No. USCA2 No. 20-947

IN THE

SUPREME COURT OF THE UNITED STATES

LISA. "LEE" WHITNUM – PETITIONER

vs.

OFFICE OF THE CHIEF STATE'S ATTORNEY,
KEVIN KANE, JOHN WHALEN,
JANE DOES 1-25, JOHN DOES 1-25,
ABC INSURANCE COMPANIES 1-10

On Petition For Writ of Certiorari
To The
United States Court of Appeals For the Second Circuit

APPENDIX FOR PETITION FOR A WRIT OF CERTIORARI

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20-947-cv
Whitnum v. Office of the Chief State's Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

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.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 19th day of February, two thousand twenty-one.

PRESENT: RAYMOND J. LOHIER, JR.,
STEVEN J. MENASHI,
Circuit Judges,
ERIC KOMITEE,*
Judge.

L. LEE WHITNUM,

Plaintiff-Appellant,

v. 20-947-cv

OFFICE OF THE CHIEF STATE'S ATTORNEY, KEVIN KANE, JOHN

---

* Judge Eric Komitee, of the United States District Court for the Eastern District of New York, sitting by designation.

WHALEN, JANE DOES 1-25, JOHN DOES 1-25, ABC INSURANCE COMPANIES 1-10,

Defendants-Appellees.[**]

FOR PLAINTIFF-APPELLANT: L. Lee Whitnum, *pro se*, Greenwich, CT.

FOR DEFENDANTS-APPELLEES: No appearance.

Appeal from a judgment of the United States District Court for the District of Connecticut (Janet C. Hall, *Judge*).

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

Plaintiff-Appellant L. Lee Whitnum, proceeding pro se, appeals from the February 20, 2020 judgment of the District Court (Hall, J.) adopting the recommended ruling of the Magistrate Judge (Merriam, M.J.) and dismissing Whitnum's amended complaint for failure to state a claim. We assume the parties' familiarity with the underlying facts and prior record of proceedings, to

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** The Clerk of Court is directed to amend the official caption to conform with the above caption.

which we refer only as necessary to explain our decision to affirm.

We review de novo a district court's sua sponte dismissal of a complaint under 18 U.S.C. § 1915(e)(2). Hardaway v. Hartford Pub. Works Dep't, 879 F.3d 486, 489 (2d Cir. 2018). "To avoid dismissal, a complaint must plead 'enough facts to state a claim to relief that is plausible on its face.'" Id. (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). We afford a pro se litigant "special solicitude" by interpreting a complaint filed pro se "to raise the strongest claims that it suggests." Hill v. Curcione, 657 F.3d 116, 122 (2d Cir. 2011) (quotation marks omitted).

As an initial matter, we conclude that the District Court properly analyzed Whitnum's complaint under § 1915(e)(2). The statute requires that a district court dismiss a complaint filed in forma pauperis if it determines that the action "(i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B). Despite Whitnum's argument to the contrary, § 1915(e)(2) is not limited to complaints filed by prisoners. See, e.g., Cieszkowska v. Gray Line N.Y., 295 F.3d 204 (2d Cir. 2002) (affirming the

dismissal of a pro se non-prisoner complaint under § 1915(e)).

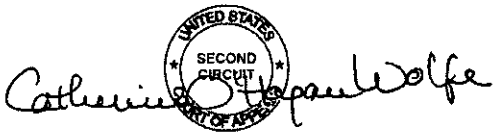
As for the merits, the District Court properly dismissed Whitnum's amended complaint. Whitnum chiefly challenges the dismissal of her malicious prosecution claim. That claim was properly dismissed because Whitnum failed to plead that the charges against her terminated in her favor. See Spak v. Phillips, 857 F.3d 458, 461 n.1 (2d Cir. 2017). In urging a contrary conclusion, Whitnum argues that because the stalking charge against her was dropped, she has adequately alleged the requisite favorable termination to sustain her malicious prosecution claim. We disagree. "When a person has been arrested and indicted, absent an affirmative indication that the person is innocent of the offense charged, the government's failure to proceed does not necessarily imply a lack of reasonable grounds for the prosecution." Lanning v. City of Glens Falls, 908 F.3d 19, 28 (2d Cir. 2018). In her complaint, Whitnum alleges that certain charges were dismissed, but she does not suggest that any charge was dismissed because she was innocent of the charge. And even if we were to look beyond the complaint and consider the transcript of the proceeding in which the prosecutor noted that he planned to dismiss the stalking charge, the prosecutor

offered no explanation for the dismissal. Accordingly, because Whitnum "has not plausibly alleged that any of the criminal proceedings against [her] were terminated in a manner indicating [her] innocence," she has failed to plead a valid malicious prosecution claim. Id. at 29.

We also reject Whitnum's claims of judicial bias, which are either unsupported or based on her disagreement with the rulings of the State Judge. See Liteky v. United States, 510 U.S. 540, 555 (1994) ("[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion.").

We have considered all of Whitnum's remaining arguments and conclude that they are without merit. For the foregoing reasons, we AFFIRM the judgment of the District Court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DEBRA ANN LIVINGSTON
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: February 19, 2021
Docket #: 20-947cv
Short Title: Whitnum v. Chief State's Attorney

DC Docket #: 18-cv-1991
DC Court: CT (NEW HAVEN)
DC Judge: Hall

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:
* be filed within 14 days after the entry of judgment;
* be verified;
* be served on all adversaries;
* not include charges for postage, delivery, service, overtime and the filers edits;
* identify the number of copies which comprise the printer's unit;
* include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
* state only the number of necessary copies inserted in enclosed form;
* state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
* be filed via CM/ECF or if counsel is exempted with the original and two copies.

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DEBRA ANN LIVINGSTON
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: February 19, 2021
Docket #: 20-947cv
Short Title: Whitnum v. Chief State's Attorney

DC Docket #: 18-cv-1991
DC Court: CT (NEW HAVEN)
DC Judge: Hall

VERIFIED ITEMIZED BILL OF COSTS

Counsel for

_____

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

_____

and in favor of

_____

for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix (necessary copies _____) _____

Costs of printing brief (necessary copies _____ ____) _____

Costs of printing reply brief (necessary copies _____) _____

(VERIFICATION HERE)

_____
Signature

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

L. "LEE" WHITNUM
Plaintiff

v. 3:18cv1991(JCH)

OFFICE OF THE CHIEF STATE'S ATTORNEY, KEVIN KANE, JOHN WHALEN, JANE DOES 1-25, JOHN DOES 1-25, ABC INSURANCE COMPANIES 1-10
Defendants

JUDGMENT

This matter came on before the Honorable Janet C. Hall, United States District Judge, and the Honorable Sarah A. L. Merriam, United States Magistrate Judge as a result of plaintiff's Amended Complaint filed against defendants.

The Court has reviewed all of the papers filed in conjunction with the Amended Complaint. On November 15, 2019, a Recommended Ruling was entered dismissing the Amended Complaint with prejudice. On February 20, 2020 the court entered a Ruling affirming, adopting, and ratifying the Recommended Ruling, over objection, and upon review.

Therefore, it is ORDERED, ADJUDGED and DECREED that the Amended Complaint is dismissed in accordance with the Recommended Ruling and the court's Ruling, and the case is closed.

Dated at New Haven, Connecticut, this 20th day of February 2020.

Robin D. Tabora, Clerk

ENTERED ON DOCKET 2/20/2020

By /s/ Diahann Lewis
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

L. LEE WHITNUM, Plaintiff,	:	CIVIL CASE NO. 3:18-CV-1991 (JCH)
v.	:	
OFFICE OF THE CHIEF STATE'S ATTORNEY, ET AL., Defendants.	:	FEBRUARY 20, 2020

RULING

The plaintiff, L. Lee Whitnum ("Whitnum"), appearing pro se, commenced this action on December 6, 2018. On the same day, she filed her Complaint (Doc. No. 1), she filed a Motion for Leave to Proceed In Forma Pauperis, attaching proof of lack of resources (Doc. No. 2). The Motion to Proceed In Forma Pauperis was referred to the Magistrate Judge. See Order (Doc. No. 7).

Based upon a review of her Motion, the Magistrate Judge ordered that the Motion was granted in light of the representations made by Whitnum in her sworn statement attached to her Motion. See Order (Doc. No. 8). Upon review of the Complaint, the Magistrate Judge recommended that the Complaint be dismissed with prejudice in part and dismissed without prejudice to refiling in part.

After notice of the time to object to this Recommended Ruling, and no objection having been received, this court entered an Order affirming and adopting the Magistrate Judge's Recommended Ruling and noting that Whitnum could file an Amended Complaint. See Order (Doc. No. 10). Subsequently, the court reconsidered that Order -- in light of Whitnum's claim that she had not received the Recommended Ruling -- and

provided Whitnum further time to file an objection to the Recommended Ruling. See Order (Doc. No. 22). After review of Whitnum's Objection, the court again affirmed and adopted the Recommended Ruling dismissing with prejudice in part and dismissing without prejudice in part with the right to replead. See Order (Doc. No. 50).

Whitnum had filed an Amended Complaint in response to the original Recommended Ruling on February 18, 2019. See Amended Complaint (Doc. No. 35). After the Circuit had dismissed an "interlocutory appeal" (Doc. No. 52) on October 9, 2019, Mandate (Doc. No. 55), the Magistrate Judge issued a second Recommended Ruling that the Amended Complaint be dismissed with prejudice.

After several Motions for Extension of Time, Whitnum filed a 33-page "Objection" to the November 15, 2019 Recommended Ruling on the Amended Complaint. Objection (Doc. No. 63). Subsequently, Whitnum filed a Motion for Order (Doc. No. 64), seeking permission to pay the filing fee in order to no longer be seeking in forma pauperis status and thus subjecting herself to review by the magistrate judge under section 1915(e)(2) of title 28 of the United States Code. That Motion is pending before the court. Subsequently, on January 15, 2020, Whitnum filed a "Further Objection" to the Recommended Ruling." See Further Objection to Recommended Ruling (Doc. No. 67). Having received Whitnum's Motion for Order in which she seeks to in effect change her in forma pauperis status to a fee-paying status, the court issued an Order to Show Cause. Order (Doc. No. 68). In that Order to Show Cause, the court pointed Whitnum to section 1915(e)(2)A of title 28 of the United States Code which states: "notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at anytime and if the court determines that – (A) the

allegation of poverty is untrue," the court requested that Whitnum show cause as to why the court should not dismiss the action under subsection (e)(2) of section 1915, because the representations on her in forma pauperis application were not true, in light of her representations of ability to pay the fee in her Motion for Order.

Whitnum replied on February 3, 2020. See Response (Doc. No. 69). In that Response, Whitnum asserts that she has recently been employed, part-time, and thus can afford to pay the fee. Based upon Whitnum's representation to the court, it would appear that her "allegation of poverty" in her Motion for In Forma Pauperis status was not "untrue," and thus the case should not be dismissed under 1915(e)(2)(A). Thus, the court could grant her Motion for Order, permitting her to pay the filing fee late, and to strike her Motion and the Order for in forma pauperis status upon the payment of that fee.

However, the court notes that another section of section 1915(e)(2) is subsection (B), which calls for the dismissal by the court "the court shall dismiss the case at any time," if the court finds that the action fails to state of claim upon which relief can be granted or seeks monetary relief against a defendant who is immune from such relief. The power of the court to dismiss such a case exists "not withstanding any filing fee, or any portion thereof, that may have been paid . . ." 28 U.S.C. section 1915(e)(2). It seems futile to grant the Motion for Order and allow Whitnum to pay her filing fee, only then to be faced with dismissal under this section on the grounds set forth by the Magistrate Judge in her Recommended Ruling and with which grounds and conclusion this court agrees.

The court has reviewed the Recommended Ruling, as well as all filings made by Whitnum following that Ruling. Objection (Doc. No. 63); further Objection (Doc. No. 67). Having reviewed these documents and viewing the Amended Complaint in the light most favorable to Whitnum, the court finds it fails to state of cause of action against any defendant. This court sees no basis, in Whitnum's opposition filings or the law, to alter the Recommended Ruling. Therefore, this court affirms, adopts and ratifies the Recommended Ruling (Doc. No. 56). The Motion for Order (Doc. No. 64) is denied as moot. The Clerk is directed to close this case.

SO ORDERED.

Dated this 20th day of February 2020 at New Haven, Connecticut.

/s/ Janet C. Hall
Janet C. Hall
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

L. LEE WHITNUM	:	Civ. No. 3:18CV01991(JCH)
v.	:	
OFFICE OF THE CHIEF STATE'S ATTORNEY, et al.	:	November 15, 2019

RECOMMENDED RULING

Self-represented plaintiff L. Lee Whitnum ("plaintiff") has now filed an Amended Complaint and a "Corrected Amended Complaint." See Docs. #31, #35. The Court is obligated by 28 U.S.C. §1915(e)(2) to review any complaint or amended complaint filed in forma pauperis to determine whether it may proceed to service of process. Consistent with that obligation, the Court here reviews only the "Corrected Amended Complaint," referring to it simply as the "Amended Complaint." [Doc. #35]. The Court finds that the Amended Complaint reasserts claims that have previously been dismissed with prejudice; asserts claims for damages against defendants who are immune; and fails to state any cognizable claim. Plaintiff has now brought multiple suits, and filed multiple complaints, all challenging the same set of events that occurred in connection with a state court criminal proceeding. Plaintiff has had ample opportunity to assert a

cognizable claim, and has failed to do so. Accordingly, the Court recommends that this matter be **DISMISSED, with prejudice.**

I. Background

Plaintiff previously brought this action against two defendants, the Office of the Chief State's Attorney, and Kevin Kane ("Attorney Kane"), "personally and in his official capacity as an employee of the defendant." Doc. #1 at 1. The Court reviewed that original complaint, and recommended that it be dismissed with prejudice, in part, and without prejudice, in part. See generally Doc. #9. Judge Janet C. Hall affirmed, adopted and ratified the recommended ruling on April 9, 2019. See Doc. #49.[1]

The Amended Complaint adds the following new defendants not named in the original complaint: "John Whalen, personally and in his official capacity, Defendants Jane and John Does 1-25, [and] ABC INSURANCE COMPANIES 1-10." Doc. #35 at 1.

The Amended Complaint again asserts that plaintiff "was charged wrongfully and deliberately of crimes, defamed, and made to appear more than 35 times by the defendants[.]" Doc. #35 at 1. Specifically, plaintiff alleges that defendant John Whalen, a state prosecutor, created a report designed to obtain an arrest

[1] Plaintiff filed an interlocutory appeal of Judge Hall's April 9, 2019, Order. [Docs. #51, #52]. The Second Circuit dismissed that appeal. See Doc. #55 (Mandate dated October 9, 2019).

warrant for plaintiff, and in that report altered plaintiff's cell phone records. See Doc. #35 at 9-11.

Plaintiff asserts causes of action for (1) malicious prosecution; (2) intentional infliction of emotional distress; (3) 42 U.S.C. §1983; (4) 42 U.S.C. §1985(3); (5) "Direct Action Pursuant to Connecticut's rules regarding insurance companies"; (6) violations of the Connecticut State Constitution; and (7) negligent infliction of emotional distress. Doc. #35.

Plaintiff seeks compensatory damages, punitive damages, an injunction prohibiting defendants "from retaliating against Plaintiff", fees and costs, "$1,000 bail and $1500 court fees paid[,]" and non-monetary relief including restoration of plaintiff's "one-time right to plead AR in the future" and "[a] a letter of exoneration and apology to be presented to the press to clean up her family name." Doc. #35 at 27 (sic).

II. Standard of Review

Plaintiff is very familiar with the standards this Court must apply when reviewing a complaint filed by a self-represented litigant proceeding in forma pauperis. The Court is required to dismiss an action, at any time, if it appears that the Court lacks jurisdiction, or that the complaint fails to state a cognizable claim. See generally 28 U.S.C. §1915(e)(2)(B). While the Court construes complaints filed by self-represented plaintiffs liberally, "the deference usually

granted to pro se plaintiffs need not be expansively drawn[]" where the plaintiff has extensive litigation experience, as this plaintiff does. Johnson v. Eggersdorf, 8 F. App'x 140, 143 (2d Cir. 2001).

III. Discussion

The Court begins by addressing those claims asserted in the Amended Complaint that are improperly brought because they were previously dismissed with prejudice.

Plaintiff again names as a defendant the Office of the Chief State's Attorney ("CSAO"). See Doc. #35 at 1. The Court has previously found that all section 1983 claims against the CSAO should be **DISMISSED, with prejudice**. See Doc. #9 at 5-6. The Court has also found that all state law claims for money damages against the CSAO should be **DISMISSED, with prejudice**. See id. at 6-7.

Plaintiff again names as a defendant Attorney Kane "personally and in his official capacity." Doc. #35 at 1. The Court has previously found that all claims for money damages asserted against Attorney Kane in his official capacity should be **DISMISSED, with prejudice**. See Doc. #9 at 8. The Court has also found that all claims asserted against Attorney Kane in his individual capacity for violation(s) of plaintiff's Fifth Amendment rights should be **DISMISSED, with prejudice**. See id. at 12.

Accordingly, the Court again recommends that these claims be **DISMISSED, with prejudice.**

A. Count One - Malicious Prosecution

Count One asserts a claim for malicious prosecution. "[T]here is no question that favorable termination is an element of a malicious prosecution claim." Miles v. City of Hartford, 719 F. Supp. 2d 207, 212-13 (D. Conn. 2010), aff'd, 445 F. App'x 379 (2d Cir. 2011). Accelerated Rehabilitation is "not a favorable termination." Id. at 214. Plaintiff asserts that she "was forced to take an accelerated rehabilitation[.]" Doc. #35 at 17. Therefore, "since Plaintiff states in her Amended Complaint that the criminal charges against her were disposed of via the Connecticut accelerated pretrial rehabilitation program, she is unable to prove that the criminal proceedings terminated in her favor." Davis v. United States, No. 3:05CV1537(PCD), 2006 WL 2223934, at *3 (D. Conn. July 31, 2006). Accordingly, the Court recommends that any claim for malicious prosecution be **DISMISSED, with prejudice.**

B. Count Three - 42 U.S.C. §1983

Count Three of the Amended Complaint asserts generally that plaintiff seeks relief "[u]nder 42 U.S.C. §1983[.]" Doc. #35 at 19. In the body of this count, plaintiff asserts that the defendants "abridged her rights guaranteed under the First,

Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution." Doc. #35 at 21.

The Court has found that the original complaint failed to state a claim upon which relief may be granted for violation of plaintiff's Fifth, Sixth, or Fourteenth Amendment rights. Nothing in the Amended Complaint alters the Court's analysis. The Amended Complaint fails to adequately allege any claim under these provisions.

The Amended Complaint does make additional allegations, not set forth in detail in the original complaint, regarding a report prepared by defendant Whalen that plaintiff alleges was falsified. See Doc. #35 at 9-11. Plaintiff has filed as exhibits to the Amended Complaint both the report itself, and the cell phone records she confirms are accurate. See Docs. #42, #43. The only difference between the records plaintiff confirms to be accurate, and the recitation of the records in the Whalen report, is the change of the word "INBOUND" to the word "OUTBOUND." Doc. #35 at 10. The import of the cell phone records at issue, according to plaintiff, related to the cell site location information provided, not to the question of whether plaintiff made or received a particular call. See id. The cell site location information is unaffected by the question of whether a call is inbound or outbound. In sum, the alleged

fabrication relied upon by plaintiff is utterly irrelevant to the issue she raises regarding location information.[2]

The Amended Complaint also fails to assert a cognizable claim against any defendant for violation of plaintiff's First Amendment rights. Plaintiff merely mentions the First Amendment as part of a list of constitutional provisions, and makes no effort to assert any substantive claim. The Court sees no allegations in the Amended Complaint that would suggest a violation of plaintiff's First Amendment rights.

Likewise, the Amended Complaint fails to state a claim for violation of plaintiff's Eighth Amendment rights. "The Eighth Amendment's protection against 'cruel and unusual punishment' applies only to prisoners incarcerated as a result of a criminal conviction." Madden v. City of Meriden, 602 F. Supp. 1160, 1163 (D. Conn. 1985). It does not appear that plaintiff was incarcerated as the result of any conviction at issue here. The Court can discern no other basis for an Eighth Amendment claim in the Amended Complaint.

In sum, the Court finds that the Amended Complaint fails to state a claim against any defendant under 42 U.S.C. §1983.

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[2] To the extent plaintiff also argues that the content of the cell phone records, including as set forth in the Whalen report, exonerates her from the charge that she was at a particular location at a particular time, such a claim does not relate to any alleged falsification by Whalen, but to the allegation that the defendants engaged in malicious prosecution. As previously discussed, that claim cannot stand. See Section III.A., supra.

Accordingly, the Court recommends that all claims asserted pursuant to 42 U.S.C. §1983 be **DISMISSED, with prejudice.**

C. Count Four - 42 U.S.C. §1985(3)

Count Four attempts to assert a civil conspiracy claim pursuant to 42 U.S.C. §1985(3) against Attorney Kane, defendant Whalen, the CSAO, and John Does 1-25. See Doc. #35 at 22. The Amended Complaint fails to state a claim pursuant to 42 U.S.C. §1985(3).

> The four elements of a §1985(3) claim are: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of the laws, or of equal privileges and immunities under the laws; (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right of a citizen of the United States. United Bhd. of Carpenters, Local 610 v. Scott, 463 U.S. 825, 828-29 (1983). Furthermore, the conspiracy must also be motivated by "some racial or perhaps otherwise class-based, invidious discriminatory animus behind the conspirators' action." Id. at 829.

Mian v. Donaldson, Lufkin & Jenrette Sec. Corp., 7 F.3d 1085, 1087-88 (2d Cir. 1993); see also Peacock v. Suffolk Bus Corp., 100 F. Supp. 3d 225, 228 (E.D.N.Y. 2015). "An essential element" of a section 1985(3) claim "is a requirement that the alleged discrimination took place because of the individual's race." Mian, 7 F.3d at 1088.

The Amended Complaint does not allege that the purported conspiracy between the named defendants was "motivated by some racial ... or other class-based invidious discriminatory

animus." Id. Although the Amended Complaint could be liberally construed to assert that plaintiff claims protected status based on political speech, see, e.g., Doc. #35 at 4, those allegations also fail to state a claim under section 1985(3).

> "Although it is unclear whether under Second Circuit law a political party is a protected group satisfying §1985's class-based discrimination requirement," Fotopolous v. Bd. of Fire Commis of Hicksville Fire Dist., No. 11CV5532(MKB), 2014 WL 1315241, at *17 (E.D.N.Y. Mar. 31, 2014), the Second Circuit has held that plaintiffs who claim discrimination because they stand "in political and philosophical opposition to the defendants, and who are, in addition, outspoken in their criticism of the defendants' political and governmental attitudes and activities do not constitute a cognizable class under Section 1985," Gleason, 869 F.2d at 695 (internal alterations, citations, and quotation marks omitted).

Frasco v. Mastic Beach Prop. Owners' Ass'n, No. 12CV2756(JFB)(WDW), 2014 WL 3735870, at *5 (E.D.N.Y. July 29, 2014) (footnotes omitted).[3]

Accordingly, the Amended Complaint fails to state a claim pursuant to 42 U.S.C. §1985(3). Because the Court sees no likelihood that any further amendment of the section 1985 claim would not be futile, the Court recommends that all claims asserted pursuant to section 1985 be **DISMISSED, with prejudice.**

[3] Further, "the intended victims of discrimination must be victims not because of any personal malice the conspirators may have toward them, but because of their membership in or affiliation with a particular class." Frasco, 2014 WL 3735870, at *5 (quoting Gleason, 869 F.3d at 695).

D. Defendant John Whalen

The Court notes that plaintiff has previously brought suit against defendant Whalen for his actions in connection with a criminal prosecution. In that prior case, Chief Judge Stefan R. Underhill found that all such claims were barred by prosecutorial immunity, and ordered dismissal of the action without prejudice, as against Whalen. See Whitnum v. Emons, No. 3:15CV959(SRU), 2015 WL 5010623, at *4 (D. Conn. Aug. 24, 2015). The Second Circuit Court of Appeals affirmed the District Court rulings in that matter in all regards. See Whitnum v. Emons, 683 F. App'x 71, 72 (2d Cir. 2017); see also Whitnum v. Emons, 767 F. App'x 195 (2d Cir. 2019). Plaintiff is now well aware that defendant Whalen is immune from suit for actions taken in the course of his duties as a state prosecutor. All claims against defendant Whalen should be **DISMISSED, with prejudice.**

E. Claims for Relief

The Court notes that, perhaps in response to the Court's prior recommended ruling observing that plaintiff had originally sought only money damages, the Amended Complaint purports to seek injunctive relief, in the form of an injunction barring defendants from retaliating against her. See Doc. #35 at 27. Any such claims should be dismissed. "[T]here is plainly no basis for injunctive relief, let alone basis for such relief at this stage of the proceedings. First, no injunction is necessary

because retaliation is already prohibited by law." Chukwueze v. NYCERS, No. 10CV8133(JMF), 2013 WL 5878174, at *2 (S.D.N.Y. Nov. 1, 2013). Furthermore, there is no allegation in the Amended Complaint that any defendant has engaged in any retaliatory conduct since the events described in the Amended Complaint. There is no basis to believe that any retaliation is occurring, or likely to occur, in the future.[4] Accordingly, the Court recommends that any claim for injunctive relief prohibiting "retaliation" be **DISMISSED, with prejudice.**

F. State Law Claims

Plaintiff asserts state law claims for intentional and negligent infliction of emotional distress, "Direct Action Pursuant to Connecticut's rules regarding insurance companies," and for violation of various provisions of the Connecticut Constitution. Doc. #35 at 23-26 (sic). The Court has recommended that all federal claims be dismissed. In the absence of any remaining cognizable federal claims, the Court declines to exercise supplemental jurisdiction over these claims. See 28

[4] Essentially, plaintiff asks the Court to enjoin any future state court criminal prosecutions against her. The Court declines to do so under the principles of comity and federalism. See, e.g., Kunz v. New York State Comm'n on Judicial Conduct, 356 F. Supp. 2d 188, 194 (N.D.N.Y. 2005) ("A Court may abstain under the principles of comity and federalism when, even though the Younger requirement that there be an ongoing state proceeding is not met, the equitable relief sought would inappropriately require the federal court to supervise institutions central to the state's sovereignty." (citation and quotation marks omitted)).

U.S.C. §1367(c)(3). Therefore, the Court recommends that all state law claims also be **DISMISSED**.

IV. Conclusion

Accordingly, for the reasons stated, and because plaintiff has unsuccessfully brought multiple suits, and filed multiple complaints, all challenging the same set of events that occurred in connection with a state court criminal proceeding, the Court recommends that pursuant to 28 U.S.C. §1915(e)(2)(B)(ii)-(iii), the Amended Complaint [**Doc. #35**] be **DISMISSED, with prejudice.**

This is a recommended ruling. See Fed. R. Civ. P. 72(b)(1). **Any objections to this recommended ruling must be filed with the Clerk of the Court within fourteen (14) days after the filing of this ruling.** See Fed. R. Civ. P. 72(b)(2). Plaintiff receives notice electronically. [Doc. #20]. Accordingly, any objection must be filed on or before **November 29, 2019**. Failure to file an objection within this time frame will preclude appellate review. See 28 U.S.C. §636(b)(1); Rules 72, 6(a) and 6(d) of the Federal Rules of Civil Procedure; D. Conn. L. Civ. R. 72.2(a); Small v. Secretary of H.H.S., 892 F.2d 15 (2d Cir. 1989) (per curiam); F.D.I.C. v. Hillcrest Assoc., 66 F.3d 566, 569 (2d Cir. 1995).

SO ORDERED at New Haven, Connecticut, this 15th day of November, 2019.

/s/
HON. SARAH A. L. MERRIAM
UNITED STATES MAGISTRATE JUDGE

Additional material from this filing is available in the Clerk's Office.