NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JESSE PLASOLA, Plaintiff-Appellant, v. STATE OF CALIFORNIA; et al., Defendants-Appellees.	No. 20-55246 D.C. No. 2:19-cv-05592-JAK-PVC MEMORANDUM* (Filed May 25, 2021)

Appeal from the United States District Court
for the Central District of California
John A. Kronstadt, District Judge, Presiding

Submitted May 18, 2021**

Before: CANBY, FRIEDLAND, and VANDYKE, Circuit Judges.

Jesse Plasola appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action arising out of his state court divorce proceedings. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Brown v. Cal. Dep't of Corr.*, 554 F.3d 747, 749-50 (9th Cir. 2009) (Eleventh Amendment immunity); *Sadoski v. Mosley*, 435 F.3d 1076, 1077 n.1 (9th Cir.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

2006) (judicial immunity); *Omar v. Sea-Land Serv., Inc.*, 813 F.3d 986, 991 (9th Cir. 1987) (sua sponte dismissal under Fed. R. Civ. P. 12(b)(6)). We affirm.

The district court properly dismissed Plasola's claims against defendants State of California and Santa Barbara Superior Court because these defendants are entitled to Eleventh Amendment immunity. *See Simmons v. Sacramento County Superior Ct.*, 318 F.3d 1156, 1161 (9th Cir. 2003) (state courts are "arms of the state" entitled to Eleventh Amendment immunity); *Franceschi v. Schwartz*, 57 F.3d 828, 831 (9th Cir. 1995) ("The Eleventh Amendment bars suits which seek either damages or injunctive relief against a state, an arm of the state, its instrumentalities, or its agencies." (citation and internal quotation marks omitted)).

The district court properly dismissed Plasola's claims against defendants Timothy Staffel and Jed Beebe because these defendants are entitled to judicial immunity. *See Ashelman v. Pope*, 793 F.2d 1072, 1075-76 (9th Cir. 1986) (en banc) (judges are immune from suit when performing judicial acts).

The district court properly dismissed Plasola's claims against defendant Roger Hubbard because he is not a state actor under § 1983. *See Simmons*, 318 F.3d at 1161 (a lawyer in private practice does not act under color of state law under § 1983).

The State of California's request for summary affirmance, set forth in its answering brief, is denied as moot.

Plasola's motion for judicial notice (Docket Entry No. 41) is denied.

AFFIRMED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JESSE PLASOLA, Plaintiff, v. STATE OF CALIFORNIA; et al., Defendants.	Case No. CV 19-5592 JAK (33) **REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE** (Filed Jan. 2, 2020)

This Report and Recommendation is submitted to the Honorable John A. Kronstadt, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I.

INTRODUCTION

On June 27, 2019, Plaintiff Jesse Plasola ("Plaintiff"), a California resident proceeding pro se but not in forma pauperis, filed a civil rights complaint pursuant to 42 U.S.C. § 1983. ("Complaint," Dkt. No. 1). The claims arise from Plaintiff's California divorce proceedings in 2006 and from Plaintiff's efforts a decade later to modify the Dissolution Order governing the division of the couple's marital property. The Complaint sues (1) the State of California ("State"); (2) the California Superior Court for the County of Santa Barbara ("Superior Court"); Superior Court judges (3) Timothy

Staffel and (4) Jed Beebe; and (5) Roger Hubbard, the attorney who has been representing Plaintiff's ex-wife, Sila Plasola, in proceedings related to the divorce since May 2016.[1] (See Dkt. No. 10).

Hubbard filed an Answer to the federal Complaint on July 15, 2019. (Dkt. No. 6). On July 22, 2019, the remaining Defendants jointly filed a Motion to Dismiss. ("MTD," Dkt. No. 11). On October 18, 2019, the District Judge granted the MTD in part and dismissed all claims against the Superior Court on the ground of Eleventh Amendment immunity and against Judges Staffel and Beebe on the ground of absolute judicial immunity. ("Order," Dkt. No. 35 at 5-6). The Court deferred ruling on the MTD with respect to the claims against the State and referred Plaintiff's claims against both the State and Hubbard to the undersigned Magistrate Judge for further proceedings. (Id. at 6). Plaintiff subsequently filed an appeal to the Ninth Circuit of the District Judge's Order dismissing the Superior Court and Judges Staffel and Beebe. (Dkt. No. 42). That appeal was dismissed on December 18, 2019 for lack of jurisdiction. (Dkt. No. 44).

On November 8, 2019, the Court issued an Order to Show Cause Why the Magistrate Judge Should Not Recommend that Defendant Roger Hubbard Be Dismissed Because He Is Not a State Actor. ("OSC," Dkt.

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[1] To avoid confusion, the Court will refer to Plaintiff's ex-wife by her first name, Sila. No disrespect is intended. Hubbard states that he has represented Sila from May 31, 2016 to the present. (Dkt. No. 10 at 1).

No. 37). Plaintiff filed a response to the OSC on December 17, 2019. ("OSC Resp.," Dkt. No. 43).

The Court concludes that the State is immune from suit under the Eleventh Amendment and that Plaintiff fails to state a cognizable claim against Hubbard because Hubbard is not a state actor. Furthermore, the Court finds that amendment of the Complaint would be futile. Accordingly, it is recommended that the claims against the State and the federal claims against Hubbard be dismissed with prejudice, and that any state law claims, to the extent that any such claims exist, be dismissed without prejudice, but without leave to amend.

II.

STANDARDS

The State of California joined in the Motion to Dismiss. (See MTD at 1). Because the District Judge deferred his decision regarding the claims against the State, the Court's recommendations below concerning the State are made in the context of the Motion to Dismiss. This Report incorporates the District Judge's rulings on the Parties' respective requests for judicial notice and will cite to the noticed documents as though they were part of the Complaint. (Order at 2-3).

In contrast to the State, Hubbard did not join in the MTD. Nonetheless, sua sponte screening of the claims against Hubbard is authorized by Federal Rule of Civil Procedure 12(b)(6), which provides that a trial

court may dismiss a claim sua sponte "where the claimant cannot possibly win relief." Omar v. Sea-Land Serv., Inc., 813 F.2d 986, 991 (9th Cir. 1987); see also Seismic Reservoir 2020, Inc. v. Paulsson, 785 F.3d 330, 335 (9th Cir. 2015) (citing Omar); Baker v. Director, U.S. Parole Comm'n, 916 F.2d 725, 726 (D.C. Cir. 1990) (per curiam) (adopting the Ninth Circuit's position in Omar and noting that a sua sponte dismissal "is practical and fully consistent with plaintiff's rights and the efficient use of judicial resources"). Additionally, a paid complaint that is "obviously frivolous" does not confer federal subject matter jurisdiction and may be dismissed sua sponte even before service of process. Franklin v. Murphy, 745 F.2d 1221, 1227 n.6 (9th Cir. 1984) ("A paid complaint that is obviously frivolous does not confer subject matter jurisdiction . . . "); see also Fed. R. Civ. P. 12(h)(3); Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567, 593 (2004).

A complaint warrants dismissal under Rule 12(b)(6) if the plaintiff fails to proffer "enough facts to state a claim to relief that is plausible on its face." 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." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). The plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555.

The court must accept the complaint's allegations as true, Twombly, 550 U.S. at 555-56, construe the pleading in the light most favorable to the pleading party, and resolve all doubts in the pleader's favor. See Berg v. Popham, 412 F.3d 1122, 1125 (9th Cir. 2005). However, the court "need not accept as true allegations contradicting documents that are referenced in the complaint or that are properly subject to judicial notice." Lazy Y Ranch Ltd. v. Behrens, 546 F.3d 580, 588 (9th Cir. 2008). Likewise, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." Iqbal, 556 U.S. at 678. Pro se pleadings are "to be liberally construed" and are held to a less stringent standard than those drafted by a lawyer. Erickson, 551 U.S. at 94; see also Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010) ("Iqbal incorporated the Twombly pleading standard and Twombly did not alter courts' treatment of pro se filings; accordingly, we continue to construe pro se filings liberally when evaluating them under Iqbal.").

Dismissal for failure to state a claim can be warranted based on either a lack of a cognizable legal theory or the absence of factual support for a cognizable legal theory. See Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008). A complaint may also be dismissed for failure to state a claim if it discloses some fact or complete defense that will necessarily defeat the claim. Franklin, 745 F.2d at 1228-29.

If the court finds that a complaint fails to state a claim, it must also decide whether to grant the plaintiff

leave to amend. Even when a request to amend is not made, "[l]eave to amend should be granted unless the pleading could not possibly be cured by the allegation of other facts, and should be granted more liberally to pro se plaintiffs." Lira v. Herrera, 427 F.3d 1164, 1176 (9th Cir. 2005) (internal quotation marks omitted). However, if amendment of the pleading would be futile, leave to amend is properly denied. See Ventress v. Japan Airlines, 603 F.3d 676, 680 (9th Cir. 2010); see also Lipton v. Pathogenesis Corp., 284 F.3d 1027, 1039 (9th Cir. 2002) ("Because any amendment would be futile, there was no need to prolong the litigation by permitting further amendment."); Robinson v. California Bd. of Prison Terms, 997 F. Supp. 1303, 1308 (C.D. Cal. 1998) ("Since plaintiff has not, and cannot, state a claim containing an arguable basis in law, this action should be dismissed without leave to amend; any amendment would be futile.") (citing Newland v. Dalton, 81 F.3d 904, 907 (9th Cir. 1996)).

III.

BACKGROUND FACTS

Deciphering Plaintiff's contentions requires some understanding of the proceedings underlying his claims, which are not clearly described in the Complaint. This summary relies primarily on state court documents that were attached to the Complaint or judicially noticed by the District Judge in connection with the motion to dismiss.

Plaintiff is a former federal Bureau of Prisons employee who initially "resigned on March 14, 2005 from federal service." (Complaint ¶ 22). A year and a half later, Plaintiff and Sila divorced. (See id., Exh. B at 54 (continuous pagination)). In the Dissolution Order dated September 14, 2006, Judge Staffel ordered in relevant part that "each party shall receive one-half of [Plaintiff's] pension and one-half of the assets from [Plaintiff's] TSP account subject to a reduction based upon tax liabilities proven by [Plaintiff]."[2] (Id. at 56). At the time of the divorce, Plaintiff had deferred his pension. Plaintiff returned to federal service on March 1, 2009. (Compl. § 87). His completion of additional years of service "improved the value of his pension because he earned a higher salary, had a greater age of retirement, and had more years of service credit." (Dkt. No. 25, Exh. D at 18-19).

On December 1, 2015, Plaintiff began drawing $1,780.50 per month from his FERS pension. (Dkt. No. 13, Exh. A at 3). Sila did not receive any of those benefits, nor did Plaintiff pay her the half of the TSP account that she was due. (Id.). Hubbard began representing Sila on May 31, 2016, and continues to serve as her counsel. (Dkt. No. 8 at 1). On September 9, 2016, Sila renewed the money judgment with respect to the

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[2] Judge Staffel determined that after Plaintiff and Sila separated, but before their divorce was final, Plaintiff withdrew $87,047.61 from his Thrift Savings Plan account, and that Sila was entitled to half that sum, or $43,523.80. (Dkt. No. 13, Exh. A at 6).

unpaid funds. The amount due, with interest, was $87,041.83. (Dkt. No. 13, Exh. A at 3).

Plaintiff moved to vacate the renewed money judgment, to set aside the division of the TSP account and FERS pension mandated by the September 14, 2006 Dissolution Order, and to terminate spousal support. (Id.). The trial court's order denying each of these motions issued on December 22, 2016, and Plaintiff moved for reconsideration. (Id.). On May 3, 2017, Judge Staffel held a hearing on the motion for reconsideration, which he denied in an order dated September 11, 2017. (Id. at 3-4; see also Dkt. No. 25 at 13-14). The court declined to reconsider its rulings on the motions to set aside the division of Plaintiff's TSP account and FERS pension because those motions were untimely. (Dkt. No. 13 at 6-9). The court similarly declined to vacate Sila's renewed money judgment, (id. at 9-10), or to reconsider the denial of the motion to terminate spousal support, stating, "When [Sila] begins receiving her community share of the FERS retirement, the court will be disposed to reconsider [the spousal support] request." (Id. at 5). With respect to Sila's entitlement to Plaintiff's FERS pension, the September 11, 2017 Order specifically provided that:

> [Plaintiff] had a deferred annuity retirement account at the time of dissolution on September 14, 2006, and the court ordered on February 9, 2006, that petitioner shall not withdraw funds from his deferred pension contributions "until further order of court," which remains in effect and is the current order of the Court.

> The court orders that Sila Plasola shall receive 25.96% (1/4) of [Plaintiff's] deferred pension.

(Dkt. No. 25, Exh. C at 14).[3]

Plaintiff appealed the denial of his motions to the California Court of Appeal. In a decision dated January 24, 2019, the appellate court affirmed the superior court's rulings on the motions to set aside the division of the TSP account and FERS pension and the motion to vacate the renewal of money judgment. (Id. at 6-9). However, the court reversed the denial of the motion to terminate spousal support and remanded the matter for further proceedings because the trial court's order did not expressly address the factors articulated in California Family Code section 4320 for modifying a spousal support order. (Id. at 4-6).

Following remand to the superior court, on July 2, 2019, Judge Beebe issued a tentative ruling on "reconsideration of the May 3, 2017 request to terminate spousal support" that specifically addressed the section 4230 factors. (Dkt. No. 25, Exh. D, at 16-22). The court concluded that spousal support to Sila not only should not be terminated, but should be increased from $489 per month to $562 because Plaintiff "was holding and spending that amount of money that he should

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[3] After Judge Staffel denied Plaintiff's motion for reconsideration on September 11, 2017, Plaintiff filed a motion requesting that he recuse himself from further proceedings in the matter. (Dkt. No. 13 at 4 n.3). Judge Staffel granted the request, and the matter was reassigned to Judge Beebe. (Id.).

have co-operated in providing to his ex-wife." (Id. at 22). This action followed on June 27, 2019.

IV.

ALLEGATIONS OF THE COMPLAINT

The Complaint is over forty pages long, disorganized, repetitive, and replete with often unexplained citations to various state and federal statutes, regulations and case law. Plaintiff appears to allege that on May 3, 2018,[4] the Superior Court modified the September 14, 2006 Dissolution Order to include reference to an "immediate annuity." (Compl. ¶ 23). Plaintiff maintains that this modification is "unprecedented in divorce history for the State of California" and exceeded the court's jurisdiction. (Id. ¶¶ 23, 29). Plaintiff maintains that "[t]he immediate annuity is not community property under any California statute because it was earned post-divorce . . . and because the U.S. Government voided all rights to the deferred annuity pre-existing law due to operation of law [sic]." (Id. ¶ 85). Plaintiff further appears to allege that the state court

[4] The state court documents attached to the Complaint or submitted for judicial notice do not refer to any proceedings on May 3, 2018. However, the record does reflect that the superior court hearing on Plaintiff's motion for reconsideration was held on May 3, 2017. (See, e.g., Dkt. No. 25, Exh. C at 13). While the substance of Plaintiff's allegations concerning the "May 3, 2018" hearing strongly suggest that he is referring to the May 3, 2017 hearing, it is unclear whether Plaintiff confused the year of the hearing or is referring to another proceeding entirely.

never had subject matter jurisdiction over his TSP account. (Id. ¶ 35).

The Complaint broadly alleges that "Hubbard caused the CA court to exceed its statutory authority" during the challenged proceedings. (Id. ¶ 67). According to Plaintiff,

> Attorney Roger Hubbard on behalf of Sila, lied on all issues at 5/2018 hearing on Plaintiff's motions and request for summary Judgment for fraud upon the court [sic]. The misrepresentations made by Defendant Attorney Roger Hubbard were in fact false. The true facts were cited above. Defendant Attorney Roger Hubbard is culpable and responsible for conspiracy and for the fraud upon the court for Santa Barbara CA.

(Id. ¶ 82). Plaintiff states that it was an "intentional decision by Attorney Roger Hubbard, Judge Timothy Staffel and Judge Jed Beebe . . . to pretend that Plaintiff was receiving the voided deferred annuity pre-existing law that the U.S. Government voided [sic]."[5] (Id. ¶ 85).

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[5] The Complaint also includes the following entirely cryptic allegations:

> It appears, Attorney Roger Hubbard, Judge Jed Beebe and Judge Timothy Staffel intentionally misrepresented the present contempt charges. The phony contempt charges are based on the 2-9-2006 minute order in order to falsely arrest Plaintiff and incarcerate him. If you read the 9-14-2006 final judgment 4g, Jurisdiction is reserved over all other issues. . . . This box was not X and does not reserve jurisdiction.

(Compl. at 39, ¶ 7).

The Complaint's purported causes of action are scattered and generally do not identify the specific Defendant or Defendants against whom they are brought. However, Plaintiff appears to assert at least the following claims: (1) the Dissolution Order's alimony provisions violate the Thirteenth Amendment's prohibition on "involuntary servitude," (id. ¶ 69); (2) each Defendant is liable for professional negligence in part because Plaintiff's due process rights were violated, (id. ¶ 73); (3) Defendants are subject to a "tort action for damages" arising from "hardship caused by income deduction orders," (id. at ¶¶ 76-80); (4) Hubbard conspired with Sila to commit fraud on the court, (id. ¶¶ 81-82); (5) the immediate annuity finding violated Plaintiff's due process rights. (Id. ¶¶ 83-84). The Complaint seeks "actual," "compensatory," "consequential," "statutory" and "punitive" damages, as well as "restitution" and "reputation damages," declaratory relief, and a preliminary and permanent injunction "prohibiting defendants[] from placing phony contempt charges as a pretext for suppressing legitimate constitutional rights by plaintiff and from using tactics and measures such as filing false contempt charges or using coercion, intimidation and summary punishments to justify any voided pension from the U.S. Government [sic]." (Id. at pages 40-41).

V.

DISCUSSION

The Court has already dismissed the claims against the Superior Court as well as Judges Staffel and Beebe. The Court dismissed the claims against the Superior Court because the court, as an arm of the state, is immune from suit under the Eleventh Amendment. The Court dismissed the judges because they are entitled to absolute judicial immunity.

A. The State Is Immune From Suit

The Court is unable to identify any allegations in the Complaint specifically directed to the State as an entity distinct from the Superior Court. At most, it is possible that Plaintiff believes that the State shares the liability he imputes to the Superior Court because California superior courts derive their power from the State. However, as the District Judge found in dismissing the claims against the Superior Court here, "a suit against the Superior Court 'is a suit against the State,'" and is consequently "barred by the Eleventh Amendment from adjudication by the federal courts." (Dkt. No. 35 at 5). Accordingly, whether sued through the Superior Court or directly as the State itself, under the Eleventh Amendment, the State is immune from a suit for damages under § 1983. See Howlett v. Rose, 496 U.S. 356, 365 (1990); Brown v. Cal. Dep't of Corr., 554 F.3d 747, 752 (9th Cir. 2009) ("California has not waived its Eleventh Amendment immunity with

respect to claims brought under § 1983 in federal court.").

A narrow exception applies to a State's general immunity from suit in federal court under the Eleventh Amendment when the action seeks only prospective injunctive or declaratory relief from a state official sued in his or her official capacity. As the Ninth Circuit has explained,

> Since the Supreme Court's decision in Ex parte Young, 209 U.S. 123 (1908), courts have recognized an exception to the Eleventh Amendment bar for suits for prospective declaratory and injunctive relief against state officers, sued in their official capacities, to enjoin an alleged ongoing violation of federal law. The Young doctrine is premised on the fiction that such a suit is not an action against a "State" and is therefore not subject to the sovereign immunity bar. The Young doctrine strikes a delicate balance by ensuring on the one hand that states enjoy the sovereign immunity preserved for them by the Eleventh Amendment while, on the other hand, "giving recognition to the need to prevent violations of federal law." [Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 269 (1997)]. And, while the Supreme Court has recently revisited the scope of both the Eleventh Amendment and the Young exception in Coeur d'Alene and in Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), the Court has made clear that it does not "question the continuing validity of the Ex parte Young doctrine." Coeur d'Alene,

> 521 U.S. at 269; see also Doe v. Lawrence Livermore Nat'l Lab., 131 F.3d 836, 839 (9th Cir. 1997) ("The viability of Ex parte Young as traditionally applied survives the Supreme Court's treatment of the issue in Idaho v. Coeur d'Alene[.]").

Agua Caliente Band of Cahuilla Indians v. Hardin, 223 F.3d 1041, 1045 (9th Cir. 2000) (parallel reporter citations omitted).

The State of California, when sued directly, is not a state officer sued in his or her official capacity; it is the governmental entity itself, to which the Ex parte Young exception does not extend. The Ninth Circuit has repeatedly instructed that the State is an improper defendant in a section 1983 action. In Wolfe v. Strankman, 392 F.3d 358 (9th Cir. 2004), for example, plaintiff sought a declaration that California's vexatious litigant statute is unconstitutional and an injunction barring further enforcement of the statute. Id. at 360. The action did not seek damages. Id. at 365. Nonetheless, the Ninth Circuit affirmed the lower court's dismissal of the State of California and the California Judicial Council because "they are not 'persons' subject to suit under § 1983." Id. at 367; see also Cortez v. Cnty. of Los Angeles, 294 F.3d 1186, 1188 (9th Cir. 2002) (a state is not considered a "person" within the meaning of § 1983 "due to the sovereign immunity generally afforded states by the Eleventh Amendment").

Accordingly, even if the Complaint included specific allegations against the State, which it does not, and sought only prospective injunctive and declaratory

relief, the State of California as an entity would still be immune from suit under the Eleventh Amendment. Accordingly, it is recommended that the Court dismiss the claims against the State of California with prejudice on the ground of Eleventh Amendment immunity.

B. Hubbard Is Not A State Actor

To state a claim under section 1983, a plaintiff must allege that the deprivation of a right secured by the federal constitution or statutory law was committed by a person acting under color of state law. Anderson v. Warner, 451 F.3d 1063, 1067 (9th Cir. 2006). "While generally not applicable to private parties, a § 1983 action can lie against a private party when he is a willful participant in joint action with the State or its agents." Kirtley v. Rainey, 326 F.3d 1088, 1092 (9th Cir. 2003).

The Ninth Circuit has identified four circumstances under which a private person may be said to be acting under color of state law. Under the "public function" test, "when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." Id. at 1093 (quoting Lee v. Katz, 276 F.3d 550, 554-55 (9th Cir. 2002)). Under the joint action test, a court will consider whether "the state has so far insinuated itself into a position of interdependence with the private entity that it must be recognized as a joint participant in the challenged activity" and "knowingly

accepts the benefits derived from unconstitutional behavior." Kirtley, 326 F.3d at 1093 (quoting Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1486 (9th Cir. 1995)). Under the "governmental coercion or compulsion" test, the court considers "whether the coercive influence or 'significant encouragement' of the state effectively converts a private action into a government action." Kirtley, 326 F.3d at 1094 (quoting Sutton v. Providence St. Joseph Medical Center, 192 F.3d 826, 836-37 (9th Cir. 1999)). Finally, under the "government nexus" test, the court asks whether "there is such a close nexus between the State and the challenged action that the seemingly private behavior may be fairly treated as that of the State itself." Kirtley, 326 F.3d at 1095 (quoting Brentwood Academy v. Tennessee Secondary School Athletic Ass'n, 531 U.S. 288, 295 (2001)).

Hubbard appears to be a lawyer in private practice. As a general matter, privately- retained attorneys are not considered state actors in § 1983 actions. See Briley v. California, 564 F.2d 849, 855 (9th Cir. 1977) ("We have repeatedly held that a privately-retained attorney does not act under color of state law for purposes of actions brought under the Civil Rights Act."); Fechter v. Shiroky, 59 F.3d 175, 175 (9th Cir. 1995) ("A private attorney performing a lawyer's traditional function cannot be considered to act under color of state law.") (unpublished) (citing Polk Cnty. v. Dodson, 454 U.S. 312, 319 n.9, 325 (1981)). Furthermore, in the specific context of divorce proceedings, courts have routinely rejected the contention that an ex-spouse's divorce lawyer may be liable as a "state actor" under

§ 1983 under any of the exceptional circumstances that may transform a private actor into a public actor. See, e.g., Schucker v. Rockwood, 846 F.2d 1202, 1205 (9th Cir. 1988) (judge's acceptance of legal arguments by plaintiff's ex-wife's counsel in divorce proceedings did "not convert a private party's action into state action" because "merely resorting to the courts and being on the winning side of a lawsuit does not make a [private] party a joint actor with the judge"); Aldabe v. Aldabe, 616 F.2d 1089, 1092 (9th Cir. 1980) (per curiam) ("[Plaintiff's] dissatisfaction with the property settlement reached in her prior divorce proceedings, and her conclusory allegations that [various judges and lawyers] had conspired to prevent her from effectively prosecuting her divorce case, are insufficient to support a § 1983 claim."); Patel v. Heidelberger, 6 F. App'x 436, 438 (7th Cir. 2001) ("[A] divorce lawyer's efforts on behalf of his client cannot under any foreseeable set of circumstances be considered state action [under § 1983]."); Read v. Klein, 1 F. App'x 866, 872 (10th Cir. 2001) (affirming dismissal of plaintiff's claims against ex-wife's divorce attorney on the ground that private attorney was not a state actor).

Plaintiff cannot state a claim against Hubbard under § 1983 because Hubbard was not a government employee acting under color of law during the divorce proceedings at issue. Nor has Plaintiff alleged facts showing that Hubbard, while representing Sila, was an instrumentality of the State under the "public function" test; a joint participant in and beneficiary of unconstitutional activity with the State under the "joint

action" test; a victim of government coercion compelled to represent Sila under the "governmental coercion or compulsion" test, or in such a close nexus with the state that his private behavior could be considered that of the State itself under the "government nexus" test. See Kirtley, 326 F.3d at 1093-95. Plaintiff's OSC Response repeatedly asserts that Hubbard committed "fraud on the court" by his misrepresentations and false accusations during various proceedings and argues that Hubbard should be held liable under 18 U.S.C. § 371, which criminalizes conspiracy to commit an offense against or to defraud the United States. This statute is plainly inapplicable here. (See, e.g., OSC Resp. at 7-14). Plaintiff does not show how Hubbard was acting as a state agent when he purportedly committed these wrongful acts. Accordingly, it is recommended the Plaintiff's federal claims against Hubbard be dismissed with prejudice.

C. The Court Should Decline To Exercise Pendent Jurisdiction Over Any State Law Claims

It is unclear whether Plaintiff is attempting to assert any state law claims. However, because the Court finds that the Complaint necessarily fails to state a federal claim against either the State or Hubbard, it is further recommended that the Court decline to exercise pendent jurisdiction over any state law claims, to the extent that any such claims exist. See Les Shockley Racing, Inc. v. National Hot Rod Ass'n, 884 F.2d 504, 509 (9th Cir. 1989) ("When, as here, the court dismisses the federal claim leaving only state claims for

resolution, the court should decline jurisdiction over the state claims and dismiss them without prejudice."); Watison v. Carter, 668 F.3d 1108, 1117 (9th Cir. 2012) (court may dismiss state law claims without prejudice once all federal claims have been dismissed).

VI.

CONCLUSION

Consistent with the foregoing, IT IS RECOMMENDED that the District Judge issue an Order: (1) accepting this Report and Recommendation; (2) dismissing the claims against the State of California with prejudice; and (3) dismissing the federal claims against Hubbard with prejudice; and (4) dismissing any state law claims, to the extent that any such claims exist, without prejudice, but without leave to amend.

DATED: January 2, 2020

/s/
SUZANNE H. SEGAL
UNITED STATES
MAGISTRATE JUDGE

[Notice Omitted]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JESSE PLASOLA, Plaintiff, v. STATE OF CALIFORNIA, et al., Defendants.	Case No. CV 19-5592 JAK (PVC) **ORDER ACCEPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE** (Filed Feb. 11, 2020)

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Complaint, all the records and files herein, the Report and Recommendation of the United States Magistrate Judge, and Plaintiff's Objections. After having made a *de novo* determination of the portions of the Report and Recommendation to which Objections were directed, the Court concurs with and accepts the findings and conclusions of the Magistrate Judge.

IT IS ORDERED that the Complaint is dismissed and Judgment shall be entered dismissing with prejudice the federal claims against surviving Defendants the State of California and Roger Hubbard, and without prejudice, but without leave to amend, the state law claims, if any, against Hubbard.

IT IS FURTHER ORDERED that the Clerk serve copies of this Order and the Judgment herein on

Plaintiff at his current address of record and on counsel for Defendants.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: February 11, 2020

/s/ John A. Kronstadt
John A. Kronstadt
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JESSE PLASOLA, Plaintiff, v. STATE OF CALIFORNIA, et al., Defendants.	Case No. CV 19-5592 JAK (33) **JUDGMENT** (Filed Feb. 11, 2020)

Pursuant to the Court's Order Accepting Findings, Conclusions and Recommendations of United States Magistrate Judge.

IT IS HEREBY ADJUDGED that the above-captioned action is dismissed with prejudice, but without leave to amend, as to the state law claims, if any, against Hubbard.

DATED: February 11, 2020

/s/ John A. Kronstadt
John A. Kronstadt
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JESSE PLASOLA, Plaintiff-Appellant, v. STATE OF CALIFORNIA; et al., Defendants-Appellees.	No. 20-55246 D.C. No. 2:19-cv-05592-JAK-PVC Central District of California, Los Angeles ORDER (Filed Aug. 25, 2021)

Before: CANBY, FRIEDLAND, and VANDYKE, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Plasola's petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 43) are denied.

No further filings will be entertained in this closed case.