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APPENDIX  
OF  
Plaintiff-Petitioner, Assem A. Abulkhair

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UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

No. 18-1584

ASSEM A. ABULKHAIR,  
Appellant

v.

GOOGLE LLC; LAWRENCE EDWARD PAGE;  
SERGEY MIIGIA'LOVICH BRIN

(D.N.J. No. 2-17-cv-07217)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO,  
CHAGARES, JORDAN, VANASKIE, SHWARTZ,  
KRAUSE, RESTREPO, and BIBAS, Circuit  
Judges, and NYGAARD,\* Senior Circuit Judge

The petition for rehearing filed by appellant in the above-captioned case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en bane is denied.

By the Court,  
s/Stephanos Bibas  
Circuit Judge

Dated: July 11, 2018

\* Judge Nygaard's vote is limited to panel rehearing only.

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BLD-238

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

No. 18-1584

ASSEM A. ABULKHAIR,  
Appellant

v.

GOOGLE LLC; LAWRENCE EDWARD PAGE;  
SERGEY MIKHAYLOVICH BRIN

On Appeal from the United States District Court  
for the District of New Jersey  
(D.C. No. 2:17-cv-07217)

District Judge: Honorable Esther Salas

Submitted for Possible Dismissal Due to a  
Jurisdictional Defect or Summary Action  
Pursuant to Third Circuit L.A.R. 27.4 and 1.O.P.  
10.6 June 14, 2018

Before: RESTREPO, BIBAS, and NYGAARD,  
Circuit Judges (Filed: June 19, 2018)

OPINION\*

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•This disposition is not an opinion of the full Court and pursuant to 1.O.P. 5.7 does not constitute binding precedent.

**PER CURIAM**

Assem Abulkhair appeals pro se from the District Court's order dismissing his complaint brought against Google LLC and its co-founders, Larry Page and Sergey Brin ("Appellees"). For the reasons that follow, we will summarily affirm that order.

I.

Because we write primarily for the parties, who are familiar with the background of this case, we discuss that background only briefly. Abulkhair's pro se complaint, filed in September 2017, revolved around allegations that Appellees tampered with, blocked access to, and ultimately disabled a free email account that he had obtained from Google in 2014. Abulkhair alleged that Appellees' conduct violated his constitutional rights and certain federal laws, and he also raised state-law tort claims. In light of these allegations, Abulkhair sought "not less than" \$100 billion in damages and various other relief.

On February 8, 2018, Google moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). On March 9, 2018, the District Court granted that motion and dismissed the complaint as to all three defendants. That dismissal was without prejudice to Abulkhair's

ability to file an amended complaint by April 23, 2018. He did not subsequently file an amended complaint; instead, he brought this appeal.

II.

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.<sup>1</sup> Our review over the District Court's dismissal order is plenary. See *Allah v. Seiverling*, 229 F.3d 220, 223 (3d Cir. 2000). We may affirm that order on any basis supported by the record, see *Murray v. Bledsoe*, 650 F.3d 246, 247 (3d Cir. 2011) (per curiam), and we may take summary action if this appeal fails to present a substantial question, see 3d Cir. 1.O.P.10.6.

Having carefully reviewed Abulkhair's complaint, we agree with the District Court's decision to dismiss that pleading. To the extent that Abulkhair's complaint raised claims under the Privacy Act of 1974 (which is codified as amended at 5 U.S.C. § 552a) and the First, Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, those claims were subject to dismissal because Appellees are private actors. See 5 U.S.C. § 552a(g)(1) (authorizing a civil action against an "agency," not a private actor); *Skinner v. Ry. Labor Execs.' Ass'n.*, 489 U.S. 602, 614 (1989) (noting that the Fourth Amendment does not protect against searches and

seizures initiated by private actors); *Rendell-Baker v. Kohn*, 457 U.S. 830, 837 (1982) (explaining that the Fourteenth Amendment "applies to acts of the states, not to acts of private persons or entities"); *Pub. Utils. Comm'n of D.C. v. Pollak*, 343 U.S. 451, 461 (1952) (stating that the First

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<sup>1</sup> Our jurisdiction under § 1291 is limited to reviewing final orders of the district courts. See 28 U.S.C. § 1291. When, as here, a district court dismisses a complaint without prejudice and the plaintiff does not file an amended complaint within the time provided by the district court, the district court's dismissal constitutes a "final" order for purposes of § 1291. See *Batoff v. State Farm Ins. Co.*, 977 F.2d 848, 851 n.5 (3d Cir. 1992).

and Fifth Amendments "apply to and restrict only the Federal Government and not private persons").<sup>2</sup> Abulkhair's claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., was subject to dismissal because he did not allege that he was Appellees' employee. See *Covington v. Int'l Ass'n of Approved Basketball Officials*, 710 F.3d 114, 119 (3d Cir. 2013). His claim under 42 U.S.C. § 1985(3) was subject to dismissal because it was insufficiently pleaded, in that it contained only bald allegations that Appellees conspired to discriminate against him on the basis of his race. See *Ashcroft v. Igbal*, 556 U.S. 662, 678 (2009) (stating that "[a] pleading that offers labels and conclusions or . . . tenders naked assertion[s] devoid of further factual

enhancement" cannot survive dismissal) (alteration in original) (internal quotation marks omitted). Lastly, because all of Abulkhair's federal claims were subject to dismissal, it was appropriate to dismiss his state-law claims, too. See *Hedges v. Musco*, 204 F.3d 109, 123 (3d Cir. 2000) ("This Court has recognized that, where the claim[s] over which the

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2 "Although a private party can be liable under [42 U.S.C.] § 1983 if he or she willfully participates in a joint conspiracy with state officials to deprive a person of a constitutional right," *Max v. Republican Comm. of Lancaster Cty.*, 587 F.3d 198, 203 (3d Cir. 2009), Abulkhair did not allege that Appellees conspired with any state officials. Furthermore, to the extent that an alleged conspiracy between a private actor and a *federal* actor can, under certain circumstances, support a viable constitutional claim against the private actor, but see *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001) (refusing to extend *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), "to confer a right of action for damages against private entities acting under color of federal law"), those circumstances are not present here. Although Abulkhair alleged, "upon information and belief," that Appellees gave his email password to the Federal Bureau of Investigation so that the agency could spy on him, that allegation is not enough to plead a viable conspiracy claim, see *Great W. Mining & Mineral Co. v. Fox Rothschild LLP*, 615 F.3d 159, 179 (3d Cir. 2010) (indicating that a plaintiff pleading a conspiracy claim must allege "facts that plausibly suggest a meeting of the minds").

district court has original jurisdiction [are] dismissed before trial, the district court must decline to decide the pendent state claims unless considerations of judicial economy, convenience, and fairness to the parties provide an affirmative justification for doing so.") (internal quotation marks omitted).

In contesting the District Court's dismissal of his complaint, Abulkhair appears to allege that he was not served with Google's motion to dismiss. But even if we take that allegation at face value (and ignore the certificate of service attached to Google's motion to dismiss, which states that service was indeed made on Abulkhair), there is no reason to disturb the District Court's dismissal order. Abulkhair has not demonstrated that he suffered prejudice by virtue of not being able to file a response to Google's motion, for that response would not have enabled him to survive dismissal. The only way to cure the defects in his complaint was to file an amended complaint. Abulkhair acknowledges that he learned of the District Court's dismissal order on March 12, 2018, which gave him 42 days to timely file an amended complaint. That he chose not to do so does not warrant vacating the District Court's decision.

Because this appeal does not present a substantial question, we will summarily affirm the District Court's judgment.<sup>3</sup>

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3 To the extent that Abulkhair argues that the presiding district judge, the Honorable Esther Salas, should have recused herself, we find this argument unpersuasive. See 28 U.S.C. §§ 144, 455 (setting forth standards for recusal). To the extent that Abulkhair takes issue with the District Court's March 9, 2018 order granting Google's motion to modify the case caption (to reflect Google's recent conversion from a corporation to a limited liability company), he has failed to show how he was prejudiced by that order, particularly in light of our conclusion that his complaint was properly dismissed. We see no reason to further consider that order here.

Not for Publication

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

ASSEM A. ABULKHAIR, :  
Plaintiff : Civil Action  
: No. 17-7217  
v. :  
GOOGLE LLC, et al., : ORDER  
Defendants. :  
:

SALAS, DISTRICT JUDGE

Pending before the Court is Defendants Google LLC, Lawrence Edward Page, and Sergey Mikhaylovich Brin's (collectively, "Google") motion to dismiss (D.E. No. 11); and pro se Plaintiff Assem A. Abulkhair having failed to oppose Google's motion; the Court having considered Google's brief in support of its motion (D.E. No. 11-1) and having decided the matter without oral argument under Federal Rule of Civil Procedure 78(b);

IT IS on this 9th day of March 2018,

ORDERED that Google's motion to dismiss (D.E. No. 11) is GRANTED; and it is further

ORDERED that Plaintiff's Complaint is DISMISSED without prejudice; and it is further

ORDERED that Plaintiff may file an amended complaint within 45 days of the date of this Order; and it is further

ORDERED that the Clerk of Court shall send a copy of this Order to Plaintiff by regular mail and TERMINATE docket entry number 11.

*s/Esther Salas*  
Esther Salas, U.S.D.J.

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UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

ASSEM A. ABULKHAIR, )  
Plaintiff, )  
v. ) CASE NUMBER:  
 ) 17-7217  
GOOGLE INC. et al., [PROPOSED] ORDER  
Defendants. )

Pending before the Court is Defendant Google LLC's Motion to Modify the Caption. Upon consideration of the documents submitted by Google U.C demonstrating its recent conversion from a corporation to a limited liability company, it is hereby

ORDERED that Google Inc. shall now be known as Google LLC in this action and the caption of the case shall be:

ASSEM A. ABULKHAIR, )  
Plaintiff, )  
v. ) CASE NUMBER:  
 ) 17-7217  
GOOGLE LLC. et al., )  
Defendants )

[handwritten]

s/Esther Salas 3/9/18  
Esther Salas, U.S.D.J.

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UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

CHAMBERS OF ESTHER SALAS  
UNITED STATES DISTRICT JUDGE  
MARTIN LUTHER KING COURTHOUSE  
50 WALNUT ST ROOM 5076  
NEWARK, NJ 07101

April 20, 2018

LETTER ORDER

Re: *Abulkhair v. The Federal Bureau of Investigation, et al.* Civil Action No. 14-5677

Dear Litigants:

Pending before the Court is pro se Plaintiff Assem A. Abulkhair's motion for recusal. (D.E. No. 41). For the following reasons, the Court DENIES Plaintiff's motion without prejudice.

On February 6, 2018, the Court granted Defendants' motion to dismiss Plaintiff's Amended Complaint. (D.E. Nos. 39 & 40). In doing so, the Court dismissed some claims with prejudice and some claims without prejudice. (*See id.*). The Court also granted Plaintiff leave to amend his pleading within thirty days to cure the deficiencies identified in the Court's Memorandum. (*See id.*). Plaintiff did not file an amended pleading.

On February 28, 2018, Plaintiff filed a motion for recusal. (D.E. No. 41). Two days later, on March 2, 2018, Plaintiff filed a Notice of Appeal of the Court's February 6, 2018 Order to the U.S. Court of Appeals for the Third Circuit. (D.E. No. 42). Thereafter, Defendants filed a letter advising that the Court lacks jurisdiction over Plaintiff's claims in this case and requesting that the Court "either deny or administratively terminate Mr. Abulkhair's recusal motion while the appeal of this Court's February 6, 2018 Order is pending before the Third Circuit." (D.E. No. 44). Plaintiff opposed Defendants' request. (See D.E. No. 45).

The Court agrees with Defendants that Plaintiff's appeal confers jurisdiction to the Third Circuit and "divests [this Court] of its control over those aspects of the case involved in the appeal." *See Venen v. Sweet*, 758 F.2d 117, 120 (3d Cir. 1985) (citing *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982)). The Third Circuit's decision in *Abulkhair v. President of US* involving the same pro se Plaintiff here and a similar procedural posture confirms this conclusion. *See* 490 F. App'x 458 (3d Cir. 2013).

Accordingly, Plaintiff's motion for recusal is DENIED without prejudice. The Clerk of Court shall TERMINATE docket entry number 41.

SO ORDERED.

s/sther Salas

Esther Salas, U.S.D.J.

APPROVED AS TO FORM ONLY

/s/Assem A. Abulkhair

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