorable to the party asserting jurisdiction. *Id.* In resolving a jurisdictional issue, the Court may consider affidavits and other materials beyond the pleadings, but may not rely on mere conclusions or hearsay statements contained therein. [J.S. ex rel. N.S. v. Attica Cent. Sch.](#), 386 F.3d 107, 110 (2d Cir. 2004); see also [All. For Envtl. Renewal, Inc. v. Pyramid Crossgates Co.](#), 436 F.3d 82, 89, n. 8 (2d Cir. 2006) (“The presentation of affidavits on a motion under Rule 12(b)(1) ... does not convert the motion into a motion for summary judgment under Rule 56.”).

2. Fed. R. Civ. P. 12(b)(6)

To survive a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), a plaintiff must allege sufficient facts “to state a claim to relief that is plausible on its face.” [Twombly](#), 550 U.S. at 570. A claim is facially plausible only “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) (citing [Twombly](#), 550 U.S. at 556). Mere labels and legal conclusions will not suffice. [Twombly](#), 550 U.S. at 555. In reviewing a motion to dismiss, the Court must accept the factual allegations set forth in the complaint as true and draw all reasonable inferences in favor of the plaintiff. [Cleveland v. Caplaw Enters.](#), 448 F.3d 518, 521 (2d Cir. 2006).

3. Federal Jurisdiction

*4 28 U.S.C. § 1331 provides that “district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.” “Unlike failure of personal jurisdiction, failure of subject matter

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jurisdiction is not waivable and may be raised at any time by a party or by the court *sua sponte*.” [Lyndonville Sav. Bank & Trust Co. v. Lussier](#), 211 F.3d 697, 700-01 (2d Cir. 2000). “If subject matter jurisdiction is lacking, the action must be dismissed.” *Id.* at 700-01; *see also* Fed. R. Civ. P. 12(h)(3). The party asserting jurisdiction bears the burden of proof. [Hertz Corp. v. Friend](#), 559 U.S. 77, 96 (2010); [DiTolla v. Doral Dental IPA of N.Y.](#), 469 F.3d 271, 275 (2d Cir. 2006).

“A case aris[es] under federal law within the meaning of § 1331 ... if a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff’s right to relief necessarily depends on resolution of a substantial question of federal law.” [Empire Healthchoice Assurance, Inc. v. McVeigh](#), 547 U.S. 677, 689-90 (2006) (internal quotation marks and citations omitted). A plaintiff invokes § 1331 jurisdiction when he pleads a “colorable claim” arising under the Constitution or federal law. [Arbaugh v. Y & H Corp.](#), 546 U.S. 500, 513 (2006). A claim alleging federal question jurisdiction “may be dismissed for want of subject-matter jurisdiction if it is not colorable, i.e., if it is ‘immaterial and made solely for the purpose of obtaining jurisdiction’ or is ‘wholly insubstantial and frivolous.’ ” *Id.* at 513 n. 10 (quoting [Bell v. Hood](#), 327 U.S. 678, 682–683 (1946)).

B. Timeliness of Plaintiff’s Section 1983 Claims

Statute of limitations is an affirmative defense. *See* F.R.C.P. 8(c); *see also* [Overall v. Estate of Klotz](#), 52 F.3d 398, 403 (2d Cir. 1995). Accordingly, a court should only grant a motion to dismiss based on a statute of limitations defense where it is apparent from the face of the pleading that the claim is time-barred. [Conopco, Inc. v. Roll Int’l](#), 231 F.3d 82, 86–87 (2d Cir. 2000).

The statute of limitations for claims brought pursuant to Section 1983 is determined by state law, and in New York State, the statute of limitations for 1983 claims is three years. [Shomo v. City of New York](#), 579 F.3d 176, 181 (2d Cir. 2009). Although the relevant limitations period is determined by state law, federal law governs the accrual date of a Section 1983 claim. [Eagleston v. Guido](#), 41 F.3d 865, 871 (2d Cir. 1994); [Singleton v. City of New York](#), 632 F.2d 185, 191 (2d Cir. 1980). Such a claim accrues when the plaintiff “knows or has reason to know” of the injury that forms the basis of the claim. [Eagleston](#), 41 F.3d at 871; [Singleton](#), 632 F.2d at 191. This does not require the plaintiff’s awareness of all consequences of an action, but only knowledge “that he is

suffering from a wrong for which damages may be recovered in a civil action.” [Singleton](#), 632 F.2d at 192.

Plaintiff filed his complaint on June 16, 2017, *see* ECF No. 1, so any Section 1983 claims that accrued before June 16, 2014 are time-barred. *See* [Shomo](#), 579 F.3d at 181. While the precise basis for plaintiff’s Section 1983 claims are not entirely clear from the complaint, it is evident that his claims arise from events that all occurred prior to June 16, 2014.⁴ Specifically, plaintiff’s Section 1983 claims relate to the New York State Family Courts’ 1999, 2012 and 2013 orders dismissing plaintiff’s paternity petitions as well as the court-ordered DNA test performed by LabCorp in 1999 establishing that plaintiff “is not the biological father of the child, Derrell(sp) Napier.” (*see* Compl. at 12-14; Pl.’s Notice, Ex. B.) Additionally, plaintiff’s allegations are based upon his 2004, 2006 and 2007 arrests for stalking, violating an order of protection and assault, respectively. (Compl. at 12; *see* Pl.’s Opp. Mem. to Napiers’ Mot. to Dismiss.) Finally, plaintiff alleges that his Section 1983 claims result from being subjected to his former employer’s drug testing program from 2006 through 2011, which led to his April 2011 termination for failing a drug test administered by LabCorp. (Pl.’s Notice at 2; Compl. at 7, 12.) Notably, it appears from the complaint that the plaintiff knew or had reason to know of these acts at or about the time that they happened. As all of these acts occurred prior to June 16, 2014, plaintiff’s Section 1983 claims are time-barred.

1. Equitable Tolling

*5 Although not raised by plaintiff, in light of his *pro se* status, the Court also has considered whether the doctrine of equitable tolling applies. With respect to equitable tolling in Section 1983 actions, “it is well-settled that federal courts should borrow the forum state’s tolling rules.” [Ellis v. Wilkinson](#), 81 F. Supp. 3d 229, 234 (E.D.N.Y. 2015) (citing [Pearl v. City of Long Beach](#), 296 F.3d 76, 80 (2d Cir. 2002)). “As the Second Circuit has explained, New York courts have adopted the same equitable tolling doctrine that exists under federal law.” *Id.* (citing [Keating v. Carey](#), 706 F.2d 377, 382 (2d Cir. 1983)). “Equitable tolling allows courts to extend the statute of limitations beyond the time of expiration as necessary to avoid inequitable circumstances.” [Johnson v. Nyack Hosp.](#), 86 F.3d 8, 12 (2d Cir. 1996). The Second Circuit “has applied the doctrine ‘as a matter of fairness’ where a plaintiff has been ‘prevented in some extraordinary way from exercising his rights, or h[as] asserted his rights in the wrong forum.’ ” *Id.* at 12 (quoting [Miller v. Int’l Tel & Tel. Corp.](#),

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755 F.2d 20, 24 (2d Cir. 1985)); see also [Abbas v. Dixon](#), 480 F.3d 636, 642 (2d Cir. 2007) (noting that New York law authorizes the use of the equitable estoppel doctrine to toll a statute of limitations “when the plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action”) (citation omitted). Thus, “[a]s a general matter, a litigant seeking equitable tolling must establish two elements: ‘(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.’ ” [Bolarinwa v. Williams](#), 593 F.3d 226, 231 (2d Cir. 2010) (quoting [Lawrence v. Florida](#), 549 U.S. 327, 336 (2007)).

Here, there is absolutely no basis to apply the doctrine of equitable tolling. Plaintiff’s own allegations demonstrate that he was aware of defendants’ alleged violations at the time they occurred. For example, plaintiff alleges that he filed numerous paternity petitions in family court and complained to the Union about National Grid’s drug testing policy. (See Compl. at 7, 12-14.) Plaintiff does not allege that he was precluded from filing his complaint in a timely manner by any fraud or deceit on the part of any of the defendants. Thus, the Court finds that plaintiff is not entitled to equitable tolling. Accordingly, plaintiff’s [Section 1983](#) claims are dismissed as time-barred.

C. [Section 1983](#)

Even if plaintiff’s [Section 1983](#) claims were not time-barred, they are subject to dismissal for lack of subject matter jurisdiction and for failure to state a claim.

[Section 1983](#) provides in pertinent part:

[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 [Section 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)); see also [Am. Mfrs. Mut. Ins. Co. v. Sullivan](#), 526 U.S. 40, 50, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999) (“[T]he under-color-of-state-law element of § 1983 excludes from its reach merely private conduct, no matter how discriminatory or wrongful.”) (internal quotation marks and citation omitted). 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.](#) With these standards in mind, the Court considers plaintiff’s claims.

1. Claim Against the NYSUCS

Initially, the Court addresses the NYSUCS’s argument that plaintiff’s claims against it are barred by the Eleventh Amendment and, therefore, it is entitled to dismissal pursuant to [Federal Rule of Civil Procedure 12\(b\)\(1\)](#) for lack of subject matter jurisdiction.

*6 The Eleventh Amendment to the United States Constitution provides: “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. Const. amend. XI. As a result, absent a state’s consent to suit or an express statutory waiver, the Eleventh Amendment bars federal court claims by private parties against states. [Board of Trustees of University of Alabama v. Garrett](#), 531 U.S. 356, 362, 121 S. Ct. 955, 962 (2001) (“The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court.”). Eleventh Amendment immunity also extends to suits against “state agents and state instrumentalities that are, effectively, arms of a state.” [Gollomp v. Spitzer](#), 568 F.3d 355, 366-68 (2d Cir. 2009) (quoting [Woods v. Rondout Valley Cent. Sch. Dist. Bd. of Educ.](#), 466 F.3d 232, 236 (2d Cir. 2006)). This includes the New York State Unified Court System. See [McKnight v. Middleton](#), 699 F. Supp.2d 507, 521 (E.D.N.Y. 2010); [Gollomp](#), 568 F.3d at 368. Accordingly, because the NYSUCS is entitled to Eleventh Amendment immunity, plaintiff’s [Section 1983](#) claims against it are dismissed for lack of subject matter jurisdiction.

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2. Claims Against the Napiers, LabCorp, National Grid

Plaintiff alleges [Section 1983](#) claims against the Napiers, LabCorp, and National Grid for violations of the Fourth and Fourteenth Amendments of the United States Constitution and also alleges that these defendants participated in a conspiracy. As noted above, in order to state a claim for relief under [Section 1983](#), 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 (quoting [Pitchell](#), 13 F. 3d at 547). Because these defendants are private actors they cannot be liable under [Section 1983](#).

However, private actors, such as the defendants, 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, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970)), or conspired with a state actor to violate a plaintiff’s constitutional rights. [Id.](#) 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)). “A merely conclusory allegation that a private entity acted in concert with a state actor,” [id.](#) at 324, or “engaged in a conspiracy to deprive the plaintiff of his constitutional rights,” [id.](#) at 325, “does not suffice to state a § 1983 claim against the private entity.” [Id.](#) at 324 (citing [Spear v. Town of West Hartford](#), 954 F.2d 63, 68 (2d Cir. 1992)).

Here, plaintiff attempts to bring [Section 1983](#) claims against defendants, the Napiers, LabCorp, and National Grid based on a theory that they conspired with defendant, the NYSUCS in the administration and reporting of plaintiff’s paternity test and drug tests, and in having plaintiff arrested multiple times. However, the factual allegations in plaintiff’s complaint concerning the alleged conspiracy between the defendants are conclusory and utterly implausible. Plaintiff alleges: “I realized with paper work LabCorp, National Grid and New York Family Court in Suffolk are business associates because they use LabCorp for testing purposes (collusion).” (Compl. at 7.) Plaintiff’s conspiracy claim seems to rest on the allegation that LabCorp administered both, the 1999 paternity test plaintiff requested in the Suffolk County Family Court

proceeding, and National Grid’s employee drug tests between 2008 and 2011. (See Pl.’s Opp. to Defs.’ Mot. to Dismiss.) Thus, plaintiff alleges, the parties must have “concerted” with each other and engaged in “fraud” because National Grid’s drug tests were not conducted randomly and because “[he] did not agree with the results of the DNA test.” (Pl.’s Notice at 1.) Plaintiff also alleges that the Napiers colluded with the NYSUCS in having him “false[ly] arrested” multiple times without being subjected to prosecution. (Pl.’s Opp. Mem. to Napiers’ Mot. to Dismiss at 1-3.) Plaintiff alleges “[t]he agreement in the conspiracy ... is through Judiciary and financial mean[s] to stop plaintiff [] from proving paternity fraud took place in the DNA test of Durelle Napier by LabCorp defendant.” (Pl.’s Opp. Mem. to Defs.’ Mot. to Dismiss at 5.)

*7 Aside from these illogical allegations, plaintiff fails to allege specific facts demonstrating that an improper relationship, much less, any relationship, existed between the NYSUCS and any of the other named defendants. Such conclusory and purely speculative allegations are insufficient to state a [Section 1983](#) conspiracy claim. See [Ciambriello](#), 292 F.3d at 325 (dismissing conspiracy allegations where they were found “strictly conclusory”); see also [Robbins v. Cloutier](#), 121 F. App’x 423, 425 (2d Cir. 2005) (finding [Section 1983](#) conspiracy claim insufficient where plaintiff merely alleged that defendants “acted in a concerted effort” to agree not to hire plaintiff and to inform others not to hire plaintiff). Though “[a] plaintiff is not required to list the place and date of defendant’s meetings and the summary of their conversations when he pleads conspiracy, [] the pleadings must present facts tending to show agreement and concerted action.” [Fisk v. Letterman](#), 401 F. Supp. 2d 362, 376 (S.D.N.Y. 2005) (internal quotations and citations omitted).

Here, plaintiff makes no allegations from which the Court could construe joint action by any of the defendants, or that any of these defendants conspired with the NYSUCS to deprive plaintiff of some constitutional right. Thus, plaintiff has not alleged a plausible conspiracy claim. Because defendants are not state actors, there is no basis for a [Section 1983](#) claim against them. Accordingly, plaintiff fails to state a [Section 1983](#) claim against any of the defendants⁵ and the claim is dismissed for this reason as well.

D. Title VII and GINA Claims⁶

1. Title VII Claim

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Title VII prohibits employers from “discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1). As an initial matter, plaintiff cannot allege a Title VII claim against the Napiers, LabCorp, or the NYSUCS as none of these defendants were the plaintiff's employer, and therefore, the statute is inapplicable to these three defendants. See Clackamas Gastroenterology Assoc., P.C. v. Wells, 538 U.S. 440, 450, 123 S.Ct. 1673, 155 L.Ed.2d 615 (2003) (determining that an employer, for purposes of the antidiscrimination laws, is an entity that “can hire and fire employees, can assign tasks to employees and supervise their performance ...”); see also Stinnett v. Delta Air Lines, Inc., 278 F. Supp. 3d 599, 610 (E.D.N.Y. 2017) (dismissing Title VII claim against Quest Diagnostics Clinical Laboratories because it was not plaintiff's employer). Therefore, the Court will address plaintiff's Title VII claim only as it relates to his former employer, National Grid.

As noted above, Title VII prohibits discrimination against someone by that person's employer because of such individual's race, color, religion, sex, or national origin. Littlejohn v. City of New York, 795 F.3d 297, 320 (2d Cir. 2015) (citing 42 U.S.C. 2000e-2(a)(1)). Claims of employment discrimination brought pursuant to Title VII are analyzed under the familiar burden-shifting approach set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). “Under this framework, a plaintiff must first establish a prima facie case of discrimination.” Ruiz v. County of Rockland, 609 F.3d 486, 491 (2d Cir. 2010) (citation omitted). “On a motion to dismiss, the question is not whether a plaintiff is likely to prevail, but whether the well-pleaded factual allegations plausibly give rise to an inference of unlawful discrimination, i.e., whether plaintiffs allege enough to ‘nudge[] their claims across the line from conceivable to plausible.’ ” Vega v. Hempstead Union Free Sch. Dist., 801 F.3d 72, 87 (2d Cir. 2015) (quoting Twombly, 550 U.S. at 570). “Nevertheless, the elements of the prima facie case ‘provide an outline of what is necessary to render a plaintiff's ... claims for relief plausible.’ ” Bivens v. Inst. for Cmty. Living, Inc., No. 14-CV-7173, 2015 WL 1782290, at *7 (S.D.N.Y. Apr. 17, 2015) (quoting Kassman v. KPMG LLP, 925 F. Supp. 2d 453, 461 (S.D.N.Y. 2013)) (internal quotation marks and alterations omitted).

*8 In order to plead a plausible claim of Title VII discrimination, the plaintiff must allege that (1) he is a member of a protected class; (2) he is qualified for a

disputed employment position; (3) he suffered an adverse employment action; and (4) the adverse action took place under circumstances giving rise to the inference of discrimination. See Soloviev v. Goldstein, 104 F. Supp. 3d 232, 247 (E.D.N.Y. 2015) (citation omitted). The facts alleged in the complaint must provide “at least minimal support for the proposition that the employer was motivated by discriminatory intent.” Littlejohn, 795 F.3d at 311. “[N]aked assertions of discrimination without any specific factual allegation of a causal link between the defendants' conduct and the plaintiff's protected characteristic are too conclusory to withstand a motion to dismiss.” Soloviev, 104 F. Supp. 3d at 249 (citations omitted).

Plaintiff's complaint falls far short of these pleading requirements. Though his complaint references Title VII, plaintiff fails to allege that he was discriminated against based on his membership in a protected class. Instead, plaintiff merely alleges, “my employer National Grid started testing me with the random drug testing program 16 times without the computer selection process.” (Compl. at 7.) Where a plaintiff fails to allege that he is a member of a protected class, he fails to allege a Title VII claim. See Connell v. City of New York, No. 00 Civ. 6306, 2002 WL 22033, at *3 (S.D.N.Y. Jan. 8, 2002) (dismissing Title VII claim where plaintiff failed to allege that he was member of a protected class). So too, here, plaintiff fails to allege that he is a member of a protected class and, therefore, fails to meet the first requirement of a prima facie Title VII case. Furthermore, “[n]otwithstanding the liberal pleading standard in Title VII cases (especially for pro se litigants), the complaint as written does not describe any factual allegations to support the vague and conclusory assertion that the treatment he received by [National Grid] was discriminatory.” Ercole v. U.S. Dep't of Transp., No. 07-CV-2049, 2008 WL 4190799, at *7 (E.D.N.Y. Sept. 10, 2008) (“[t]he complete absence of any such allegations articulating plaintiff's discrimination claim fails to satisfy even this most liberal standard.”). Accordingly, plaintiff's Title VII claim against National Grid is dismissed.⁷

2. GINA Discrimination Claim

GINA makes it unlawful for an employer “to fail or refuse to hire, or to discharge, any employee, or otherwise to discriminate against any employee ... because of genetic information with respect to the employee.” 42 U.S.C. § 2000ff-1(a)(1). GINA further prohibits an employer from “request[ing], requir[ing], or purchas[ing] genetic information with respect to an employee ...” Id. § 2000ff-1(b).

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“The Act defines ‘genetic information’ as (1) an employee’s genetic tests; (2) the genetic tests of the employee’s family members; or (3) the manifestation [of] a disease or disorder in the employee’s family members.” [Grimes](#), 2017 WL 2258374, at * 10 (citing 42 U.S.C. § 2000ff(4)) (dismissing GINA claim where plaintiff failed to allege that she was discriminated against because of genetic information). To state a claim for genetic discrimination under GINA, plaintiff must allege “(1) that []he was an employee; (2) who was discharged or deprived of employment opportunities; (3) because of information from [p]laintiff’s genetic tests.” [Allen v. Verizon Wireless](#), No. 12 Civ. 482, 2013 WL 2467923, at *23 (D. Conn. June 6, 2013) (citation omitted).

*9 As it relates to his GINA claim, plaintiff alleges that National Grid used “genetic test results in making decisions about [his] employment.” (Pl.’s Opp. Mem. to Defs.’ Mot. to Dismiss at 5-6.) He alleges “[t]his also includes “firing, to limit, segregate, classify, or otherwise mistreat an employee, i.e. [p]laintiff Terence Powell.” (*Id.* at 6.) Though plaintiff’s allegations are unclear, to the extent he alleges that National Grid improperly terminated his employment based on his failing a second drug test, no GINA claim lies. The EEOC’s implementing regulations to GINA make clear that “[a] test for the presence of alcohol or illegal drugs is not a genetic test,” 29 C.F.R. § 1635.3(f)(4)(i), “meaning that a request for such a test does not constitute a request for genetic information under EEOC rules.” [Lewis v. Gov’t of the District of Columbia](#), 161 F. Supp. 3d 15, 33 (D.D.C. 2015).

The Court further finds that plaintiff has not pleaded any facts indicating that defendant requested or obtained plaintiff’s “genetic information” and discriminated against him on the basis of such “genetic information.” Thus, in addition to being barred for failing to exhaust his administrative remedies, as discussed above, plaintiff’s claim for genetic discrimination must be dismissed because the plaintiff fails to allege any facts to support this claim. See [Verizon Wireless](#), 2013 WL 2467923, at *23–24 (GINA claim based on “conclusory allegations do[es] not meet the standard set forth in [Twombly](#) and [Iqbal](#)”). Accordingly, plaintiff’s GINA claim is dismissed.

E. State Law Claims

Liberally construing plaintiff’s complaint, he appears to assert state law claims for false arrest, malicious prosecution, defamation, intentional infliction of emotional distress, harassment, and fraud. Where no federal claims remain in an action, and diversity jurisdiction is lacking, a district court is not required to retain jurisdiction of remaining state law

claims. 28 U.S.C. § 1367(c)(3); [Rocco v. New York State Teamsters Conference Pension & Retirement Fund](#), 281 F.3d 62, 72 (2d Cir. 2002). A district court may, however, “at its discretion, exercise supplemental jurisdiction over state law claims even where it has dismissed all claims over which it had original jurisdiction.” [Parker v. Della Rocco](#), 252 F.3d 663, 666 (2d Cir. 2001) (citation omitted). In this regard, the court must balance the “values of judicial economy, convenience, fairness, and comity.” [Carnegie–Mellon Univ. v. Cohill](#), 484 U.S. 343, 350, 108 S.Ct. 614, 619, 98 L.Ed.2d 720 (1988). The balance of factors here weigh in favor of exercising supplemental jurisdiction over plaintiff’s state law claims against the moving defendants because those claims are frivolous, and the defendants should not be subject to additional frivolous litigation in state court.⁸ For the reasons set forth below, plaintiff’s state-law claims fail and are therefore dismissed.

1. False arrest, malicious prosecution, defamation, intentional infliction of emotional distress and harassment

New York’s one-year statute of limitations governs claims for false arrest, malicious prosecution, defamation and intentional infliction of emotional distress. N.Y. CPLR § 215(3); see e.g., [Abdallah v. City of New York](#), No. 95 Civ. 9247, 2001 WL 262709, at *5 (S.D.N.Y. March 16, 2001) (intentional infliction of emotional distress); [E.E.O.C. v. Die Fliedermaus](#), 77 F. Supp. 2d 460, 473 (S.D.N.Y. 1999) (defamation); [Greiner v. County of Greene](#), 811 F. Supp. 796, 800 (N.D.N.Y. 1993) (false arrest and malicious prosecution).⁹

*10 As plaintiff filed the instant complaint on June 16, 2017, any alleged intentional tort claims must have accrued after June 15, 2016. According to his complaint, all of plaintiff’s claims, whether state or federal, accrued on or before August 26, 2013, the date of the Suffolk County Family Court’s dismissal of plaintiff’s third paternity petition. (See Compl. at 5.) Therefore, plaintiff’s intentional tort claims are time-barred. Accordingly, plaintiff’s claims for false arrest, malicious prosecution, defamation, intentional infliction of emotional distress and harassment are dismissed.

2. Fraud

Plaintiff appears to allege that LabCorp, the Napiers and the NYSUCS committed “paternity fraud” or conspired together to commit “paternity fraud”.

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“Under New York law, the elements of common law fraud are a material, false representation, an intent to defraud thereby, and reasonable reliance on the representation, causing damage to the plaintiff.” [Chanayil v. Gulati](#), 169 F.3d 168, 171 (2d Cir. 1999) (citation and internal quotation marks omitted). Further, allegations of fraud must be pled with particularity under [Rule 9\(b\) of the Federal Rules of Civil Procedure](#). See [Fed. R. Civ. P. 9\(b\)](#) (“In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.”). Conclusory allegations of fraud will not survive [Rule 9\(b\)](#)’s heightened pleading standard, and therefore, will be subject to dismissal at the motion to dismiss stage. See [Nasso v. Bio Reference Labs., Inc.](#), 892 F. Supp. 2d 439, 446 (E.D.N.Y. 2012) (citing [Shemtov v. Shearson, Hammill & Co.](#), 448 F.2d 442, 444 (2d Cir. 1971)). Generally, to comply with [Rule 9\(b\)](#)’s specificity requirements, “the complaint must: (1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent.” [Lerner v. Fleet Bank, N.A.](#), 459 F.3d 273, 290 (2d Cir. 2006) (quoting [Mills v. Polar Molecular Corp.](#), 12 F.3d 1170, 1175 (2d Cir. 1993)). Furthermore, when fraud is alleged against multiple defendants, a plaintiff must plead with particularity by setting forth separately the acts complained of by each defendant. [Zerman v. Ball](#), 735 F.2d 15, 22 (2d Cir. 1984).

In the instant case, plaintiff fails to plead fraud with sufficient particularity to survive a motion to dismiss. Plaintiff merely alleges that “after receiving DNA test results from LabCorp and Suffolk Family Court” on July 30, 1999, he contacted a LapCorp employee and told him that “[he] did not agree with the results of the DNA test.” (Pl.’s Notice at 1.) Plaintiff further alleges:

the [d]efendant New York State Unified Court System decided to unify the court system to deny the plaintiff justice under the law. ‘Paternity Fraud’. By being in business with LabCorp it made the [d]efendant Unified Court System make the[i]r[] decisions based on business not truth and justice. By doing this it gave Mr. and Mrs. Kevin Napier [d]efendant[s] the power of coercion to get me Terence Powell plaintiff

arrested without probable cause of committing a crime without g[i]ving me the ability to get justice.

(Pl.’s Opp. Mem. to Defs.’ Mot. to Dismiss at 2.) It seems that plaintiff relates the alleged fraud in the DNA test results to his allegations of false arrests. (*Id.*) As discussed above in regard to plaintiff’s [Section 1983](#) conspiracy claim, such vague and conclusory allegations are insufficient to state a claim and certainly fail to satisfy [Rule 9\(b\)](#)’s heightened pleading requirement. Further, to the extent plaintiff’s claims can be read to allege conspiracy to commit fraud, under New York law, “civil conspiracy to commit fraud, standing alone, is not actionable ... if the underlying independent tort has not been adequately pleaded.” [Vasile v. Dean Witter Reynolds Inc.](#), 20 F.Supp.2d 465, 482 (E.D.N.Y. 1998), *aff’d*, 205 F.3d 1327 (2d Cir. 2000) (“New York does not recognize conspiracy as an independent cause of action in tort ...”). Thus, plaintiff’s fraud claim and conspiracy to commit fraud claim are dismissed.

*11 Plaintiff’s fraud claim also fails on the grounds of collateral estoppel and under the Rooker-Feldman doctrine. “Collateral estoppel, or issue preclusion, ‘precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party ... whether or not the tribunals or causes of action are the same.’ ” [Sullivan v. Gagnier](#), 225 F.3d 161, 166 (2d Cir. 2000) (citing [Ryan v. New York Tel. Co.](#), 62 N.Y.2d 494, 478 N.Y.S.2d 823, 826, 467 N.E.2d 487 (1984)). “To determine whether the issue in the first litigation was necessarily decided, the focus is on the rights, questions or facts that underlie a judicial decision, not the legal theories underlying the complaint.” [Yeiser v. GMAC Mortg. Corp.](#), 535 F. Supp. 2d 413, 424-25 (S.D.N.Y. 2008) (citing [Coveal v. Consumer Home Mortgage, Inc.](#), 2005 WL 2708388, at *5 (E.D.N.Y. Oct. 21, 2005)). “New York requires only that the issue have been properly raised by the pleadings or otherwise placed in issue and actually determined in the prior proceeding.” *Id.*

Here, plaintiff is collaterally estopped from alleging paternity fraud as the Suffolk County Family Court dismissed plaintiff’s paternity petitions in two prior proceedings finding “a 0 % chance that the [plaintiff] is the father of Durrell[e].” (Pl.’s Notice, Ex. G) (dismissing plaintiff’s 2013 paternity petition based on collateral estoppel finding that plaintiff had been given a full opportunity to be heard with regard to the

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paternity issue).¹⁰ Thus, the state court has already ruled “that the order of filiation [] and the dismissal of the 1999 petition preclude the petitioner from once again raising the issue of paternity.” (*Id.*) Therefore, plaintiff’s instant paternity fraud claim and conspiracy to commit fraud claim are barred by collateral estoppel.

Plaintiff’s paternity fraud claim is also barred under the Rooker-Feldman doctrine. The Rooker-Feldman doctrine recognizes that “federal district courts lack jurisdiction over suits that are, in substance, appeals from state-court judgments.” *Hoblock v. Albany Cnty. Bd. of Elections*, 422 F.3d 77, 84 (2d Cir. 2005). “The doctrine applies when a litigant seeks to reverse or modify a state court judgment, [], or asserts claims that are ‘inextricably intertwined’ with state court determinations.” *Park v. City of New York*, No. 99 Civ. 2981, 2003 WL 133232, at *7 (S.D.N.Y. Jan. 16, 2003) (citations omitted). The doctrine precludes a district court from hearing “cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the federal district court proceedings commenced and inviting district court review and rejection of those judgments.” *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). As discussed above, plaintiff has already raised the issue of paternity numerous times in state court and he cannot now seek to modify those state court judgments by claiming “paternity fraud” which is, at the least, “inextricably intertwined” with those state court determinations. Accordingly, plaintiff’s paternity fraud claim

and conspiracy to commit fraud claim are dismissed for this additional reason.

F. Leave to Amend

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.” *Boddie v. New York State Div. of Parole*, No. 08–CV–911, 2009 WL 1033786, at *5 (E.D.N.Y. Apr. 17, 2009) (citations omitted). Here, because the deficiencies in the claims dismissed by the Court are substantive and would not be cured with better pleading, leave to amend the complaint is denied.

III. CONCLUSION

*12 For the reasons set forth above, the Court dismisses all of plaintiff’s claims against the moving defendants. Further, the Court dismisses plaintiff’s federal claims against the Union because those claims are not colorable. To the extent plaintiff alleges state law claims against the Union, the Court declines to exercise supplemental jurisdiction over those claims and dismisses those claims without prejudice.

SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2018 WL 6814371

Footnotes

- 1 In defendant LabCorp's Memorandum of Law in support of its motion to dismiss it states that its proper name is Laboratory Corporation of America. (Def. LabCorp's Mot. To Dismiss, ECF. No. 27 at 1.)
- 2 The Court references the electronic filing system page numbers on the complaint for clarity.
- 3 Plaintiff's complaint states "omitting evidence from transcript," however, aside from this single reference, plaintiff does not allege any other facts related to this allegation.
- 4 Notably, plaintiff's complaint alleges that the events giving rise to his claim occurred on August 26, 2013, three years and ten months before he filed the instant complaint. (*See* Compl. at 5.)
- 5 To the extent plaintiff alleges a [Section 1983](#) claim against the Union, he fails to raise a colorable claim. The Union is not a private actor and plaintiff fails to allege any facts bringing the Union under the ambit of [Section 1983](#).

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- 6 Defendant National Grid contends that plaintiff has failed to exhaust his administrative remedies and therefore his Title VII claim should be dismissed. (Def. National Grid's Mot. To Dismiss, ECF. No. 29-1 at 5, n.5.) The Court recognizes that as a prerequisite to filing suit under both Title VII and GINA, a private plaintiff must first exhaust all administrative remedies, see [Chin v. Port Authority of New York & New Jersey](#), 685 F.3d 135, 146 (2d Cir. 2012) (Title VII); [Yajaira Bezares C. v. Donna Karan Company Store LLC](#), Nos. 13 Civ. 8560, 13 Civ. 9123, 2014 WL 2134600, at *5 (S.D.N.Y. May 22, 2014) (GINA) (citing 42 U.S.C. § 2000ff-6). Though plaintiff fails to allege that he filed a timely charge with the EEOC prior to bringing the instant claims, the Court declines to address this issue.
- 7 To the extent plaintiff asserts a Title VII claim against the Union, that claim is also dismissed because plaintiff's conclusory allegations that the Union supported National Grid's illegal drug testing policies fails to raise a colorable claim under Title VII.
- 8 To the extent plaintiff alleges state law claims against the Union, the Court declines to exercise supplemental jurisdiction over those claims as the Union has not appeared in this action and, thus, has not moved to dismiss the state law claims against it.
- 9 "Harassment is not a cognizable claim under New York State common law." [DiBlanca v. Town of Marlborough](#), No. 1:13-CV-1579, 2014 WL 2866341, at *8 (N.D.N.Y. June 24, 2014) (citing [CBS Inc. v. Arcane Visuals, LTD.](#), 156 Misc.2d 665, 667 (N.Y. Civ. Ct. 1993); [Jerulee Co. v. Sanchez](#), 43 A.D.3d 328, 329 (1st Dept. 2007)); see also [Beneficial Capital Corp. v. Richardson](#), No. 92 Civ. 3785, 1995 WL 324768, at *1 (S.D.N.Y. May 31, 1995) ("There is no civil cause of action for harassment in New York law", however "[e]ven were such a claim maintainable, it would be governed by the one-year statute of limitations for intentional torts.") (citing [N.Y. Civ. Prac. L. & R. § 215\(3\)](#)).
- 10 Plaintiff alleges that he also filed a petition in Queens Family Court seeking another DNA test on D. Napier but that the case was dismissed on August 3, 2012. (Compl. at 13.)

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Only the Westlaw citation is currently available.
United States District Court, N.D. New York.

Matthew J. MANN, Plaintiff,
v.

The NEW YORK STATE COURT OF APPEALS;
the State of New York Supreme Court, Appellate
Division, Third Judicial Department; and the Attorney
Grievance Committee of the Supreme Court, Appellate
Division, Third Judicial Department, Defendants.

1:21-CV-49 (MAD/CFH)

Signed 10/29/2021

Attorneys and Law Firms

OF COUNSEL: [DAVID B. CABANISS](#), ESQ., CABANISS
CASEY LLP, 4 Tower Place, Suite 100, Albany, New York
12203, Attorneys for Plaintiff.

OF COUNSEL: [JORGE A. RODRIGUEZ](#), AAG, OFFICE
OF THE NEW YORK STATE ATTORNEY GENERAL, The
Capitol, Albany, New York 12224, Attorneys for Defendants.

MEMORANDUM-DECISION AND ORDER

[Mae A. D'Agostino](#), United States District Judge:

I. INTRODUCTION

*1 Plaintiff, an attorney licensed to practice law in the State of New York, commenced this action on January 15, 2021, seeking “intervention and declaratory judgment of this Court in relation to improper, illegal, and unconstitutional professional discipline imposed upon him by the Appellate Division Third Judicial Department by Memorandum and Order dated January 18, 2018.” Dkt. No. 1 at ¶ 1. Upon commencing this action, Plaintiff submitted an application pursuant to Local Rule 5.3 to seal the complaint and “all further papers in this action.” Dkt. No. 2 at 1. In a March 31, 2021 Memorandum-Decision and Order, the Court denied Plaintiff’s motion to seal the complaint and all papers in this action. *See* Dkt. No. 12.

Currently before the Court is Defendants’ motion to dismiss the complaint in its entirety. *See* Dkt. No. 13.

II. BACKGROUND

Plaintiff is an attorney who has been duly licensed to practice law in the State of New York since 1994. *See* Dkt. No. 1-1 at ¶¶ 7, 13. The named Defendants are the New York State Court of Appeals, the Appellate Division, Third Department, and the Attorney Grievance Committee of the Third Department. *See id.* at ¶ 8.

According to the complaint, this case “involves the improper discipline of an attorney in violation of state and federal law by the Courts of the State of New York embodied collectively as the named Defendants.” *Id.* at ¶ 11. Plaintiff claims that the conduct for which he was disciplined occurred at a time when he was not acting as an attorney to any person and that he did not render legal advice or counsel to any person; rather, “it involved a conversation between friends which occurred only after Plaintiff and the other participants acknowledged in writing that it was not a conversation between individuals and their attorney.” *Id.* at ¶ 12.

In the underlying attorney misconduct petition, the petitioner alleged that Plaintiff engaged in a conflict of interest and conduct prejudicial to the administration of justice in violation of Rules 1.7(a)(1) and 8.4(d) of the New York State Rules of Professional Conduct. *See In re Matthew J. Mann*, 157 A.D.3d 1160, 1161 (3d Dep’t 2018). The petitioner claimed that Plaintiff improperly prepared and urged the execution of a child custody agreement purporting to settle a dispute between parents and grandparents regarding the care of the parents’ minor children. *See id.* All of the parties to the agreement were not only Plaintiff’s friends to a greater or lesser extent, but they were also persons that Plaintiff was contemporaneously representing as clients in separate legal matters unrelated to the custody dispute. *See id.* After the grandparents commenced a proceeding in Albany County Family Court, Plaintiff prepared the custody agreement unsolicited, without any input from the respective parties, and without giving them the opportunity to review the matter in advance of a meeting that he had arranged at his law office for the purpose of presenting the agreement. *See id.* Although Plaintiff inserted a provision into the agreement stating that he was not representing any of the parties with respect to the proposed custody arrangement, the petition of charges asserted that Plaintiff, nevertheless, explained, discussed and provided legal advice at the meeting regarding the custody agreement. *See id.* After the parties were persuaded to

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execute the agreement notwithstanding the father's initial objection, the dispute between the parties intensified and the grandparents, represented by separate counsel, did not settle the pending Family Court matter as provided in the agreement. *See id.*

*2 Complaints against Plaintiff were thereafter filed by the parents, who asserted that Plaintiff pressured them into executing a one-sided agreement that adversely affected their custody rights, without an adequate explanation of the risks of signing such an agreement, or providing a reasonable opportunity to seek independent counsel. *See In re Mann, 157 A.D.3d at 1161.* Plaintiff denied the allegations and a full hearing was conducted in June 2017, at which Plaintiff was represented by counsel. *See id.* Thereafter, the referee issued a report sustaining the petition of charges and rejecting Plaintiff's claims that he acted only as a disinterested mediator and that the parties to the agreement waived or consented to any conflict of interest. *See id. at 1161-62.*

On January 18, 2018, the Appellate Division, Third Department confirmed the referee's report and determined an appropriate disciplinary sanction. *See id. at 1162.* In determining the appropriate sanction, the Third Department considered Plaintiff's submissions in mitigation from colleagues and clients attesting to Plaintiff's good character and further noted the lack of proof that Plaintiff's misconduct stemmed from "any venal intent." *Id.* The Third Department also heard from the petitioner and observed that Plaintiff's "misconduct is aggravated by, among other things, his significant disciplinary history, which includes a two-year stayed suspension upon findings of conversion and escrow account mismanagement, ... which was later terminated upon [Plaintiff's] application, ... and private discipline in the form of two admonitions and a letter of caution." *Id.* Based on the facts presented, the Third Department determined that Plaintiff should be censured and that, within one year of the date of its decision, that Plaintiff must take and pass the Multistate Professional Responsibility Examination and complete six credit hours of continuing legal education in ethics and professionalism. *See id.*

Plaintiff appealed the Third Department's decision to the New York State Court of Appeals. On April 26, 2018, the Court of Appeals dismissed the appeal *sua sponte* upon the ground that no substantial constitutional question was presented. *See In re Mann, 31 N.Y.3d 1037 (2018).* Thereafter, the Court of Appeals denied Plaintiff's motion for reconsideration and his motion for reargument of his motion for leave to appeal. *See*

In re Mann, 32 N.Y.3d 948 (2018); In re Mann, 32 N.Y.3d 1185 (2019).

In his complaint dated January 15, 2021, Plaintiff brings the following causes of action against Defendants in relation to the January 18, 2018 decision of the Third Department: (1) violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution and the Due Process Clause of [Article 1, § 6 of the New York State Constitution](#); (2) violation of [New York State Judiciary Law § 90\(8\)](#); (3) declaratory judgment that Rules 1.7 and 8.4 are unconstitutionally vague as applied to Plaintiff; and (4) a declaratory judgment determining that Plaintiff did not violate Rule 8.4(d). *See* Dkt. No. 1-1 at ¶¶ 58-113. Moreover, Plaintiff seeks the following relief: (1) an Order directing that the discipline of Plaintiff as set forth in the Memorandum and Order be struck from the record with publication revoked and/or sealed; or, alternatively, an Order compelling the New York State Court of Appeals to hear Plaintiff's appeal of the Memorandum and Order; or, in the alternative, (2) an Order certifying the questions raised herein to the Court of Appeals for determination; (3) an Order granting declaratory judgment determining that Plaintiff did not violate 22 NYCRR 1200 Rules 1.7(a)(1) and Rule 8.4(d) or any other section of law, rule, or regulation; (4) an Order awarding all costs and disbursements, including but not limited to reasonable attorney's fees, incurred by Plaintiff in defense of the underlying disciplinary proceedings and in prosecution of the within action; and (5) an Order Granting such other and further relief as this Court deems just fair and proper.

*3 In their motion to dismiss, Defendants argue that Plaintiff's complaint must be dismissed because (1) the Court lacks subject-matter jurisdiction over this litigation under the Eleventh Amendment and the *Rooker-Feldman* doctrine and (2) Plaintiff's claims are barred by the doctrines of *res judicata* and collateral estoppel. *See* Dkt. No. 13-1. In response, Plaintiff contends that Defendants have attempted to improperly cast his claims as simply an effort to relitigate the state court findings. *See* Dkt. No. 15 at 6. Plaintiff clarifies that he is not asking the Court to substitute its judgment for that of the Appellate Division; rather, he contends that he was denied procedural due process and he is challenging the rules applied to his matter as vague and facially invalid. *See id.* Moreover, Plaintiff makes clear that he is only seeking prospective injunctive and declaratory relief to prevent the state's ongoing violation of due process and enforcement of rules that are unconstitutional. *See id.* As such, Plaintiff argues

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that his claims are not barred by the Eleventh Amendment, the *Rooker-Feldman* doctrine, or the doctrines of *res judicata* and collateral estoppel. *See id.*

III. DISCUSSION

A. Legal Standard

“A court faced with a motion to dismiss pursuant to both Rules 12(b)(1) and 12(b)(6) must decide the jurisdictional question first because a disposition of a Rule 12(b)(6) motion is a decision on the merits and, therefore, an exercise of jurisdiction.” *Dutrow v. New York State Gaming Commission*, No. 13-cv-996, 2014 WL 11370355, *3 (E.D.N.Y. July 29, 2014), *aff'd*, 607 Fed. Appx. 56 (2d Cir. 2015). A motion seeking dismissal under the Eleventh Amendment or the *Rooker-Feldman* doctrine is properly considered under Rule 12(b)(1). *See Long Island Pure Water Ltd. v. Cuomo*, 375 F. Supp. 3d 209, 215 (E.D.N.Y. 2019); *Hylton v. J.P. Morgan Chase Bank, N.A.*, 338 F. Supp. 3d 263, 273 (S.D.N.Y. 2018). A motion seeking dismissal “invoking *res judicata* and collateral estoppel are properly brought under Rule 12(b)(6).” *Marcelin v. Cortes-Vazquez*, No. 09-cv-4303, 2010 WL 5665037, *2 (E.D.N.Y. Dec. 9, 2010) (citations omitted).

1. Rule 12(b)(1)

“[A] federal court generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of claim in suit (*i.e.*, subject-matter jurisdiction).” *Sinochem Int'l Co., Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430-31 (2007) (citation omitted). “A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it.” *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). When subject matter jurisdiction is challenged, a plaintiff “bear[s] the burden of ‘showing by a preponderance of the evidence that subject matter jurisdiction exists.’ ” *APWU v. Potter*, 343 F.3d 619, 623 (2d Cir. 2003) (quoting *Lunney v. United States*, 319 F.3d 550, 554 (2d Cir. 2003)). “In resolving a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) a district court may consider evidence outside the pleadings.” *Morrison v. Nat'l Australia Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008) (citing *Makarova*, 201 F.3d at 113).

In reviewing a motion to dismiss under Rule 12(b)(1), the court “must accept as true all material factual allegations in the complaint, but [is] not to draw inferences from the

complaint favorable to plaintiffs.” *J.S. ex rel. N.S. v. Attica Cent. Sch.*, 386 F.3d 107, 110 (2d Cir. 2004). The court “may consider affidavits and other materials beyond the pleadings to resolve the jurisdictional issue, but [] may not rely on conclusory or hearsay statements contained in the affidavits.” *Id.* In resolving a Rule 12(b)(1) motion, a court may also “consider ‘matters of which judicial notice may be taken.’ ” *Greenblatt v. Gluck*, No. 03 Civ. 597, 2003 WL 1344953, *1 n.1 (S.D.N.Y. Mar. 19, 2003) (quoting *Hertz Corp. v. City of New York*, 1 F.3d 121, 125 (2d Cir. 1992)).

2. Rule 12(b)(6)

A motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of the party's claim for relief. *See Patane v. Clark*, 508 F.3d 106, 111-12 (2d Cir. 2007). In considering the legal sufficiency, a court must accept as true all well-pleaded facts in the pleading and draw all reasonable inferences in the pleader's favor. *See ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) (citation omitted). This presumption of truth, however, does not extend to legal conclusions. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). Although a court's review of a motion to dismiss is generally limited to the facts presented in the pleading, the court may consider documents that are “integral” to that pleading, even if they are neither physically attached to, nor incorporated by reference into, the pleading. *See Mangiafico v. Blumenthal*, 471 F.3d 391, 398 (2d Cir. 2006) (quoting *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152-53 (2d Cir. 2002)).

*4 To survive a motion to dismiss, a party need only plead “a short and plain statement of the claim,” *see Fed. R. Civ. P. 8(a)(2)*, with sufficient factual “heft to ‘sho[w] that the pleader is entitled to relief.’ ” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007) (quotation omitted). Under this standard, the pleading's “[f]actual allegations must be enough to raise a right of relief above the speculative level,” *see id.* at 555 (citation omitted), and present claims that are “plausible on [their] face,” *id.* at 570. “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 556 U.S. at 678 (citation omitted). “Where a complaint pleads facts that are ‘merely consistent with’ a defendant's liability, it ‘stops short of the line between possibility and plausibility of ‘entitlement to relief.’ ” *Id.* (quoting *Twombly*, 550 U.S. at 557). Ultimately, “when the allegations in a complaint, however true, could not raise a claim of entitlement to relief,” *Twombly*, 550 U.S. at 558, or where a plaintiff has

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“not nudged [its] claims across the line from conceivable to plausible, the [] complaint must be dismissed[.]” *id.* at 570.

B. Eleventh Amendment

The Eleventh Amendment provides that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. Const. amend. XI. “The Supreme Court has long held that the Eleventh Amendment bars suits against a state by one of its own citizens, unless (1) the state consents to be sued, or (2) Congress validly abrogates the state’s immunity.” *Ross v. City Univ. of New York*, 211 F. Supp. 3d 518, 525 (E.D.N.Y. 2016) (citing *Coll. Sav. Bank v. Fl. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999)). But the Supreme Court established a third exception in *Ex parte Young*, 209 U.S. 123 (1908), allowing “prospective injunctive relief ... against individuals being sued in their official capacities in order to correct an ongoing violation of federal law.” *JTE Enterprises, Inc. v. Cuomo*, 2 F. Supp. 3d 333, 340 (E.D.N.Y. 2014) (citing *Edelman v. Jordan*, 415 U.S. 651, 663, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974)).

In their motion to dismiss, Defendants contend that it is well settled that Section 1983 did not abrogate the states’ immunity and New York has not consented to suit in federal court. *See* Dkt. No. 13-1 at 12-13. Since all named Defendants are considered arms of the state, Plaintiff’s claims must be dismissed. *See id.* In response, Plaintiff contends that the *Ex parte Young* exception applies to this matter since he is seeking “to compel a state official to comply with federal law by employing prospective injunctive and declaratory relief.” Dkt. No. 15 at 21.

The Court agrees with Defendants that the New York State Court of Appeals, the Appellate Division, Third Department, and the Attorney Grievance Committee of the Third Department are all arms of the state which benefit from Eleventh Amendment immunity. *See Napolitano v. Saltzman*, 315 Fed. Appx. 351, 351 (2d Cir. 2009) (holding that the district court correctly found that the Eleventh Amendment barred the plaintiff’s claims against the Appellate Division, the Grievance Committee, and the individual defendant named in his official capacity as counsel to the Grievance Committee); *Abrahams v. Appellate Div. of Supreme Court*, 474 F. Supp. 2d 550, 556 (S.D.N.Y. 2007), *aff’d*, 311 Fed. Appx. 474 (2d Cir. 2009); *Bloom v. N.Y.S. Unified Ct. Sys.*, No. 19-cv-7115, 2020 WL 6118828, *3 (E.D.N.Y. Oct. 16,

2020). Since New York has not consented to be sued, and because Section 1983 did not abrogate New York’s Eleventh Amendment immunity, Plaintiff’s claims can only proceed if the *Ex parte Young* exception applies.

In his complaint, Plaintiff seeks the following relief:

a) An order and judgment declaring that with respect to Plaintiff, Defendants did engage in:

- *5 i. Violation of Due Process Clause of 14th Amendment of U.S. Constitution;
- ii. Violation of Due Process Rights Article 1 § 6 of the NYS Constitution[;]
- iii. Violation of N.Y.S. Judiciary Law § 90(8).

b) An order and judgment declaring 22 NYCRR 1200 Rule 1.7(a)(1) and 8.4(d) as applied unconstitutional and void for vagueness;

c) An order and judgment declaring that the Memorandum and Order of the Appellate Division is not supported by preponderance of evidence or substantial evidence;

d) An order and judgment declaring that the Appellate Division violated Plaintiff’s right to privacy in relation to private discipline in violation of § 90(10) of the N.Y.S. Judiciary Law, 22 NYCRR § 1240.18 and the former 22 NYCRR § 806.4(c)(5);

e) An order and judgment directing that the discipline of Plaintiff be struck of record with publication revoked and/or sealed; or compelling the New York State Court of Appeals to hear Plaintiff’s appeal of the Memorandum and Order[.]

Dkt. No. 1-1 at 18-19.

As noted by Defendants, each prayer for relief in Plaintiff’s complaint seeks relief from judicial determinations made prior to commencement of this lawsuit. There is no request by Plaintiff for an order enjoining Defendants from taking any future or prospective action against him. As such, it is clear from the face of the complaint that the *Ex parte Young* exception does not apply.

Additionally, the Supreme Court has made clear that this exception only contemplates action brought against individual defendants in their official capacities, and “has no application in suits against the States and their agencies,

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which are barred regardless of the relief sought.” *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). In his complaint, Plaintiff has not named any individuals in their official capacities who are responsible for the enforcement of the laws at issue, which further highlights the inapplicability of *Ex parte Young*.

Based on the foregoing, the Court grants Defendants’ motion to dismiss.

C. *Rooker-Feldman* Doctrine

The *Rooker-Feldman* doctrine bars “cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the federal district court proceedings commenced and inviting district court review and rejection of those judgments.” *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 281 (2005). For the *Rooker-Feldman* doctrine to apply, the defendant must satisfy the following four requirements: “First, the federal-court plaintiff must have lost in state court. Second, the plaintiff must complain of injuries caused by a state-court judgment. Third, the plaintiff must invite district court review and rejection of that judgment. Fourth, the state-court judgment must have been rendered before the district court proceedings commenced.” *Sykes v. Mel S. Harris & Associates LLC*, 780 F.3d 70, 94 (2d Cir. 2015). “While all four requirements must be met in order for *Rooker-Feldman* to act as a jurisdictional bar, [the Second Circuit has] held that the second requirement – that the plaintiff complains of an injury caused by a state-court judgment – is the core requirement from which the other *Rooker-Feldman* requirements derive.” *Sung Cho v. City of New York*, 910 F.3d 639, 646 (2d Cir. 2018) (emphasis in original).

*6 Here, (1) the Appellate Division rendered Plaintiff a “state-court loser” on January 18, 2018, when it confirmed the referee’s report and disciplined Plaintiff; (2) Plaintiff’s injuries trace to that discipline; (3) the relief Plaintiff seeks specifically invites this Court to review and reject the decision of the Appellate Division; and (4) the Appellate Division’s decision was rendered before Plaintiff commenced this action. Courts have routinely found claims of this nature barred by the *Rooker-Feldman* doctrine. See *Abrahams v. Appellate Div. of Supreme Court*, 311 Fed. Appx. 474, 475 (2d Cir. 2009); *Bloom*, 2020 WL 6118828, at *6; see also *Sowell v. Tinley Renehan & Dost, LLP*, 807 Fed. Appx. 115, 119 (2d Cir. 2020) (holding that the plaintiffs’ claims, alleging that prior state court rulings interpreting Connecticut’s professional conduct rule governing communication with a

person represented by counsel denied their rights to free speech, due process, and equal protection, were barred under the *Rooker-Feldman* doctrine, since the claims did not allege any injury traceable to the rule itself, but to state courts’ application of rule to the plaintiffs’ particular state case).

In his response, Plaintiff attempts to avoid dismissal under the *Rooker-Feldman* doctrine by arguing that “facial challenges to rules and doctrines used in state court determinations is not barred by *Rooker-Feldman*, so long as ‘plaintiffs d[o] not seek review of the [rules’ and doctrines’] application in a particular case.’ ” Dkt. No. 15 at 12 (quotation omitted). While Plaintiff is correct regarding facial challenges, nothing in his complaint can reasonably be interpreted as a facial challenge to any particular rule or regulation. As noted above, each prayer for relief makes specific reference to the rules and regulations as applied to his state-court case and Plaintiff, who is represented by counsel, cannot amend his complaint through his response to raise such a claim. See Dkt. No. 1-1 at 18-19; see also *Charchenko v. City of Stillwater*, 47 F.3d 981, 983 (2d Cir. 1995) (looking to the relief requested by the plaintiff in determining whether his claim was barred by the *Rooker-Feldman* doctrine).¹

As such, the Court finds that Plaintiff’s complaint is subject to dismissal on this alternative ground.

D. *Res Judicata* and Collateral Estoppel

Res judicata provides that “a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.” *Allen v. McCurry*, 449 U.S. 90, 94 (1980). As the Second Circuit explained in *Marcel Fashions Group, Inc. v. Lucky Brand Dungarees, Inc.*, 779 F.3d 102 (2d Cir. 2015):

The term *res judicata*, which means essentially that the matter in the controversy has already been adjudicated, encompasses two significantly different doctrines: claim preclusion and issue preclusion.... Under *claim preclusion*, “a final judgment forecloses successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit.” ... The doctrine precludes not only litigation of claims raised and adjudicated in a prior litigation between the parties (and their privies), but also of claims that might have been raised in the prior litigation but were not.... The doctrine of *issue preclusion*, in contrast, “bars successive litigation of an issue of fact or law actually litigated and resolved in a valid

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court determination essential to the prior judgment, even if the issue recurs in the context of a different claim.”

*7 *Marcel*, 779 F.3d at 107-08 (internal citations and quotations omitted).

Res judicata applies where “(1) the previous action involved an adjudication on the merits; (2) the previous action involved the plaintiffs or those in privity with them; [and] (3) the claims asserted in the subsequent action were, or could have been, raised in the prior action.” *Monahan v. New York City Dept. of Corrections*, 214 F.3d 275, 285 (2d Cir. 2000) (citation omitted).

In the present matter, even assuming Plaintiff's claims were not subject to dismissal for lack of subject matter jurisdiction, dismissal would still be warranted. In response to Defendants' motion, Plaintiff contends that *res judicata* is inapplicable because “[t]he federal remedy under Section 1983 ‘is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.’ ” Dkt. No. 15 at 22-23 (quoting *Monroe v. Pape*, 365 U.S. 167, 183 (1961)). Moreover, Plaintiff contends that simply because his constitutional claims might have been raised before the state court does not prevent him from doing so in the present matter. *See id.* at 23.

Initially, the Court notes that the case relied on by Plaintiff, *Monroe v. Pape*, does not support his position. Rather, that case merely provides that an individual does not have to first look to state law before seeking relief under Section 1983, a proposition which is not in dispute. The issue here, however, is the fact that Plaintiff could have raised his constitutional arguments before the Appellate Division and failed to do so. Plaintiff had a full and fair opportunity to litigate the issues

raised in this case during the pendency of the state court proceedings, yet failed to do so. As such, Plaintiff's claims would be subject to dismissal on this alternative ground. *See Sassower v. Mangano*, 927 F. Supp. 113, 120 (S.D.N.Y. 1996) (holding that the plaintiff attorney's claims challenging his suspension from the practice of law by the Second Department were subject to dismissal under the doctrine of *res judicata*).

Accordingly, the Court finds that, assuming the Court had subject matter jurisdiction over Plaintiff's claims, they would be subject to dismissal on this alternative ground.

IV. CONCLUSION

After carefully reviewing the entire record in this matter, the parties' submissions and the applicable law, the Court hereby

ORDERS that Defendants' motion to dismiss (Dkt. No. 13) is **GRANTED**; and the Court further

ORDERS that the Clerk of the Court shall enter judgment in Defendants' favor and close this case; and the Court further

ORDERS that the Clerk of the Court shall serve a copy of this Memorandum-Decision and Order on the parties in accordance with the Local Rules.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2021 WL 5040236

Footnotes

- 1 Even assuming that Plaintiff is attempting a facial challenge to Rules 1.7(a)(1) and 8.4(d), his complaint fails to allege any facts that he is or will be subject to the application of these Rules. Because Plaintiff fails to allege any facts demonstrating an injury in fact that is “actual or imminent,” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016), or “clearly impending,” *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990), he lacks standing to bring these claims. *See Sowell*, 807 Fed. Appx. at 120 (holding that the plaintiff attorney lacked standing for a facial challenge to the state's rules of conduct where he failed to allege facts that he was or imminently would be subject to the application of the rules at issue).

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United States Court of Appeals, Second Circuit.

HANDSOME, INC., Todd Cascella,
Mona Cascella, Plaintiffs-Appellants,

v.

TOWN OF MONROE, Planning and Zoning
Commission of the Town of Monroe,
Scott H. Schatzlein, Karen Martin, Steven
Vavrek, Patrick O'Hara, Michael Parsell, Joel
Leneker, Richard Zini, Defendants-Appellees.

No. 23-711

I

May 29, 2024

Appeal from a judgment of the United States District Court
for the District of Connecticut ([Chatigny, J.](#)).

Upon due consideration, it is hereby **ORDERED**,
ADJUDGED, and **DECREED** that the judgment of the
district court is **AFFIRMED**.

Attorneys and Law Firms

For Plaintiffs-Appellants: [Alexander T. Taubes](#), New Haven,
CT.

For Defendants-Appellees: [Jonathan C. Zellner](#), Ryan Ryan
Deluca LLP, Bridgeport, CT.

PRESENT: [John M. Walker, Jr.](#), [Steven J. Menashi](#), Circuit
Judges, [Nusrat Jahan Choudhury](#), District Judge. *

SUMMARY ORDER

*1 Plaintiff-Appellant Handsome, Inc., is a Connecticut corporation owned and operated by Plaintiffs-Appellants Todd and Mona Cascella. The individual defendants are members of the Planning and Zoning Commission for the town of Monroe, Connecticut. The plaintiffs allege that the Commission's actions over the course of several years with respect to a property they owned and were developing violated their due process, First Amendment, and equal protection rights. This action was originally filed in Connecticut state court in July 2011 and subsequently removed to federal court. The district court granted summary

judgment on March 31, 2023, and this appeal followed. We assume the parties' familiarity with the facts, the procedural history, and the issues on appeal.

I

Handsome acquired the land at issue—a ten-acre parcel located at 125 Garder Road in Monroe—from Todd Cascella via a quitclaim deed in 2001. The zoning regulations in effect at the time required all uses within the relevant zone to obtain a special exception permit (“SEP”) from the Commission. Handsome submitted an initial SEP application in February 2003 that stated its intention to construct a total of three industrial buildings at the site. However, it sought a permit only for the first building, which it wished to construct immediately “in order to avoid permitting delays, get the project going and produce a source of income.” App'x 33. The project required excavation and grading at the site prior to construction. The Commission granted the SEP for a period of five years on March 20, 2003. The SEP included a number of special conditions that required Handsome, *inter alia*, to provide periodic progress reports on grading work, post a bond in an amount to be determined by the Commission, and complete construction of the first building by March 20, 2005.

The project fell behind schedule, and only about half of the excavation and grading was completed by January 2008. Handsome applied for an SEP extension in April 2008, just before the original SEP was set to expire. The Commission held a hearing on the extension request on April 24, 2008. The hearing addressed “the lack of progress at the site,” “whether the special permit authorized the excavation-related activities,” “Handsome's failure to file progress reports,” and “frustration ... regarding laxity in the enforcement of zoning regulations by Town officials, especially with regard to excavations.” *Id.* at 35-36. The chairman expressed the view that the project was “nothing but a mining operation.” *Id.* at 36. The Commission voted unanimously to deny the extension, and Handsome sought review in Connecticut state court. On September 10, 2010, the Connecticut Superior Court sustained Handsome's appeal, holding that the Commission was required to grant the extension because Handsome was not in violation of any applicable statute or regulation (“*Handsome F*”).

*2 Prior to the April 2008 hearing on the extension, Handsome had submitted a plan to build a 32-unit affordable housing complex on another property on Garder Road. This

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proposal was denied in August 2008. Handsome appealed, and the parties ultimately entered into a settlement agreement in July 2009 that allowed Handsome to build a 28-unit complex. Meanwhile, during the pendency of the appeal from the denial of the 125 Garder Road SEP extension, a judgment of strict foreclosure on that property was entered in favor of MD Drilling and Blasting, Inc., which held a mechanic's lien on the property. Title passed to MD Drilling and Blasting on June 10, 2010. However, the new owner agreed to let Handsome continue to use the property in exchange for installment payments.

Handsome renewed its request for an extension following *Handsome I*, but the Commission did not hold a hearing on the matter until May 5, 2011. In the meantime, members of the Commission made an unannounced visit to 125 Garder Road, where they informed Todd Cascella of resident complaints regarding blasting; falsely accused him of continuing work in violation of a cease-and-desist order that had been issued—but was withdrawn—by the town planner; and threatened to require a \$100,000 restoration bond. Prior to the public hearing on May 5, the Commission convened in executive session. At the hearing, the Commission voted to extend the SEP but backdated the effective date of the extension to March 2008, when the original SEP would have expired. The Commission also added new conditions to the permit and required Handsome to post a \$100,000 restoration bond. Handsome appealed this decision as well. When Handsome resumed work at the site without posting the bond, the town issued a cease-and-desist order and then brought a zoning enforcement action, which was later dropped pending the resolution of Handsome's appeal.

On December 21, 2012, the Connecticut Superior Court sustained Handsome's second appeal ("*Handsome II*"). The court held that the executive session prior to the public hearing was illegal; that the Commission had no discretion to impose additional conditions when it approved the extension; and that the five-year time limit on the original SEP should have been tolled pending the resolution of the first appeal, and for that reason the extension's effective date should not have been backdated. The Connecticut Supreme Court subsequently vacated *Handsome II* on the ground that "Handsome had no standing to bring the appeal because, having lost title to the property, it was not aggrieved by the commission's decision to impose conditions in connection with the permit extension." *Handsome, Inc. v. Planning & Zoning Comm'n of Monroe*, 317 Conn. 515, 530 (2015) ("*Handsome III*"). Justice Palmer dissented

because "Handsome was aggrieved by the commission's decision," which affected the "valuable interest in the property" Handsome retained through "[t]he agreement with MD Drilling." *Id.* at 554 (Palmer, J., dissenting). The majority decided that Handsome had waived this argument because the plaintiffs "did not rely on the agreement as evidence of a possessory interest in the property in support of their claim of aggrievement" earlier in the litigation and "did not adequately brief" the issue on appeal. *Id.* at 532 n.7. Mona Cascella and Handsome filed for bankruptcy in 2017 and 2018, respectively.

The plaintiffs originally filed this action in the Connecticut Superior Court in July 2011, in the wake of the cease-and-desist order from the Commission. They asserted claims under the First Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment and sought compensatory damages, punitive damages, and attorneys' fees. The defendants moved for summary judgment on October 5, 2015, and the district court requested supplemental briefing on several issues. On March 31, 2023, the district court granted the defendants' motion for summary judgment. The district court held that the plaintiffs had Article III standing notwithstanding the Connecticut Supreme Court's decision in *Handsome III*.¹ It then held that the claims based on the denial of the SEP in April 2008 were time-barred and would have failed on the merits even if timely. The district court also held that the defendants' actions following *Handsome I* did not violate the plaintiffs' due process or First Amendment rights. Finally, the district court held that summary judgment was appropriate on the plaintiffs' equal protection claim because their proposed comparator was not similarly situated. This appeal followed.

II

*3 "Summary judgment is warranted when, viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." *Garcia v. Heath*, 74 F.4th 44, 47 (2d Cir. 2023) (quoting *Romano v. Ulrich*, 49 F.4th 148, 152 (2d Cir. 2022)). "We review a district court's decision to grant summary judgment *de novo*, resolving all ambiguities and drawing all permissible factual inferences in favor of the party against whom summary judgment is sought." *Id.* at 47-48 (quoting *Burg v. Gosselin*, 591 F.3d 95, 97 (2d Cir. 2010)).

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III

The plaintiffs raise four arguments on appeal. First, they argue that the district court erred in holding that their First and Fourteenth Amendment claims related to the denial of the SEP extension in 2008 were time-barred. Second, they argue that the district court erred in holding that, even if those claims were not time-barred, summary judgment for the defendants would have been appropriate on the merits. Third, they argue that the district court erred in granting summary judgment for the defendants on the merits with respect to their First and Fourteenth Amendment claims related to the defendants' actions following the Connecticut Superior Court's decision in *Handsome I*. Fourth, they argue that the district court erred in granting summary judgment for the defendants with respect to their equal protection claim on the ground that Handsome was not similarly situated to its proposed comparator, Monroe Land Holdings ("MLH"), as a matter of law. We affirm the judgment of the district court.

A

Because this action was brought under 42 U.S.C. § 1983, the applicable limitations period is the general statute of limitations for tort actions under the law of the state in which the district court sits—in this case, Connecticut. See *Owens v. Okure*, 488 U.S. 235, 249-50 (1989). Under Connecticut law, the general statute of limitations for tort actions, which we apply here, is three years. See Conn. Gen. Stat. § 52-577 ("No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of."); see also *Clark v. Hanley*, 89 F.4th 78, 91 (2d Cir. 2023) (applying Conn. Gen. Stat. § 52-577 to a § 1983 claim). The time at which a cause of action accrues under § 1983, however, is "a question of federal law that is not resolved by state law." *Wallace v. Kato*, 549 U.S. 384, 389 (2007). The Commission denied Handsome's application for an extension on April 4, 2008, and Handsome filed this action in May 2011, more than three years later. The district court held that claims based on the initial denial of the extension were time-barred.

On appeal, the plaintiffs argue that these claims were timely pursuant to the "continuing violation doctrine." Ordinarily, a cause of action accrues under § 1983 "when the plaintiff knows or has reason to know of the injury which is the basis of his action." *Pearl v. City of Long Beach*, 296 F.3d 76, 80 (2d Cir. 2002) (quoting *Singleton v. City of New York*,

632 F.2d 185, 191 (2d Cir. 1980)). The continuing violation doctrine is an exception to this rule, and it applies when the defendant engages in a continuous pattern of wrongful behavior that "cannot be said to occur on any particular day" and no single instance of which is "actionable on its own." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002); see also *Sherman v. Town of Chester*, 752 F.3d 554, 567 (2d Cir. 2014) (applying the continuing violation doctrine to a takings claim that was "based on an unusual series of regulations and tactical maneuvers that constitutes a taking when considered together, even though no single component is unconstitutional when considered in isolation").

*4 The district court correctly held that the continuing violation doctrine does not apply to the plaintiffs' claims based on the April 2008 extension denial. The doctrine does not apply to a series of discrete, though related, unlawful acts, each of which is actionable on its own. See *DeSuze v. Ammon*, 990 F.3d 264, 272 (2d Cir. 2021) ("Where ... plaintiffs complain of 'discrete acts' separated in time, the usual limitations rule applies.") (quoting *Gonzalez v. Hastly*, 802 F.3d 212, 220 (2d Cir. 2015)). The plaintiffs in this case allege a series of discrete unlawful acts, the first of which was the denial of the extension in 2008. Moreover, according to the plaintiffs, after Handsome applied for permission to construct an affordable housing development, the Commission became "[i]mmediately [h]ostile" to them, and this hostility was "blatant" at the meeting on the extension on April 4, 2008. Appellants' Br. 6, 8. If the Commission denied Handsome's SEP extension in retaliation for the affordable housing project, and the plaintiffs knew this, the plaintiffs would at that time have had a "complete and present cause of action." *Green v. Brennan*, 578 U.S. 547, 554 (2015) (quoting *Graham Cty. Soil & Water Conserv. Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 418 (2005)). The district court correctly determined that the plaintiffs' claims became time-barred when they failed to bring those claims within three years of the denial of the SEP extension.

B

The plaintiffs' claims regarding the Commission's actions following the decision of the Connecticut Superior Court in *Handsome I*, on the other hand, are timely. Nonetheless, the district court correctly granted summary judgment on the merits with respect to these claims.

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A substantive due process claim based on a zoning board's denial of a permit requires the plaintiff to make two showings. First, there must be “a demonstration that [the plaintiff] had a clear entitlement to the permit under state law.” *Natale v. Town of Ridgefield*, 170 F.3d 258, 263 (2d Cir. 1999).² “Usually, entitlement turns on whether the issuing authority lacks discretion to deny the permit, *i.e.*, is required to issue it upon ascertainment that certain objectively ascertainable criteria have been met.” *Natale*, 170 F.3d at 263. However, it is not enough to “prov[e] that someone did not obtain what he or she is entitled to under state law. For state action to be taken in violation of the requirements of substantive due process, the denial must have occurred under circumstances warranting the labels ‘arbitrary’ and ‘outrageous.’ ” *Id.* at 262. This two-step framework applies to the plaintiffs’ claims based on the Commission’s actions following *Handsome I*.

We conclude that the district court correctly granted summary judgment to the defendants because no reasonable jury could have decided that the Commission’s conduct was “so outrageously arbitrary as to constitute a gross abuse of governmental authority.” *Id.* The record shows that Handsome was behind schedule on the project, had failed to comply with conditions of the initial SEP, and was experiencing financial difficulties. Given these circumstances, the Commission’s decisions following *Handsome I*—even if those decisions were contrary to Connecticut law, as the Superior Court subsequently held in *Handsome II*—were not “ ‘conscience-shocking,’ or ‘oppressive in the constitutional sense,’ ” as opposed to “merely ‘incorrect or ill-advised.’ ” *Ferran v. Town of Nassau*, 471 F.3d 363, 370 (2d Cir. 2006) (quoting *Lowrance v. C.O. S. Achtyl*, 20 F.3d 529, 537 (2d Cir. 1994)). “Substantive due process is an outer limit on the legitimacy of government action. It does not forbid governmental actions that might fairly be termed arbitrary and capricious and for that reason correctable in a state court lawsuit seeking review of administrative action,” as the Commission’s actions were corrected here. *Natale*, 170 F.3d at 262.

*5 The district court also correctly granted summary judgment for the defendants on the plaintiffs’ non-time-barred First Amendment retaliation claim. “If an official takes adverse action against someone” for engaging in protected speech, “and ‘non-retaliatory grounds are in fact insufficient to provoke the adverse consequences,’ the injured person may generally seek relief by bringing a First Amendment claim.” *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019) (quoting *Hartman v. Moore*, 547 U.S. 250, 256 (2006)). The official’s

retaliatory motive “must be a ‘but-for’ cause, meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive.” *Id.*

We agree with the district court that “[o]n this record, a jury could not reasonably find that any of the individual defendants acted with [a] retaliatory motive” or that “retaliatory animus was the but-for cause of the challenged actions.” App’x 99. The plaintiffs have failed to offer any “particularized evidence” that suggests a retaliatory motive, such as “expressions by the officials involved regarding their state of mind, circumstances suggesting in a substantial fashion that the plaintiff has been singled out, or the highly unusual nature of the actions taken.” *Blue v. Koren*, 72 F.3d 1075, 1084 (2d Cir. 1995). In addition, the record indicates that the alleged adverse actions—the Commission’s delay in acting on the extension request following *Handsome I* and the imposition of the new conditions—would have been taken regardless of the plaintiffs’ decision to seek relief from the Connecticut Superior Court. As the district court explained, “the Commission did not act on the extension until after the tax foreclosure proceeding was resolved; and the new requirements were consistent with the original conditions of approval.” App’x 97. The record indicates that the Commission delayed the hearing and the decision on the extension because the property might have gone into foreclosure. It also indicates that the Commission imposed the new conditions because of its concern about the lack of progress at the site rather than retaliation against the plaintiffs for availing themselves of the Connecticut courts. Because “non-retaliatory grounds are in fact []sufficient” to explain the Commission’s conduct, *Nieves*, 139 S. Ct. at 1722 (quoting *Hartman v. Moore*, 547 U.S. 250, 256 (2006)), the plaintiffs’ First Amendment retaliation claim fails.

C

Finally, the plaintiffs brought an equal protection claim based on the Commission’s issuance of the cease-and-desist order against Handsome and the requirement to post a restoration bond. The plaintiffs claim that the town did not take similar actions with respect to MLH, which was also conducting extensive excavation on a 74-area parcel of land in the same zoning district. The district court granted summary judgment on this claim because Handsome and MLH are not similarly situated.

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The Supreme Court has recognized “class of one” equal protection claims based on selective enforcement of laws and regulations “where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and there is no rational basis for the difference in treatment.” *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). However, “[i]n order to succeed in a ‘class of one’ claim, the level of similarity between plaintiffs and persons with whom they compare themselves must be extremely high.” *Neilson v. D’Angelis*, 409 F.3d 100, 105 (2d Cir. 2005), *overruled on other grounds by Appel v. Spiridon*, 531 F.3d 138 (2d Cir. 2008). The plaintiff must show, first, that “no rational person could regard the circumstances of the plaintiff to differ from those of a comparator to a degree that would justify the differential treatment on the basis of a legitimate government policy”; and, second, that “the similarity in circumstances and difference in treatment are sufficient to exclude the possibility that the defendant acted on the basis of a mistake.” *Id.* We have recently reaffirmed this “stringent similarity standard” for “class of one” claims. *Hu v. City of New York*, 927 F.3d 81, 94 (2d Cir. 2019).

*6 The district court identified several relevant differences between Handsome and MLH that could lead a rational person to conclude that the differential treatment was justified by legitimate government interests, including Handsome’s record of noncompliance with permit conditions, its financial difficulties, and the fact that work was resumed at the site without posting the bond required by the extended SEP. Based on these differences, the district court correctly concluded that Handsome and MLH were not similarly situated.

* * *

We have considered the plaintiffs’ remaining arguments, which we conclude are without merit. For the foregoing reasons, we affirm the judgment of the district court.

All Citations

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Footnotes

- * Judge Nusrat Jahan Choudhury of the United States District Court for the Eastern District of New York, sitting by designation.
- 1 The defendants do not challenge the plaintiffs’ standing on appeal. In any event, we conclude that the district court was correct that the plaintiffs have Article III standing.
- 2 We note that, in other cases, a property interest protected by the Due Process Clause may be based on a source other than state law. See *Tyler v. Hennepin County*, 598 U.S. 631, 638 (2023) (“[S]tate law cannot be the only source [of protected property interests]. Otherwise, a State could ‘sidestep the Takings Clause by disavowing traditional property interests’ in assets it wishes to appropriate.”) (quoting *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 167 (1998)); see also *S. Cal. Edison Co. v. Orange Cnty. Transp. Auth.*, 96 F.4th 1099, 1104 (9th Cir. 2024).

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