No. _____

In The
Supreme Court of the United States

DAN CHERNER,

Petitioner,

v.

WESTCHESTER JEWISH COMMUNITY SERVICES, INC. AND KATHLEEN MCKAY,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

APPENDIX

DAN CHERNER
THE CHERNER FIRM
411 Theodore Fremd Avenue
Suite 206S
Rye, New York 10580
(917) 318-9800
fedctsdc@gmail.com

Pro se Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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APPENDIX A

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 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 20th day of December, two thousand twenty-two.

PRESENT:

ROBERT D. SACK,
BARRINGTON D. PARKER
MICHAEL H. PARK
Circuit Judges.

Dan Cherner, on his own behalf and on behalf of all others similarly situated,

Plaintiff-Appellant,

v. 22-642

Westchester Jewish Community Services, Inc., Kathleen McKay,

Defendants-Appellees.

FOR PLAINTIFF-APPELLANT:

Dan Cherner, pro se, The Cherner Firm, Rye, NY.

FOR DEFENDANT-APPELLEE WESTCHESTER JEWISH COMMUNITY SERVICES, INC:

Daniel W. Milstein, Aaronson Rappaport Feinstein & Deutsch, LLP, New York, NY.
LP, New York, NY.

FOR DEFENDANT-APPELLEE KATHLEEN MCKAY:

Barbara D. Goldberg, Martin Clearwater & Bell LLP, New York, NY.

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

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

Appellant Dan Cherner, an attorney proceeding pro se, appeals the district court's dismissal of his 42 U.S.C. § 1983 complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).[1] Cherner sued Kathleen McKay, the court-appointed forensic evaluator in Cherner's child custody dispute, and Westchester Jewish Community Services, Inc. ("WJCS"), McKay's employer, under 42 U.S.C. § 1983 for alleged constitutional violations and under New York state law for fraud and negligent infliction of emotional distress. Cherner primarily argues that (1) Defendants are state actors, and (2) they are not entitled to quasi-judicial immunity. We assume the parties' familiarity with the underlying facts, the procedural history, and the issues on appeal.

"We review *de novo* a district court's dismissal of a complaint pursuant to Rule 12(b)(6), construing the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor.: *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2nd Cir. 2002). To survive a motion to dismiss under Rule 12(b)(6), the complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570

[1] The special solicitude typically afforded to pro se litigants does not apply here because Cherner is an attorney. *See Tracy v. Freshwater*, 623 F.3d 90, 102 (2nd Cir. 2010).

(2007). A claim will have "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).

Cherner's claims fail because Defendants are shielded from liability by quasi-judicial immunity, even assuming they were state actors. Private actors may be entitled to quasi-judicial immunity "if [their] role is 'functionally comparable' to the roles of . . . judges, or [their] acts are integrally related to an ongoing judicial proceeding." *Bliven v. Hunt*, 579 F.3d 204, 209-10 (2nd Cir. 2009) (internal citations omitted). Here, the family court ordered Defendants to conduct an evaluation and to prepare a report to aid that court's decision in a child custody suit. These acts are "integrally related to an ongoing judicial proceeding." *Id.; see McKnight v. Middelton*, 699 F.Supp.2nd 507, 528 (E.D.N.Y. 2010) (concluding that court-appointed forensic evaluators in a custody dispute were entitled to quasi-judicial immunity), *aff'd*, 434 F. App'x 32 (2nd Cir. 2011). "[E]ngag[ing] in neutral fact-finding and advis[ing] the court . . . are intimately related and essential to the judicial process because they aid and inform the court in its discretionary duties." *Hughes v. Long*, 242 F.3d 121, 127 (3d Cir. 2001); *see also Brown v. Newberger*, 291 F.3d 89, 94 (1st Cir. 2002) (holding court-appointed evaluator was entitled to quasi-judicial immunity); *Hodgson v. Waters*, 958 F.2d 377 (9th Cir. 1992) (mem.) (same for a court-appointed psychologist). We thus agree with the district court that Defendants were entitled to quasi-judicial immunity.

We also conclude that the district court did not abuse its discretion by declining to exercise supplemental jurisdiction over Cherner's state-law claims. 28 U.S.C. § 1367(c)(3); *see Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988) (explaining that once only state-law claims remain, it is well within a district court's discretion to decline to exercise supplemental jurisdiction.

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

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

/s/

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

DAN CHERNER, on his own behalf and on behalf of all others similarly situated,

Plaintiff,

-against-

WESTCHESTER JEWISH COMMUNITY SERVICES, INC., and KATHLEEN MCKAY,

Defendants.

----------X

20 CIVIL 8331 (CS)

JUDGMENT

It is hereby ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Opinion & Order dated February 28, 2022, Defendants' motions to dismiss are GRANTED; accordingly, the case is closed.

Dated: New York, New York
March 1, 2022

RUBY J. KRAJICK
Clerk of Court

BY: /s K. Mango
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

DAN CHERNER, on his own behalf and on behalf of all others similarly situated,

Plaintiff,

-against-

WESTCHESTER JEWISH COMMUNITY SERVICES, INC., and KATHLEEN MCKAY,

Defendants.

----------X

20-CV-8331 (CS)

OPINION & ORDER

Appearances:

Dan Cherner
The Cherner Firm
Rye, NY
Pro Se Plaintiff

Michelle A. Frankel
Martin Clearwater & Bell, LLP
New York, NY
Counsel for Defendant McKay

Daniel W. Milstein
Aaronson Rappaport Feinstein & Deutsche, LLP

New York, NY
Counsel for Defendant Westchester Jewish Community Services, Inc.

Seibel, J.

Before the Court are the Motions to Dismiss of Defendants Kathleen McKay, (ECF No. 18), and Westchester Jewish Community Services, Inc. ("WJCS"), (ECF No. 20). For the following reasons, the motions are GRANTED.

I. BACKGROUND

For purposes of this motion, the Court accepts as true the facts, but not the conclusions, alleged by Plaintiff in the Amended Complaint (ECF No. 15 ("AC").)

A. Facts

In May 2016, Plaintiff filed for custody of his children in New York State Family Court, and filed an Amended Petition on August 30, 2016. (AC ¶¶ 12-13). On September 29, 2016, the Family Court appointed Defendant McKay, a psychologist employed by or affiliated with Defendant WJCS (*id.*, ¶¶ 6, 15), to perform a forensic evaluation of Plaintiff and his family to assist in the determination of custody issues, (*id.*, ¶ 16).[1]

[1] Plaintiff attached the Family Court Order of Forensic Examination, (ECF No. 22-1 (the "Order")), to his Declaration (ECF No. 22). I may consider the Order on this motion, as it is integral to the Complaint. See DiFalco v. MSNBC Cable L.L.C., 622 F.3d 104, 111 (2nd Cir. 2010). Plaintiff's

Plaintiff brings this action against McKay, the court-appointed forensic evaluator, and WJCS, McKay's employer.[2]

Declaration, (ECF No. 22), which he filed in addition to a memorandum of law, (ECF No. 21 ("P's Opp.")), is mostly argumentative and an apparent end-run around my page limits for briefs. *See Quattlander v. Ray*, No. 18-CV-3229, 2021 WL 5043004, at *2 no.4 (S.D.N.Y. Oct. 29, 2021) ("I will not allow counsel to bypass the page limits on memoranda of law set by my individual practices by submitting additional argument in the form of an affirmation."); *Novie v. Village of Montebello*, No. 10-CV-9436, 2012 WL 3542222, at *9 (S.D.N.Y. Aug. 16, 2012) ("[I]t is improper for a court to consider declarations and affidavits on a motion to dismiss."). As an attorney, Plaintiff should have known better.

[2] Plaintiff names both McKay and WJCS as Defendants and argues that they both "act[ed] as the court-appointed forensic examiner in [his] custody matter." (P's Opp. at 1). The Order, which is on a standard form, names "Kathleen E. McKay, PhD., Westchester Jewish Community Services" as the "Agency . . . appointed as the forensic evaluator with respect to this matter." (Order at 1.) It appears that Plaintiff and the "other party" paid McKay directly, (AC ¶ 25), and because no conduct by WJCS is alleged in the AC apart from McKay's, it appears, as WJCS argues, "that WJCS's inclusion in the pleadings is solely the result of the allegation that Dr. McKay was affiliated with WJCS," (ECF No. 20-2 at 6).

B. Procedural History

Plaintiff filed the original complaint in this action on October 6, 2020. (ECF No. 1.) In January 2021, Defendants filed separate requests for pre-motion conferences in contemplation of their motions to dismiss. (ECF Nos. 6, 10.) The Court held a pre-motion conference on February 11, 2021, and granted Plaintiff leave to amend the complaint. (*See* Minute Entry dated Feb. 11, 2021.)

Plaintiff filed the Amended Complaint on April 2, 2021. (AC.) Plaintiff seeks damages and injunctive relief for violations of his First and Fourteenth Amendment rights pursuant to 42 U.S.C. § 1983 and asserts state-law claims for fraud and negligent infliction of emotional distress ("NIED"). (*Id.* at ¶¶ 99-161).[3] With respect to his federal claims, Plaintiff alleges that Defendants violated his First and Fourteenth Amendment (1) "liberty interest in retaining custody of his children," (*id.* ¶ 101), (2) "right to personal privacy and family relationships," (*id.* ¶ 111), (3) "liberty interest in preserving the integrity and stability of his family from intervention without due process of law," (*id.* ¶ 120), (4) "right to raise his children free from state interference absent some compelling justification for

[3] The first paragraph of Plaintiff's AC mentions the Fifth Amendment, (AC ¶ 1), but as Defendant McKay argues, "there is no mention or substantiation" of any alleged Fifth Amendment violation, (ECF No. 18-2 at 10 n.1). Plaintiff also cites the Declaration of Independence, ¶ 1), but "there is no private right of action to enforce the Declaration of Independence," *Nguyen v. Bank of Am.*, No. 14-CV-1243, 2015 WL 58602, at *3 (E.D.N.Y. Jan. 5, 2015). Plaintiff seeks to represent an undefined class. (AC ¶¶ 92-98.)

interference," (*id.* ¶ 129), (5) and "liberty interest in the care, custody, and management of his children," (*id.* ¶ 138). The instant motions followed. (ECF Nos. 18-20).

II. LEGAL STANDARD

"To survive a motion to dismiss, a complaint must contain 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.* "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires 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 (cleaned up). While Federal Rule of Civil Procedure 8 "marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era, . . . it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Iqbal*, 556 U.S. at 678-79.

In considering whether a complaint states a claim upon which relief can be granted, the court "begin[s] by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth," and then determines

whether the remaining well-pleaded factual allegations, accepted as true, "plausibly give rise to an entitlement to relief." *Id.* at 679. Deciding whether a complaint states a plausible claim for relief is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'shown' – 'that the pleader is entitled to relief.'" *Id.* (cleaned up) (quoting Fed. R. Civ. P. 8(a)(2)).[4]

III. DISCUSSION

In *Falco v. Santoro*, No. 18-CV-2480, 2018 WL 6706312 (E.D.N.Y. 2018), a closely analogous case, the plaintiff sued the court-appointed psychologist who was tasked with "conduct[ing] a forensic evaluation of [the plaintiff] and [his ex-wife] with respect to custody of their children and related issues." *Id.* at *1.[5] The court dismissed the case on jurisdictional grounds but explained that "insofar as Plaintiff seeks to impose Section 1983 liability on the court-appointed attorneys for the children in the Matrimonial Action, as well as court-appointed psychologist and caseworkers, such individuals do not act under color of state law and are immune from suit under the doctrine of

[4] Because Plaintiff is a lawyer, he is not entitled to the special solicitude normally accorded to *pro se* litigants. *Tracy v. Freshwater*, 623 F.3d 90, 102 (2nd Cir. 2010).

[5] The plaintiff brought claims for deprivation of his "Fourth and Fourteenth Amendment rights to due process" and "fraud and other tort-based claims." *Id.*

absolute witness immunity." *Id.* at *4 n.4. The same is true of Defendants here.

A. State Actors

A claim for relief under § 1983 must allege facts showing that each defendant acted under the color of a state "statute, ordinance, regulation, custom, or usage." 42 U.S.C. § 1983. Private parties are therefore not generally liable under the statute. *Sykes v. Bank of Am.*, 723 F.3d 399, 406 (2d Cir. 2013) (citing *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001)); *see also Fabrikant v. French*, 691 F.3d 193, 206 (2d Cir. 2012) ("'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.'") (quoting *Flagg v. Yonkers Sav. & Loan Ass'n*, 396 F.3d 178, 186 (2d Cir. 2005)); *Ciambriello v. County of Nassau*, 292 F.3d 307, 323 (2d Cir. 2002) ("[T]he United States Constitution regulates only the Government, not private parties.").

There are, however, limited circumstances under which a private party can be deemed a state actor under § 1983. Although there is "no single test to identify state actions and state actors," *Cooper v. U.S. Postal Serv.*, 577 F.3d 479, 491 (2d Cir. 2009) (cleaned up), courts in this Circuit rely on three tests:

For the purposes of section 1983, the

> actions of a nominally private entity are attributable to the state (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").

Fabrikant, 691 F.3d at 207 (cleaned up). The main inquiry under each test is "whether the private entity's challenged actions are 'fairly attributable' to the state." *Id.* (citing *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982)).

Plaintiff has failed to establish state action under any of these three tests. Plaintiff's allegations that "[D]efendants were state actors," (AC ¶¶ 7-11, 83-84), are conclusory, and Plaintiff does not plausibly allege that anything Defendants did employed the "coercive power" of the state, was closely "entwined" with the state, or amounted to the state delegating a "public function" to them. *Fabrikant*, 691 F.3d at 207 (cleaned up); *see Davis v. Whillheim*, No. 17-CV- 5793, 2019 WL 935214,

at *9-10 (S.D.N.Y. Feb. 26, 2019).[6]

"[C]ourt-appointed psychologist[s] . . . do not act under color of state law . . . ." *Falco*, 2018 WL 6706312, at *4 n.4 (collecting cases); *see Young v. N.Y. State Corr. & Cmty. Supervision*, No. 18-CV-5786, 2019 WL 591555, at *4 n.9 (E.D.N.Y. Feb. 13, 2019) (courts dismiss section 1983 claims "against court-appointed psychologists . . . on the grounds that they are not state actors."); *Davis*, 2019 WL 935214, at *10 ("Simply providing the Family Court with allegedly defective reports does not support allegations that [clinicians employed by private organizations] should be treated as state actors."); *Elmasri v. England*, 111 F. Supp. 2d 212, 221 (E.D.N.Y. 2000) (granting summary judgment dismissing § 1983 claim challenging outcome of divorce and custody proceedings and holding court-appointed guardian and psychologist were not state actors even though paid with state funds). Here, McKay was a court-appointed psychologist tasked with performing a forensic evaluation of Plaintiff and his family. Thus, she is not a state actor and, it follows, neither is WJCS.

B. Quasi-Judicial Immunity

Even assuming Defendants are state actors – and

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[6] Plaintiff has cited no case in support of his argument that a "Family Court order set[ting] the framework for the defendants' assignment," (P's Opp. at 3), transforms them into state actors. Nothing McKay did was coerced, controlled encouraged or joined by the Court – indeed, by Plaintiff's account she violated the Family Court Order, (AC ¶¶ 34, 40, 64, 79, 86, 107, 112, 121, 130, 139, 156-57) – nor is practicing psychology or performing evaluations a public function.

they are not – Defendants would still be entitled to dismissal because they are immune from suit. "[A]bsolute immunity may attach to non-judicial officers and employees where the individual serves as an arm of the court or where the individual conducts activities that are inexorably connected with the execution of court procedures and are analogous to judicial action." *McKnight v. Middleton*, 699 F. Supp. 2d 507, 527 (E.D.N.Y. 2010) (cleaned up); *see Henderson v. Heffler*, No. 07-CV-0487, 2010 WL 2854456, at *3 (W.D.N.Y. July 19, 2010) ("Absolute immunity has been extended to court- appointed social workers, doctors, psychiatrists, and evaluators" on "inexorably connected" theory) (cleaned up). "Court-appointed forensic evaluators act as arms of the court and enjoy judicial immunity from federal civil rights liability as a non judicial person who fulfills a quasi- judicial role at the court's request." *Monte v. Vance*, No. 18-CV-9595, 2018 WL 11302546, at *4 (S.D.N.Y. Nov. 7, 2018) (cleaned up).

Defendant McKay was "appointed as the forensic evaluator" by the Family Court, (Order at 1), and her alleged indiscretions pertain to the way she carried out her court-assigned task, (*see generally* AC). Thus, Defendants McKay and WJCS are immune from suit. *See Monte*, 2018 WL 11302546, at *5 ("[M]ental health professionals" were "entitled to absolute quasi-judicial immunity for their conduct in evaluating Plaintiff's competency."); *Falco*, 2018 WL 6706312, at *4 n.4 ("[C]ourt-appointed psychologist[s] and caseworkers . . . are immune from suit under the

doctrine of absolute witness immunity.") (collecting cases); *McKnight*, 699 F. Supp. 2d at 527 (social worker and psychotherapist appointed by family court entitled to absolute quasi-judicial immunity for their actions in interviewing and consulting the parties in a Family Court proceeding and preparing a report to the court); *Hunter v. Clark*, No. 04-CV-0920, 2005 WL 1130488, at *2 (W.D.N.Y. May 5, 2005) (court-appointed psychiatrists who examined the plaintiff and submitted reports to court regarding competency to stand trial entitled to absolute immunity); *Di Costanzo v. Henriksen*, No. 94-CV-2464, 1995 WL 447766, at *2 (S.D.N.Y. July 28, 1995) ("The doctrine of witness immunity bars an action against [clinical psychologist and medical doctor who provided medical and psychological evaluations to the court] even if they did not formally testify as witnesses in the proceedings, since their role in the proceedings would have been essentially that of witnesses."); *see also Mikhail v. Kahn*, 572 F. App'x 68, 71 (3d Cir. 2014) (court-ordered custody evaluators immune because "[i]ndividuals charged with the duty of carrying out facially valid court orders enjoy quasi-judicial absolute immunity" and "immunity extends to evaluative functions when the evaluation is done, as it plainly was here, to assist the court in its decision-making process") (cleaned up); *Shallow v. Rogers*, 201 F. App'x 901, 904 (3d Cir. 2006) ("[C]ourt-appointed evaluators are entitled to judicial immunity because of their integral relationship to the court. Thus, it follows that . . . both court-appointed psychologists . . . are entitled to judicial immunity.").

C. State Law Claims

In addition to Plaintiff's federal claims, Plaintiff further alleges that his rights were violated under New York state law. The "traditional 'values of judicial economy, convenience, fairness, and comity'" weigh in favor of declining to exercise supplemental jurisdiction where all federal-law claims are eliminated before trial. *Kolari v. N.Y.-Presbyterian Hosp.*, 455 F.3d 118, 122 (2d Cir. 2006) (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988)). Having determined that the only claims over which this Court has original jurisdiction should be dismissed, and having considered the factors set forth in *Cohill*, the Court declines to exercise supplemental jurisdiction over Plaintiff's remaining state law causes of action. *See* 28 U.S.C. § 1367(c)(3). Accordingly, although I tend to agree with Defendants that the allegations here do not approach those required for NIED and fraud, Plaintiff's NIED and fraud claims are dismissed without prejudice.

D. Leave to Amend

Leave to amend a complaint should be freely given "when justice so requires." Fed. R. Civ. P. 15(a)(2). "[I]t is within the sound discretion of the district court to grant or deny leave to amend." *Kim v. Kimm*, 884 F.3d 98, 105 (2d Cir. 2018) (cleaned up). "Leave to amend, though liberally granted, may properly be denied" for "'repeated failure to cure deficiencies by amendments previously

allowed'" or "'futility of amendment,'" among other reasons. *Ruotolo v. City of N.Y.*, 514 F.3d 184, 191 (2d Cir. 2008) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

Plaintiff has already amended once, after having the benefit of pre-motion letters from Defendants stating the grounds on which they would move to dismiss, (ECF Nos. 6, 10), as well as the Court's observations during the pre-motion conference, (*see* Minute Entry dated Feb. 11, 2021). In general, a plaintiff's failure to fix deficiencies in the previous pleading, after being provided notice of them, is alone sufficient ground to deny leave to amend. *See Nat'l Credit Union Admin. Bd. v. U.S. Bank Nat'l Ass'n*, 898 F.3d 243, 257-58 (2d Cir. 2018) ("When a plaintiff was aware of the deficiencies in his complaint when he first amended, he clearly has no right to a second amendment even if the proposed second amended complaint in fact cures the defects of the first. Simply put, a busy district court need not allow itself to be imposed upon by the presentation of theories *seriatim*.") (cleaned up); *In re Eaton Vance Mut. Funds Fee Litig.*, 380 F. Supp. 2d 222, 242 (S.D.N.Y. 2005) (denying leave to amend because "the plaintiffs have had two opportunities to cure the defects in their complaints, including a procedure through which the plaintiffs were provided notice of defects in the Consolidated Amended Complaint by the defendants and given a chance to amend their Consolidated Amended Complaint," and "plaintiffs have not submitted a proposed amended complaint that would cure these pleading defects"), *aff'd sub nom. Bellikoff v. Eaton*

Vance Corp., 481 F.3d 110, 118 (2d Cir. 2007) (*per curiam*) ("[P]laintiffs were not entitled to an advisory opinion from the Court informing them of the deficiencies in the complaint and then an opportunity to cure those deficiencies.") (cleaned up).

Further, Plaintiff has not asked to amend his federal claims again or otherwise suggested that he is in possession of facts that would cure the deficiencies identified in this opinion. *See TechnoMarine SA v. Giftports, Inc.*, 758 F.3d 493, 505 (2d Cir. 2014) (plaintiff need not be given leave to amend if plaintiff fails to specify how amendment would cure the pleading deficiencies in the complaint); *Gallop v. Cheney*, 642 F.3d 364, 369 (2d Cir. 2011) (district court did not err in dismissing claim with prejudice in absence of any indication plaintiff could or would provide additional allegations leading to different result); *Horoshko v. Citibank, N.A.*, 373 F.3d 248, 249- 50 (2d Cir. 2004) (*per curiam*) (district court did not abuse its discretion by not granting leave to amend where there was no indication as to what might have been added to make the complaint viable and plaintiffs did not request leave to amend). Indeed, "[t]he problem[s] with [Plaintiff's federal] causes of action [are] substantive," and "better pleading will not cure [them]." *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000).

Accordingly, the Court declines to grant leave to amend *sua sponte*.

IV. CONCLUSION

For the foregoing reasons, Defendants' motions to dismiss are GRANTED. The Clerk of Court is respectfully directed to terminate the pending motions, (ECF Nos. 18-20), and close the case.

SO ORDERED.

Dated: February 28, 2022
White Plains, New York

/s/

CATHY SEIBEL, U.S.D.J.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DAN CHERNER, on his own behalf and on behalf of all others similarly situated,

20 CIV 8331 (CS)(JCM)
Plaintiff,

v.

WESTCHESTER JEWISH COMMUNITY SERVICES, INC., and KATHLEEN MCKAY,

Defendants.

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20 CIV 8331 (CS)(JCM)

JURY DEMAND

FIRST AMENDED COMPLAINT

1. Plaintiff, Dan Cherner, brings this action pursuant to 42 U.S.C. §1983 and the United States Constitution, including the 1st, 5th, and 14th Amendments, as well as the Declaration of Independence, and under New York State law, pursuant to 28 U.S.C. § 1367. Plaintiff contends that defendants willfully, knowingly, deliberately and negligently violated his Constitutional and legal rights as follows.

JURISDICTION AND VENUE

2. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367. Plaintiff's state law claims are brought pursuant to 28 U.S.C. § 1367.

3. Venue is proper in this judicial district under 28 U.S.C. §§ 1391(b)(1) and (b)(2), as the defendants reside in this judicial district and the acts complained of herein took place in this judicial district.

PARTIES

4. Plaintiff Dan Cherner is a citizen of the United States and resident of the State of New York.

5. Defendant Westchester Jewish Community Services, Inc. (WJCS) is a corporation organized under the laws of the State of New York, with offices located in White Plains, New York; Hartsdale, New York; and Yonkers, New York.

6. Defendant Kathleen McKay is, upon information and belief, an employee of defendant WJCS. Upon information and belief, defendant McKay was and is a licensed psychologist in the State of New York and a member of the American Psychological Association (APA).

7. At all times complained of herein, defendants were state actors, in that they were clothed with the authority of state law, and their actions were taken under color of state law.

8. At all times complained of herein, the Family Court of the State of New York completely relied on defendants with respect to forensic evaluation, and insinuated itself into a position of interdependence with the defendants so as to make itself a joint participant in defendants' actions.

9. At all times complained of herein, the State of New York, Family Court of the State of New York, created the legal framework through which defendants acted and which was to govern the defendants' conduct.

10. At all times complained of herein, the Family Court of the State of New York delegated its responsibilities and its authority with respect to forensic evaluation to defendants, and defendants' Constitutional and legal violations occurred while exercising that authority.

11. At all times complained of herein, defendants' conduct violated clearly established Constitutional and statutory rights of which a reasonable person would have known.

STATEMENT OF FACTS

12. On or around May 6, 2016, Mr. Cherner filed for custody of his children in New York State Family Court.

13. On August 30, 2016, Mr. Cherner filed an amended custody petition which detailed more facts, including: (i) on May 8, 2016, the adverse

party in the custody petition (Ospina) tried to grab Mr. Cherner's children and force herself on them physically; when they responded affirmatively to her question as to whether they wanted to reside with Mr. Cherner full-time, she told them to leave; (ii) on May 30, 2016, Mr. Cherner's children were scheduled to study for their final examinations, yet Ospina forced them into a vehicle on threat of physical violence and prevented them from studying; (iii) on June 6, 2016, Ospina forced Mr. Cherner's children to sit with her and she began reading from Mr. Cherner's custody petition and asking them questions about it; (iv) on June 25, 2016, as Mr. Cherner and one of his children were walking to a high school graduation ceremony, where the other child was performing, Ospina stalked them in her car, tried to confront Mr. Cherner's child, and, when Mr. Cherner told her to stop, she stated "I don't have to speak with you", and then started yelling "I am a woman, I am a woman" as she drove away; (v) on July 8, 2016, Mr. Cherner's children were each spending the day with friends, with Ospina's knowledge, yet she threatened them and tracked them down, and forced them to go with her, and then proceeded to lock them in separate rooms for the remainder of the day.

14. In fact, in 2013, Mr. Cherner had filed a petition for an order of protection on behalf of his children and against Ospina, in Family Court in 2013, based on repeated threats of physical violence made by Ospina to Mr. Cherner's children.

15. On September 29, 2016, defendants WJCS and McKay were appointed as the forensic evaluator in the custody matter.

16. The "Order for Forensic Evaluation" ordered that the forensic evaluator "conduct a complete forensic evaluation" of Mr. Cherner, his children, and Ospina, including "evaluations of each parent, the children and each parent with the children."

17. Defendants were and aware, or should have been aware, that evaluating children with each parent is essential to a forensic evaluation, as case law makes clear that a forensic evaluation and report have no evidentiary value and are not taken into consideration if there is no evaluation of the children with each parent.

18. The order also ordered that "the forensic evaluator shall conduct the necessary interviews and investigations, and thereafter shall submit to the court a report **within 60 days from the date of this Order** unless the court, upon application, shall provide otherwise. (emphasis in original).

19. On October 31, 2016, by court order, Mr. Cherner was granted temporary primary physical custody of his children.

20. Upon information and belief, the court amended the original forensic evaluation order so as to require Mr. Cherner and the other party to pay defendants, i.e., "private pay" as opposed to payment

being made by New York State. Upon information and belief, defendants and defendant McKay refused to begin work until the order was so modified, which was done, upon information and belief, in December 2016.

21. The original order required defendants and defendant McKay to submit a report to the court no later than November 23, 2016; however, defendants did not even begin work in this regard until January 2017. Even if defendants had 60 days from the date of a modified order, they would have been required to submit a report to the court no later than, upon information and belief, the end of February, 2017.

22. In fact, defendants constantly and deliberately delayed their work, and delayed issuance of a report to the court. At no time did defendants ever make any application to the court for an extension of time to submit a report to the court.

23. Meanwhile, Ospina had yet another outburst when, on November 26, 2016, she threatened Mr. Cherner's children and put them in fear of their physical safety as they were leaving a visitation with her. Ospina's behavior was so extreme that Mr. Cherner had to call the police and have them appear so as to ensure his children's safety.

24. When Mr. Cherner first met with defendant McKay on January 23, 2017, he explained to her that her work and report were delayed, and

explained that there was a court date in April, 2017. McKay stated clearly that she could get her work done and issue a report in advance of that court date, but immediately stated that she would not issue a report until she got paid.

25. Mr. Cherner and the other party were ordered to pay defendant McKay $7,500.00 each – in other words, the court decided that this was a "private pay" matter as opposed to the court system paying for the evaluation. Defendant McKay expressed to Mr. Cherner her further willingness to violate the court's order by stating that she would not issue her report until she was paid.

26. Nowhere in the court order is there any provision for defendants' report to the court being contingent on being paid.

27. Defendant McKay also told Mr. Cherner on January 23, 2017, that her work would include observing Mr. Cherner's children with each parent, as required by the court order. Despite this acknowledgement of the court's order and material representation to Mr. Cherner, defendants and defendant McKay deliberately failed and refused to comply with the court order in this regard. Defendant McKay also promised to Mr. Cherner that she would obtain the other party's therapist's records, as required by court order.

28. Mr. Cherner made defendant McKay aware of the incidents mentioned his amended petition, as well as the incident in November, 2016, as well as the incidents surrounding the 2013

petition, as well as many other incidents by the other party where she threatened Mr. Cherner's children with physical violence, encroached on their physical space, engaged in intimidation and intimidation tactics, disparaged him to them on a regular basis, and, in general, engaged and attempted to engage in a reign of terror.

29. Mr. Cherner made it clear to defendant McKay that the other party's actions were part of an ongoing and deliberate pattern of behavior designed to harm his children.

30. Mr. Cherner also informed defendant McKay of several financial crimes that the other party had committed over an extended period of time, which he had discovered during the course of a prior matrimonial action.

31. Mr. Cherner also informed defendant McKay that the other party had told him that she had been in therapy, and that she had told him that she had been diagnosed with some type of disorder.

32. Over time, defendant McKay made it clear that she was not interested in such information, but, rather, she was interested in trying to demonize Mr. Cherner and cast him in a bad light, based, in part, on her discriminatory animus towards Mr. Cherner based on gender.

33. Thus, defendant McKay asked Mr. Cherner principally about his past, going back decades, and sought to ridicule him. Such queries had little, if any, relevance to defendants' task.

34. Defendant McKay asked little or nothing about his parenting of his children, his view of the parenting – and lack thereof – of the other party, and other relevant lines of inquiry which were pertinent to her task and the order of the court.

35. To Mr. Cherner's knowledge, defendants never sought to obtain and never did obtain the records of the therapist seen by the other party, records which, upon information and belief, would have had major relevance to defendant McKay's appointed task.

36. After Mr. Cherner's first meeting with defendant McKay, her behavior became more and more inappropriate.

37. Mr. Cherner met with defendant McKay three times, the last time being February 7, 2017. On that date, defendant McKay stated told Mr. Cherner that the next meeting would be with him and his children, and that she would reach out to him to schedule. She explained that she still had another meeting with the other party, and that she would then schedule meetings with each party and the children.

38. There was never any further attempt by defendant McKay to schedule a meeting with Mr. Cherner and his children.

39. Instead, defendant McKay conspired with the other party to demonize Mr. Cherner and put his children at risk.

40. As part of this conspiracy, defendants and defendant McKay deliberately and intentionally decided not to follow the court's order, not to observe the children with each parent, not to issue an impartial and objective report, and, instead, to infringe on Mr. Cherner's Constitutional and legal rights and violate them.

41. Defendant McKay also decided to commit multiple violations of the American Psychological Association's (APA) Code of Ethics. As a member of the APA, defendant McKay is bound to follow these ethical requirements.

42. Instead of scheduling meetings with each parent and the children, as required by the court's order, defendant McKay decided, with the other party, to appear at the other party's residence and question Mr. Cherner's children, without prior notification to Mr. Cherner's childrens' attorney (law guardian), and without seeking any consent from the law guardian to engage in such activity.

43. Thus, on April 4, 2017, Mr. Cherner's youngest child was studying for an exam at a friend's residence after school, with the knowledge of Mr. Cherner and the other party.

44. The other party contacted Mr. Cherner's child at 3:55 p.m., and told her that she was going to pick her up at 5:00 p.m. (for her scheduled visitation); Mr. Cherner's child told her she would not yet be done studying.

45. The other party started yelling at Mr. Cherner's child, telling her that does not get to decide what she is going to do, and that she was going to pick her up at 5:00 p.m., and then hung up the phone.

46. The temporary order of custody made it clear that the other party could not interfere with the extracurricular activities of Mr. Cherner's children; this restriction included after-school studying.

47. The reason for this outburst soon became clear. When Mr. Cherner's oldest child arrived at the other party's residence around 5:00 p.m., defendant McKay was present, introduced herself, and proceeded to ask her some questions.

48. In other words, defendant McKay conspired with the other party to appear unannounced, without notice to the law guardian, and inappropriately question Mr. Cherner's children.

49. Such inappropriate behavior by defendant McKay, in which she appeared unannounced, without notice to the law guardian, was a clear indication that defendant McKay had decided to inappropriately align herself with the other party, and clearly intended to violate Mr. Cherner's Constitutional and legal rights.

50. Defendants and defendant McKay's inappropriate behavior continued. Defendant McKay scheduled meetings with the other party to meet with Mr. Cherner's children without consulting

the law guardian, as would have been appropriate. Such meetings were scheduled for April 20, 2017 and May 9, 2017, even though such dates interfered with Mr. Cherner's childrens' extracurricular activities – in context, the Family Court judge had made it explicitly clear that such meetings were to be scheduled so as not to interfere with such extracurricular activities.

51. When the law guardian got involved to schedule dates, dates were scheduled without interfering with extracurricular activities; however, when defendant McKay met with Mr. Cherner's children, she met with each of them separately, outside the presence of the other party and any other individuals.

52. Defendant McKay never told Mr. Cherner that she wanted to or planned to meet with his children separately. Defendant McKay never reached out to Mr. Cherner to ask him or seek to have him bring his children for a meeting with her.

53. Instead, defendant McKay conspired with the other party to seek to find some way to violate Mr. Cherner's Constitutional and legal rights and to issue a report demonizing him and minimizing the other party's continual and ongoing abuse and threats of violence.

54. Thus, when defendant McKay's inappropriate behavior on April 4, 2017, was brought to light, she inappropriately sought to characterize it is a "home inspection" and claimed to Mr. Cherner that she wanted to do a "home inspection."

Defendant McKay never followed up on this supposed intention.

55. On June 9, 2017, Mr. Cherner sought to understand these behaviors from defendant McKay and to understand what else needed to be done to complete her assignment.

56. In response, defendant McKay falsely claimed that she had sent Mr. Cherner an email requesting his assistance in facilitating appointments with the other party and his children, and that when he did not respond, she "assumed" that he was "no longer going to comply."

57. Such outrageous and false claims exist as further proof of defendants and defendant McKay's intentional alignment with the other party and her deliberate intent to violate Mr. Cherner's Constitutional and legal rights.

58. In that response, defendant McKay also informed Mr. Cherner that she had to meet with the other party another one or two times, she was most likely done meeting with his children, and would like to meet with him again.

59. Mr. Cherner informed defendant McKay that it is always improper to assume, and that she could have easily reached out to him and communicated directly. He also informed defendant McKay of his availability, and she stated that she would get back to him to schedule a meeting. Defendant McKay never got back to Mr. Cherner nor

did she ever seek to schedule a meeting with Mr. Cherner and his children.

60. Instead, Mr. Cherner reached out to defendant McKay on September 22, 2017 and let her know of his availability to meet. Defendant McKay responded by stating that it did not appear to her that she needed to meet, but would let him know the following week. Defendant McKay never reached out to Mr. Cherner beyond that date.

61. Instead, defendant McKay continued her ongoing conspiracy and alignment with the other party to demonize Mr. Cherner and violate his Constitutional and legal rights.

62. Defendant McKay also deliberately delayed the issuance of her report to try and create a situation where Mr. Cherner, and, most importantly, Mr. Cherner's expert witness and attorney, had very little time to review the report and properly prepare and refute it at the custody hearing.

63. Thus, for a hearing scheduled on November 6, 2017, defendants and defendant McKay issued a report dated October 6, 2017, knowing that (i) the report goes to the court, (ii) Mr. Cherner's attorney and expert witness have to go to the court and get a copy of it and then review it.

64. Defendants and defendant McKay issued a report that was outlandish and inappropriate, and of no evidentiary value. Defendant McKay violated the court's order by deliberately refusing to meet with the children and

each parent, because she knew that such meetings would obligate her to speak to the ongoing and continuous violence and threats of violence and wrongful acts of the other party.

65. Defendant McKay also failed and refused to obtain the therapist's records, which, upon information and belief, would have given valuable and relevant evidence. The other party and her attorney spent the entirety of the proceeding trying to prevent Mr. Cherner from obtaining such records, to which he was entitled. Upon information and belief, defendant McKay conspired with these individuals from keeping such records from being obtained.

66. Instead, defendant McKay improperly included hearsay in her report and outlandish and outrageous conclusion.

67. Thus, defendants and defendant McKay sought to demonize Mr. Cherner by including in the report hearsay allegations about him which were and are patently false and defamatory. Defendant McKay never mentioned this hearsay to Mr. Cherner and sought his response. Further, based on information provided by Mr. Cherner to defendant McKay, she knew or should have known such allegations were false.

68. Incredibly, defendant McKay, in her report, sought to minimize the ongoing and continuous outbursts and threats of violence against the other party, by falsely claiming that the other party's behavior was the fault of Mr. Cherner's

children, for not being "empathic" enough to understand the "triggers" that cause the other party to engage in such outbursts and threats.

69. The entire report was an attempt to demonize Mr. Cherner and to minimize the other party's behavior, and an attempt to violate Mr. Cherner's Constitutional and legal rights and to harm him and his children.

70. Mr. Cherner's expert found the report to be as much. Specifically, he found that defendant McKay's "report does not comport with APA Guidelines for Forensic Psychology", and that defendant McKay's report did not address the issue of confirmation bias, in which the evaluator ends up "utilizing data non-scientifically and opining based on speculation as opposed to supporting analyses with a scientific foundation derived from empirical literature", and that "there was little if any effort to address the issue of confirmatory bias. The report was essentially one-sided."

71. Specifically, Mr. Cherner's expert found that defendants and defendant McKay's report violated APA Guideline 2.05, "Knowledge of the Scientific Foundation for Opinions and Testimony", in that defendant McKay "does not provide a single source or reference to support her conclusory statements or how her methodology supports her conclusions . . . this responsibility was not undertaken through the entirety of the report, which has resulted in speculative and unsupported conclusions."

72. Specifically, Mr. Cherner's expert found that defendants and defendant McKay's report violated APA Guideline 9.02, "Use of Multiple Sources of Information", in that defendant McKay used multiple sources of information "in a perfunctory way and makes no attempt to apply caveats as to the strengths and limitations of her findings . . . [defendant] McKay does not do an adequate job of identifying potential problems associated with relying on self-report and as a result is overconfident in the generation of her conclusions."

73. Specifically, Mr. Cherner's expert found that defendants and defendant McKay's report violated APA Guideline 10.02, "Selection and Use of Assessment Procedures", in that defendant McKay "did not conduce an interview with father and children and did not conduct an interview with mother and children either. [Defendant] McKay was directed by Court order to conduct such interviews and she failed to do so. Such interviews and observations of each parent with the children are essential in a custody evaluation. As a result, the most important and substantial data in the study was not collected."

74. Specifically, Mr. Cherner's expert found that defendants and defendant McKay's report violated APA Guideline 11.02, "Differentiating Observations, Inferences, and Conclusions", in that defendant McKay "does not distinguish between what she observes and speculates about with any unified theory which could be cross-referenced to the science of her methods or the underlying foundation

supporting her conclusions. The vast majority of her conclusions were "inferential", without any unified theory of what supports them."

75. Specifically, Mr. Cherner's expert found that defendants and defendant McKay's report did not comport with APA Guidelines for custody evaluation, and violated Section I ("Orienting Guidelines: Purpose of the Child Custody Evaluation Subsection 3: The evaluation focuses upon parenting attributes, the child's psychological needs, and the resulting fit"), in that defendant McKay specifically criticized Mr. Cherner personally but "does not spend any significant effort explaining how his parenting attributes fit the needs of his children at the present time and at the children's current state of need."

76. Specifically, Mr. Cherner's expert found that defendants and defendant McKay's report did not comport with Section I Subsection 5 ("Impartial Evaluators") in that defendant McKay "spends little if any effort describing the complexities of the family dynamic, nor does she delve into the contributions each family makes to the current circumstances. Instead, effort was taken to highlight father's weaknesses and ignore his potential strengths; and also to ignore the mother's weaknesses and minimize them."

77. Specifically, Mr. Cherner's expert found that defendants and defendant McKay's report did not comport with Section 12 ("Psychologists strive to complement the evaluation with the appropriate combination of examinations"), in that defendant

McKay "failed to interview/observe the father with the children and also failed to interview/observe the mother with the children. Without such an interview the evaluator is at a serious disadvantage in providing underlying support for the criticism she levels at Mr. Cherner in the conclusory section of her report and for her minimalization of the mother's issues. Further, such interviews/observations are essential to this type of forensic examination/custody evaluation."

78. Mr. Cherner did not start to learn of the contents of the report until October 13, 2017.

79. It is clear from McKay's failures and refusals to follow the court's order; from her numerous ethics violations; and from her outlandish and inappropriate report; that she was attempting to run a racket, in which she improperly aligned herself with the other party, ignored and minimized the unacceptable and inappropriate behaviors of the other party, and tried to demonize Mr. Cherner, to create a situation in which she could entrap Mr. Cherner's children and deceive the court into ordering therapy, from which she and defendant WJCS would profit and benefit from financially.

80. Defendants and defendant McKay took such actions in violation of Mr. Cherner' s Constitutional and legal rights.

81. Upon information and belief, defendants and defendant McKay have done this in other matters and continue to engage in such illegal and unacceptable behavior.

82. On November 6, 2017, the Family Court issued a final order giving Mr. Cherner primary physical custody of his children.

Defendants were state actors

83. Both of the defendants were named in the Court's order, and both are state actors, as (i) New York State created the legal framework governing the defendants' conduct – they are directed specifically as to what their assignment is, within the body of the order; and (ii) New York state delegated its authority to conduct a forensic analysis to the defendants.

84. The defendants were able to so act only because they were clothed with authority under state law, so their actions were actions taken "under color of" state law.

Defendants are not entitled to absolute immunity

85. While individuals and/or entities may be entitled to absolute immunity in performing judicial functions that have been delegated to them, such individuals and/or entities are not entitled to absolute immunity when they act outside the scope of their authority.

86. In this matter, the defendants acted outside the scope of their authority, in that they refused and failed to carry out the directives as given

in the court order, and, thus, are not entitled to absolute immunity.

87. Defendants acted outside the scope of the authority granted to them, and, as a result, they are not entitled to absolute immunity.

88. Just as a prosecutor, for example, loses his or her immunity when directing an arrest, for example, which is outside the scope of prosecutorial authority, defendants lose any absolute immunity that they might have when they act, as in this matter, outside of the scope of their authority.

89. To allow otherwise would not only stand the law on its head, but lead to a result where a forensic examiner could blatantly (as in this matter) violate a court order, act outside the scope of his/her/its authority, in a manner intended to abuse and prey on vulnerable children, and not be held accountable in this regard.

Defendants are not entitled to qualified immunity

90. Defendants are not entitled to qualified immunity either. The causes of action herein involve clearly established statutory and Constitutional rights of which a reasonable person would have known.

Defendants are not entitled to XIth Amendment immunity

91. Defendants are state actors, not a State and not a state official or employee, and, accordingly, defendants are not entitled to XIth Amendment immunity.

CLASS ALLEGATIONS

92. Upon information and belief, defendants and defendant McKay routinely receive court appointments to act as a forensic evaluator custody cases.

93. Upon information and belief, defendants and defendant McKay routinely aligns herself, inappropriately and illegally, with one party in a custody matter.

94. Upon information and belief, defendants and defendant McKay routinely and deliberately refuse to comply with court orders, including refusing and failing to meet with children and each parent together.

95. Upon information and belief, defendants and defendant McKay routinely violate the Constitutional and legal rights of litigants in custody cases, and attempt to cause harm to litigants and children in so doing.

96. There are questions of law or fact which are common to such class.

97. The claims of plaintiff are typical of the claims of the class.

98. Plaintiff will fairly and adequately protect the interests of the class.

AS AND FOR A FIRST CAUSE OF ACTION
42 U.S.C. § 1983: 1st and 14th Amendments
Liberty Interest in Retaining Custody

99. Plaintiff repeats and realleges paragraphs 1 through 98 above as though set forth herein.

100. Prior to defendants' involvement, Mr. Cherner was granted temporary full custody.

101. Mr. Cherner had a liberty interest in retaining custody of his children.

102. Defendants violated that liberty interest, in violation of the 1st and 14th amendments to the U.S. Constitution and other laws.

103. In this regard, defendants discriminated against Mr. Cherner based on gender.

104. For example, defendants ignored and/or minimized the other party's (i) mental health records, (ii) numerous outbursts and threats of violence; (iii) the Family Court petition filed against her in 2013; (iv) numerous police reports detailing her behavior, etc.

105. Defendants also gave the other party opportunity to present individuals (whose hearsay testimony wound up in their report) and did not afford the same to Mr. Cherner.

106. Defendants also coordinated with the other party to "show up" one afternoon without Mr. Cherner's knowledge and without the knowledge or consent or presence of the children's attorney.

107. Defendants interfered with and violated Mr. Cherner's rights by refusing to comply with the court's order as noted above, and, specifically, by refusing and failing to observe Mr. Cherner's children with each parent and by deliberately delaying completion of their assignment in violation of the court's order, and by acting inappropriate also as noted above.

108. Such delay and refusal interfered with Mr. Cherner's liberty interest in retaining custody of his children in violation of the 1st and 14th Amendments to the U.S. Constitution.

109. Plaintiff is entitled to damages pursuant to 42 U.S.C. § 1983.

AS AND FOR A SECOND CAUSE OF ACTION
42 U.S.C. § 1983: 1st and 14th Amendments
Right to Personal Privacy and Family Relationships

110. Plaintiff repeats and realleges paragraphs 1 through 109 above as though set forth herein.

111. At all times herein, Mr. Cherner had and has a right to personal privacy and family relationships, protected by the 1st and 14th Amendment to the U.S. Constitution and other laws.

112. Defendants violated these rights by refusing to observe the children with each parent, as required by the court order; by failing and refusing to conduct the assigned work in a timely manner and to issue a report within the time frame required by the Family Court; by failing and refusing to obtain the other party's therapist's records; and by aligning themselves with the other party inappropriately, and seeking to inappropriately demonize Mr. Cherner and inappropriately interfere with his rights.

113. In this regard, defendants discriminated against Mr. Cherner based on gender.

114. For example, defendants ignored and/or minimized the other party's (i) mental health records, (ii) numerous outbursts and threats of violence; (iii) the Family Court petition filed against her in 2013; (iv) numerous police reports detailing her behavior, etc.

115. Defendants also gave the other party opportunity to present individuals (whose hearsay testimony wound up in their report) and did not afford the same to Mr. Cherner.

116. Defendants also coordinated with the other party to "show up" one afternoon without Mr.

Cherner's knowledge and without the knowledge or consent or presence of the children's attorney.

117. Such wrongful acts were in violation of Mr. Cherner's rights as noted above.

118. Plaintiff is entitled to damages pursuant to 42 U.S.C. § 1983.

AS AND FOR A THIRD CAUSE OF ACTION 42 U.S.C. § 1983: 1st and 14th Amendment violations of Mr. Cherner's liberty interest in preserving the integrity and stability of his family from intervention without due process of law

119. Plaintiff repeats and realleges paragraphs 1 through 118 above as though set forth herein.

120. At all times herein, Mr. Cherner had and has a liberty interest in preserving the integrity and stability of his family from intervention without due process of law, protected by the 1st and 14th Amendment to the U.S. Constitution and other laws

121. Defendants violated these rights by refusing to observe the children with each parent, as required by the court order; by failing and refusing to conduct the assigned work in a timely manner and to issue a report within the time frame required by the Family Court; by failing and refusing to obtain the other party's therapist's records; and by aligning themselves with the other party inappropriately, and

128. Plaintiff repeats and realleges paragraphs 1 through 127 above as though set forth herein.

129. At all times herein, Mr. Cherner had and has a right to raise his children free from state interference absent some compelling justification for interference, protected by the 1st and 14th Amendment to the U.S. Constitution and other laws.

130. Defendants violated these rights by refusing to observe the children with each parent, as required by the court order; by failing and refusing to conduct the assigned work in a timely manner and to issue a report within the time frame required by the Family Court; by failing and refusing to obtain the other party's therapist's records; and by aligning themselves with the other party inappropriately, and seeking to inappropriately demonize Mr. Cherner and inappropriately interfere with his rights.

131. In this regard, defendants discriminated against Mr. Cherner based on gender.

132. For example, defendants ignored and/or minimized the other party's (i) mental health records, (ii) numerous outbursts and threats of violence; (iii) the Family Court petition filed against her in 2013; (iv) numerous police reports detailing her behavior, etc.

133. Defendants also gave the other party opportunity to present individuals (whose hearsay testimony wound up in their report) and did not afford the same to Mr. Cherner.

134. Defendants also coordinated with the other party to "show up" one afternoon without Mr. Cherner's knowledge and without the knowledge or consent or presence of the children's attorney.

135. Such wrongful acts were in violation of Mr. Cherner's rights as noted above.

136. Plaintiff is entitled to damages pursuant to 42 U.S.C. § 1983.

AS AND FOR A FIFTH CAUSE OF ACTION 42 U.S.C. § 1983: 1st and 14th Amendment violations of Mr. Cherner's liberty interest in the care, custody, and management of his children

137. Plaintiff repeats and realleges paragraphs 1 through 136 above as though set forth herein.

138. At all times herein, Mr. Cherner had and has a liberty interest in the care, custody, and management of his children, protected by the 1st and 14th Amendment to the U.S. Constitution and other laws.

139. Defendants violated these rights by refusing to observe the children with each parent, as required by the court order; by failing and refusing to conduct the assigned work in a timely manner and to issue a report within the time frame required by the Family Court; by failing and refusing to obtain the other party's therapist's records; and by aligning

themselves with the other party inappropriately, and seeking to inappropriately demonize Mr. Cherner and inappropriately interfere with his rights.

140. In this regard, defendants discriminated against Mr. Cherner based on gender.

141. For example, defendants ignored and/or minimized the other party's (i) mental health records, (ii) numerous outbursts and threats of violence; (iii) the Family Court petition filed against her in 2013; (iv) numerous police reports detailing her behavior, etc.

142. Defendants also gave the other party opportunity to present individuals (whose hearsay testimony wound up in their report) and did not afford the same to Mr. Cherner.

143. Defendants also coordinated with the other party to "show up" one afternoon without Mr. Cherner's knowledge and without the knowledge or consent or presence of the children's attorney.

144. Such wrongful acts were in violation of Mr. Cherner's rights as noted above.

145. Plaintiff is entitled to damages pursuant to 42 U.S.C. § 1983.

AS AND FOR A SIXTH CAUSE OF ACTION
FRAUD

146. Plaintiff repeats and realleges paragraphs 1 through 145 above as though set forth herein.

147. On January 23, 2017, defendant McKay told Mr. Cherner (i) that her work would include observing his children with each parent, as required by court order; (ii) that she would get the work done and a report to the court in advance of the April, 2017 court date; and (iii) that she would comply with all aspects of the court order.

148. These statements were both material and false. Further, defendant McKay never intended to observe Mr. Cherner's children with each parent, nor did she intend to issue a report in a timely manner, both as required by court order, nor did she intend to comply with other aspects of the court order. Defendant McKay intended to deceive Mr. Cherner.

149. Mr. Cherner relied on these representations and statements by defendant McKay, and such reliance was reasonable.

150. Defendants are not entitled to any type of immunity under state law, as they manipulated the legal process, and they acted in bad faith and without a reasonable basis.

151. Mr. Cherner suffered injuries as a result of defendants' fraud, including but not limited

to: interference with his Constitutional rights as noted above; additional attorney's fees and expenses incurred; emotional distress; and physical distress due to emotional distress.

AS AND FOR A SEVENTH CAUSE OF ACTION NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

152. Plaintiff repeats and realleges paragraphs 1 through 151 above as though set forth herein.

153. On January 23, 2017, defendant McKay told Mr. Cherner (i) that her work would include observing his children with each parent, as required by court order; (ii) that she would get the work done and a report to the court in advance of the April, 2017 court date; and (iii) that she would comply with all aspects of the court order.

154. These statements were both material and false. Further, defendant McKay never intended to observe Mr. Cherner's children with each parent, nor did she intend to issue a report in a timely manner, both as required by court order, nor did she intend to comply with other aspects of the court order. Defendant McKay intended to deceive Mr. Cherner.

155. Mr. Cherner relied on these representations and statements by defendant McKay, and such reliance was reasonable.

156. Further, defendants failed and refused to observe Mr. Cherner's children with each parent as required by court order; failed and refused to issue a report in a timely manner as required by court order; failed and refused to seek and obtain the therapist's records of the other party, as required by court order; included hearsay (which was false) provided by individuals at the other party's behest, but failed to afford to Mr. Cherner the opportunity to provide witnesses to substantiate the information provided by him; failed to obtain the other party's therapist's records; sought to demonize Mr. Cherner; and violated several APA ethical guidelines.

157. Defendant McKay had a duty to comply and carry out the court's order, and to act and conduct herself within the ethical guidelines of the APA; her failure to do so was intentional and deliberate, reckless, and negligent.

158. As a direct result of defendant McKay's improper conduct in this regard, Mr. Cherner suffered emotional distress, and also physical distress caused by emotional distress.

159. Defendants are not entitled to any immunity under state law, as they acted in bad faith, manipulated the legal process, acted without a reasonable basis.

160. Mr. Cherner is entitled to damages as a result of defendants' negligent infliction of emotional distress.

PRAYER FOR RELIEF

161. Plaintiff requests the following relief:

(a) On the First through Seventh causes of action, actual damages as permitted by law, including for the proposed class, in excess of $75,000;

(b) An injunction enjoining defendant McKay and anyone acting on behalf of or working for defendant WJCS and/or defendant McKay from accepting any assignments from any court to act as a forensic evaluator, pending the resolution of this matter;

(c) An injunction enjoining defendant McKay and anyone acting on behalf of or working for defendant WJCS and/or defendant McKay from working on any current assignments from any court to act as a forensic evaluator, pending the resolution of this matter;

(d) Appointment of a monitor to oversee and report to the Court on a periodic basis, the status of any current forensic evaluator assignments made to defendant WJCS or defendant McKay or anyone working for or on behalf of defendant WJCS;

(e) An order prohibiting defendants and anyone acting on their behalf from violating any and all court orders with respect to forensic evaluator assignments;

(f) Attorney's fees and costs as to which plaintiff may be entitled;

(g) An order certifying the proposed class and designating plaintiff as representative of the class;

(h) An order entering judgment in favor of plaintiff and the class against the defendants;

(i) Such other and further relief as the Court may deem appropriate.

Respectfully submitted,

/s/
THE CHERNER FIRM
By: Dan Cherner (DC-1905)
411 Theodore Fremd Ave. Suite 206S
Rye, NY 10580
(917) 310-9800
fedctsdc@gmail.com

Dated: April 1, 2021
Rye, New York

APPENDIX E

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
Honorable: Gail B. Rice
In the Matter of a Proceeding for Custody and/or Family Visitation Pursuant to Family Court Act Article 6

ANA OSPINA

vs.
ORDER FOR FORENSIC

EVALUATION
DANIEL CHERNER
FAMILY UNIT # 114328

DOCKET: V-6884-16/16A, V-6152-16/16A, V-6885-16/16A, V-6161-16/16A

ORDER FOR FORENSIC EVALUATION

THE ABOVE-NAMED PARTIES, having placed in issue the custody and/or visitation of their children, and

IT APPEARING TO THE COURT that a neutral forensic evaluation will be of assistance to the Court in determining the issue(s):

NOW, THEREFORE, IT IS HEREBY ORDERED that the following agency be appointed as the forensic evaluator with respect to this matter:

Kathleen E. McKay, Phd,
Westchester Jewish Community Services
141 N. Central Ave
Hartsdale, NY 10530

and it is further ORDERED THAT the forensic evaluator shall conduct the forensic evaluation in accordance with the following provisions:

NATURE OF THE EVALUATION
The forensic evaluator shall conduct a complete forensic evaluation of the following ADULT parties:

Adult Last Name	First Name	Street Address	City	State	Zip	Phone
Ospina	Ana					
Cherner	Daniel					

and the MINOR CHILDREN:

Child Last Name	Child First Name	Gender	DOB	Lives With
Cherner	[red'td]	F	[red'td]	Daniel Cherner
Cherner	[red'td]	F	[red'td]	Daniel Cherner

ATTORNEY INFORMATION

Attorney Name	Person Representing	Phone #	Email Address
Douglas Martino, Esq.	Petitioner	[redacted]	[redacted]
Lidia Antoncic, Esq.	Respondent	[redacted]	[redacted]
Lisa Goldman, Esq.	Children	[redacted]	[redacted]

in the matter, including but not limited to evaluation of each parent, the children and each parent with the children, in such environments and circumstances as the forensic evaluator finds appropriate, as well as interviews with any such extended family members or persons affiliated with either party's households with whom the evaluator wishes to speak.

FOCUS OF THE EVALUATION: The forensic evaluator shall focus specifically on the following issues:

Standard Evaluation will address the following issues:

- Risk Assessment
- Parental Functioning Assessment
- General Psychological Psychiatric Functioning of All Parties

Please Indicate or Write In Any Additional Foci of Evaluation:

X	Interference with Parental Rights	X	Decision Making		Substance Abuse
X	Gatekeeping		Relocation		Serious Mental Illness
X	Parental Alienation	X	Access Schedule		Allegations of sexual abuse
X	Ability to foster relationship with other parent				

FORENSIC EVALUATOR'S FEE:

In the case of full paying litigants with combined income between $100000-$200000

Based on inquiry regarding the income and assets of each party, the forensic evaluator's fee will be:

Adult Party 1		Adult Party 2	
Last Name: Ospina	First Name: Ana	Last Name: Cherner	First Name: Daniel
Judge's Initial	Fee Amount	Judge's Initial	Fee Amount
GBR	To pay 50% of full fee	GBR	To pay 50% of full fee

FORENSIC EVALUATOR'S REPORT: The forensic evaluator shall conduct the necessary interviews and investigations, and thereafter shall submit to the Court a report within **60 days from the date of this Order** unless the Court, upon application, shall provide otherwise. The report shall set forth the evaluator's findings and the factual and analytical bases thereof, including any diagnosis made by the forensic evaluator of any child or party, any recommendations for treatment that the forensic evaluator finds to be appropriate. A recommendation as to residence and access arrangements that best suit the children's emotional, developmental, and psychological needs, a recommendation with respect to the custody of the children and each parent's ability to make appropriate decisions for them, and any other issues with respect to which the forensic evaluator believes is appropriate to advise the Court.

CONFIDENTIALITY OF FORENSIC EVALUATOR'S REPORT: The forensic evaluator's report is confidential and shall not be copied or disclosed to any person except in accordance with the terms of this order. The forensic evaluator shall provide copies of his or her report to the Court directly. No further copying of the report shall be permitted. The Court shall, at its discretion, make available copies of the report to counsel.

ADMISSIBILITY OF FORENSIC EVALUATOR'S REPORT: The neutral evaluator's report shall be admitted as evidence in chief, without the necessity

for independent foundation testimony or evidence, pursuant to the INDIVIDUAL PART RULES FOR THE HON. HAL B. GREENWALD. Any party that wishes to cross examine the forensic evaluator, as permitted by the Uniform Rules, shall bear the cost of the forensic evaluator's services in preparing for such testimony, travel and testifying, unless otherwise directed by the Court.

CONDUCT OF COUNSEL: No counsel shall communicate with the forensic evaluator for reasons other than those that pertain to administration and evaluation progress or completion. If any attorney wishes to submit papers to the forensic evaluator, a list and a copy of all items submitted must be sent to all other counsel.

SO ORDERED THIS THE 29th DAY OF THE MONTH SEPTEMBER, THE YEAR 2016.

Dated: September 29, 2016 ENTER:
City: New Rochelle
State: New York

/s/
HON. Gail B. Rice
Acting Judge of the Family Court