UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---X
JACOB TEITELBAUM, individually and as father to CHILD A and CHILD B,

Plaintiff,

-against-

JUDA KATZ; CHAYA KATZ; JOEL TENNENBAUM, BLUMA TENNENBAUM; DAVID RUBENSTEIN; KIRYAS JOEL COMM AMBULANCE CRP; DISTRICT FAMILY COURT OF ORANGE COUNTY 9TH JUDICIAL DISTRICT; HON. ANDREW P. BIVONA; ATTY. MARIA PETRIZIO; CHILDREN'S RIGHTS SOCIETY OF ORANGE COUNTY; ATTY. KIM PAVLOVIC; ATTY JOHN FRANCIS X. BURKE; CHILD PROTECTIVE SERVICES OF ORANGE COUNTY; DEPARTMENT OF SOCIAL SERVICES OF ORANGE COUNTY; CHRISTINE BRUNET; ATTY. STEPHANIE BAZILEOR, JOHN DOES 1 THROUGH 95, JANE DOES 1 THROUGH 20,

12 CV 02858 (VB)

Defendants.
---X

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS ON BEHALF OF DEFENDANTS' CHILDREN'S RIGHTS SOCIETY OF ORANGE COUNTY AND ATTY KIM PAVLOVIC

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PRELIMINARY STATEMENT

Defendants, Children's Rights Society, Inc.[1] (hereinafter referred to as "Children's Rights Society") and Kim Pavlovic (hereinafter referred to collectively as "Defendants") respectfully submit this Memorandum of Law in support of their motion to dismiss the plaintiff's *pro se* Amended Complaint pursuant to Fed. R. Civ. P. 12(b) (1) and (6) on the grounds that 1) the Court lacks subject matter jurisdiction under *Rooker-Feldman* over plaintiff's First and Second causes of action to the extent they seek relief from the Family Court proceedings and judgment; 2) defendants are entitled to quasi-judicial immunity; 3) defendant Pavlovic is not a state actor for purpose of liability under §1983; 4) there is no vicarious liability under §1983; 5) plaintiff fails to state a claim of conspiracy under §1983 or §1985; 6) plaintiff fails to state a claim for negligent infliction of emotional distress, together with such other and further relief as to this Court seems just and proper.

STATEMENT OF FACTS[2]

Plaintiff, Jacob Teitelbaum,[3] is a resident of an Hasidic, ultra-Orthodox community located in the Village of Kiryas Joel, Town of Monroe, County of Orange, State of New York [AC ¶¶ 1, 4].[4] Plaintiff brings this action on behalf of himself and his two minor children, Child "A" and Child "B" [AC. ¶¶ 4, 9].

A. Neglect Proceedings

On April 27, 2010, Child "A" ingested an unidentified amount of children's Tylenol and the child was taken to the hospital [AC at pgs 8-9]. Plaintiff's wife was taken to Presbyterian

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[1] Plaintiff has identified the Children's Rights Society, Inc., as "Children's Rights Society of Orange County."
[2] The facts as set forth are taken from plaintiff's *pro se* Amended Complaint and attachments and are presumed to be true only for purposes of this motion to dismiss.
[3] At the conference held before this Court on July 2, 2012, Benjamin Friedman, who appeared with plaintiff, indicated that he assisted plaintiff with the preparation of the Complaint and Amended Complaint.
[4] Unless otherwise indicated page and/or paragraph references proceeded by "AC" are to plaintiff's *pro se* Amended Complaint.

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hospital [AC at pg 9]. The children were removed from plaintiff and his wife's custody by Child Protective Services [AC at pg 9]. Orange County Department of Social Services (hereinafter referred to as "DSS") commenced a neglect proceeding against plaintiff and his wife [AC at pg 9]. The neglect proceeding resulted in an adjournment in contemplation of dismissal as to plaintiff's wife, and a finding of neglect as against plaintiff [AC at pg 10]. The children were returned to plaintiff and his wife on or about September 7, 2010 [AC pg 10].

On or about September 16, 2010, child "B" ingested an unidentified amount of plaintiff's psychotropic medication and was hospitalized [AC at pg 11]. The children were again removed from plaintiff and his wife's custody by DSS and a violation petition was filed against plaintiff and his wife [AC at pg 11].

In January 2011, the Orange County Family Court dismissed the neglect petition as against plaintiff's wife [AC at pg 11]. However, Family Court made a finding of neglect as against Plaintiff [AC at pg 11]. Family Court ordered supervised visitation [AC at Ex. "A"].

In December 2011 and January 2012, plaintiff petitioned Family Court to have defendant Burke relieved as counsel [AC at 24]. Family Court denied the application [AC at pg 24].

In January 2012, petitioner filed a motion with Family Court seeking a determination that the involvement of Child Protective Services and the Department of Social Services was politically motivated [AC at 18, 22-23]. In February 2012, Family Court denied plaintiff's motion as frivolous [AC at 22-23].

On January 25, 2012, DSS filed a petition to terminate the parental rights of plaintiff and his wife [AC at 25]. The Court ordered that plaintiff and his wife participate in psychiatric evaluations [AC at 25]. Based upon the report of the psychiatric evaluation, DSS withdrew the

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termination petition. However, the children remain in the custody of the DSS and have been placed in foster care with defendants Joel and Bluma Tennenbaum [AC at 26].

B. Plaintiff's Claims

Plaintiff commenced this action by filing a *pro se* complaint on April 11, 2012. Subsequently, plaintiff filed a pro se Amended Complaint on June 20, 2012. Plaintiff pleaded four separate causes of action alleging claims under 42 U.S.C. § 1983 and § 1985, as well as asserting state law claims for intentional infliction of emotional distress and negligent infliction of emotional distress.

Kim Pavlovic is an attorney with the Children's Rights Society, Inc. [AC at ¶ 17]. Pavlovic was the children's court-appointed law guardian [AC at ¶ 17]. As against Pavlovic, plaintiff alleges that she:

1. proposed in Court on or about January 9, 2012, that the children be returned to plaintiff's wife on the condition that plaintiff would be evicted from the come; and

2. stated that the major issue that would prevent the return of the children was the plaintiff and that the plaintiff's wife had been complying all along; and that only by evicting the plaintiff could the situation be helped [AC ¶¶ 144, 145].

Plaintiff does not assert any allegations as against the Children's Rights Society, other than to identify it as a defendant and employer of Kim Pavlovic [AC ¶ 17].

Plaintiff's first and second causes of action are brought pursuant to 42 U.S.C. §1983 and § 1985, respectively. Plaintiff alleges that the several defendants, acting individually and in concert, violated his constitutional rights. Specifically, plaintiff claims that the several defendants 1) facilitated and confined the plaintiff to Bellevue Hospital Center; 2) deprived plaintiff of custody and reasonable and unfettered access to his children; and 3) deprived plaintiff

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of his constitutional rights for "reasons that are based on the tenants of the religious community prevalent in the area and contrary to the interests of plaintiff" [AC at pg 29-30].

Plaintiff's third cause of action asserts a claim for negligent infliction of emotional distress. Plaintiff claims that the several defendants, individually or in cooperation with one another, negligently inflicted emotional distress on the plaintiff 1) to further the ends of certain of the defendants to remove the children from plaintiff's custody and care; 2) to force a separation and potential divorce by offering to reunite plaintiff's wife with the children in exchange for separating from and divorcing plaintiff; 3) and that plaintiff continues to be separated from his family because of defendant's negligent actions [AC at pgs 30-31].

Plaintiff's fourth cause of action[5] assets a claim for intentional infliction of emotional distress as against defendants Juda Katz, Chaya Katz, Yoel Tennenbaum and Bluma Tennanbaum. Plaintiff alleges that they "conspired with one another to facilitate their own goals to separate the Plaintiff and his wife and children and in doing so Intentionally Inflicted Emotional Distress on the person of the Plaintiff." Plaintiff claims that defendants Katz and Tennenbaum 1) took custody of plaintiff's children, 2) caused his children to call other individuals mommy and daddy; 3) sought to divide plaintiff and his wife and counseling plaintiff's wife to divorce him by using the children as an incentive to do so; 4) caused false and misleading information to be disseminated in plaintiff's Hasidic community, attempting to dishonor and shame plaintiff; and have acted to permanently deprive plaintiff of access to his children [AC at pg 31-32].

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[5] Plaintiff does not assert his fourth cause of action against defendants Children's Rights Society and Kim Pavlovic. Thus, it will not be addressed in defendants' argument.

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ARGUMENT

POINT I

LEGAL STANDARD FOR MOTION TO DISMISS

"A motion to dismiss may be granted only when it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief" (Warren v Goord, 476 F.Supp.2d 407, 409 [S.D.N.Y. 2007] [internal quotations and citations omitted]). "A Fed. R. Civ. P. 12(b)(6) motion to dismiss hinges on a claim's legal sufficiency. In considering the motion, the court must examine the factual allegations of the complaint, including exhibits to the complaint and documents or statements incorporated in it by reference (Romer v Morgenthau, 119 F.Supp.2d 346, 352 [S.D.N.Y. 2000] [internal citation omitted]). "In deciding a motion to dismiss, the Court accepts the factual allegations in a complaint as true and draws all reasonable inferences in the plaintiff's favor. However, allegations that are no more than legal conclusions are not entitled to the assumption of truth" (Woodward v Office of District Attorney, 689 F.Supp.2d 655, 658 [S.D.N.Y. 2010]).

Based on the arguments set forth below, it is respectfully submitted that plaintiff's amended complaint, should be dismissed as against the Children's Rights Society and Kim Pavlovic.

POINT II

THE COURT LACKS SUBJECT MATTER JURISDICTION OVER PLAINTIFF'S §1983 AND §1985 CLAIMS UNDER THE ROOKER-FELDMAN DOCTRINE

"The *Rooker-Feldman* doctrine bars challenges in federal court to the substance of state-court decisions which are more properly raised on appeal, even where such challenges appear to raise questions of federal law on their face" (Allen v Mattingly, No. 10-CV-0667, 2011 WL

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1261103, at *8 [E.D.N.Y. March 29, 2011], aff'd 2012 WL 2345404 [2d Cir. June 21, 2012]).

There are four "requirements" for application of Rooker-Feldman:

> First, the federal-court plaintiff must have lost in state court. Second, the plaintiff must 'complain[] of injuries caused by [a] state-court judgment [.]" Third, the plaintiff must 'invite district court review and rejection of [that] judgment[]. Fourth, the state-court judgment must have been 'rendered before the district court proceedings commenced'. (Hoblock v Albany County Bd. of Elections, 422 F.3d 77, 85 [2d Cir. 2005] [alterations in original], citing Exxon Mobil Corp. v Saudi Basic Industries Corp., 544 U.S. 280 [2005]).

Here, all four factors for application of the *Rooker-Feldman* doctrine are satisfied with respect to plaintiff's claims relating to the custody of his children: (1) plaintiff lost custody of his children in state court pursuant to an order of disposition of the Orange County Family Court (NY Family Court Act § 1112[a] [allowing an appeal as of right from any order of disposition]; Matter of Yamoussa M., 220 A.D.2d 138, 142 [1st Dept 1996] ["An order of disposition is synonymous with a final order or judgment"][internal quotation and citation omitted]); (2) plaintiff claims of an injury caused by the Family Courts orders, i.e., his "alleged injuries from the removal of [his] child[ren] did not exist 'prior in time to the [Family Court] proceedings;' rather, they were 'caused by' the Family Court's order[s]" (Green v Mattingly, 585 F.3d 97, 102 [2d Cir. 2009]); (3) plaintiff's claims invite this Court to review and reject the Orange County Family Court's determinations to remove plaintiff's children from his custody and to place them in the custody of the Department of Social Services, which have not otherwise been vacated, i.e., his children have not been returned to his custody, and (4) the Orange County Family Court's determinations to remove plaintiff's children from his custody and place them in foster care were rendered prior to the commencement of this action (see Phifer v City of New York, 289 F.3d 49, 57 [2d Cir. 2002] [holding that the plaintiff's claims seeking an order directing ACS to return

plaintiff's child to her custody were barred by the *Rooker-Feldman* doctrine]; Allen v Mattingly, 2011 WL 1261103, at *8 [holding that there was no jurisdiction under *Rooker-Feldman* where plaintiff's "claims invited this Court to review and reject the state Family Court's determinations to remove her son from her custody and to place him in the custody of a foster care agency, which have not otherwise been vacated, i.e., her son has not been returned to her custody"]; Puletti v Patel, No. 05-CV-2293, 2006 WL 2010809, at *5 [E.D.N.Y. July 14, 2006] [finding that *Rooker-Feldman* deprived the court of subject matter jurisdiction over the complaint where the "plaintiff request[ed] that th[e] Court restore his lost Thursday night visitations because he [wa]s unsatisfied with the outcome of the custody proceeding that left Plaintiff with 'four nights out of every ten' with his son"]; Johnson v Queens Admin. For Children's Services, No. 02-CV-4497, 2006 WL 229905, at *3, n. 2 [E.D.N.Y. Jan. 31, 2006] aff'd 197 Fed. Appx. 33 [2d Cir. Sept. 6, 2006] cert. denied 549 U.S. 1284 [2007] [finding that pursuant to the *Rooker-Feldman* doctrine, the Court lacked subject matter jurisdiction to address issues dealing with child custody, neglect and visitation]). Based on the foregoing, this Court lacks subject matter jurisdiction over those portions of plaintiff's first and second causes of action which seek redress from the Orange County Family Court's orders removing plaintiff's children from his custody, and as such they should be dismissed.

POINT III

PLAINTIFF'S CLAIMS SHOULD BE DISMISSED BECAUSE DEFENDANTS CHILDREN'S RIGHTS SOCIETY AND PAVLOVIC ARE ENTITLED TO QUASI-JUDICIAL IMMUNITY

"New York case-law holds that guardians appointed by the court to assist with matters of child custody are entitled to quasi-judicial immunity" (Lewittes v Lobis, No. 04-CV-0155, 2004 WL 1854082, *11 [S.D.N.Y. Aug. 10, 2004], aff'd 164 Fed Appx 97 [2d Cir. 2006], cert. denied

127 S.Ct. 110 [2006], citing Bluntt v O'Connor, 291 AD2d 106 [4th Dept 2002], appeal denied 98 NY2d 605 [2002] [holding that guardian ad litem was protected by quasi-judicial immunity and noting that "most courts that have considered suits by disgruntled parents against attorneys appointed by courts to protect children in custody disputes have granted, on public policy grounds, absolute quasi-judicial immunity to the attorneys for actions taken within the scope of their appointments"] and Bradt IV v White, 190 Misc.2d 526 [Sup. Ct. Green Co., 2002] [holding that a guardian for a child in a custody proceeding "has quasi-judicial immunity from civil liability for conduct directly relating to the performance of the law guardian's duty to further the best interests of the children"]).

The Second Circuit and the Southern District have applied the common law quasi-judicial immunity to preclude liability of law guardians in litigation actions arising out of family court proceedings (see Yapi v Kondratyeva, 340 Fed. Appx 683 [2d Cir. 2009] [summary order, unpublished opinion] [holding that "law guardian and her director were entitled to quasi-judicial immunity"]; Zahl v Kosovsky, No. 08-CV-8308, 2011 WL 779784, at *10 [S.D.N.Y. Mar. 3, 2011], aff'd 2012 WL 1004278 [2d Cir. Mar. 27, 2012] [holding that "regardless of 'whether [defendant acted] as a 'law guardian' or guardian ad litem," [defendant] is similarly entitled to absolute quasi-judicial immunity"]; Wilson v Wilson-Polson, No. 09-CV-9810, 2010 WL 3733935, at * 7 [S.D.N.Y. 2010], aff'd 446 Fed.Appx 330 [2d Cir. 2011] [holding that defendant "may not be sued for her actions in her capacity as guardian ad litem because it is well-established that guardians ad litem and 'law guardians' are protected by quasi-judicial immunity"]; Lewittes v Lobis, , 2004 WL 1854082, *11 ["The Court agrees with the New York cases and holds that a law guardian or guardian ad litem appointed by the court in a matrimonial action is entitled to quasi-judicial immunity"]; see also Allen v Mattingly, 2011 WL 1261103, at

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*16 [holding that law guardians were "entitled to absolute quasi-judicial immunity for actions taken within the scope of their appointment as law guardian for plaintiff's children"]; McKnight v Middleton, 699 F.Supp.2d 507, 528 [E.D.N.Y. 2010], aff'd 434 Fed.Appx 32 [2d Cir. 2011] [holding that quasi-judicial immunity protected the defendant law guardians and the Children's Law Center who employed, oversaw and approved of all the acts of the law guardians from liability]).

Based upon the well-established case-law in the State of New York, defendant Pavlovic and the Children's Rights Society, who employed, oversaw and approved of Pavlovic's acts as court-appointed law guardian to plaintiff's children, are entitled to absolute quasi-judicial immunity regardless of whether plaintiff's claims are based on federal or state law, or whether founded on theories of conspiracy or negligent infliction of emotional distress.[6] Therefore, plaintiff's Amended Complaint should be dismissed in its entirety as against the Children's Rights Society and Pavlovic.

[6] The protections of quasi-judicial immunity protects Defendants Children's Rights Society and Pavlovic from liability under both 42 U.S.C. § 1983 and § 1985 (c.f. Estate of Rosenbaum v City of New York, 975 F.Supp. 206, 214, n. 11 [E.D.N.Y. 1997] [applying qualified immunity analysis to plaintiff's 42 U.S.C. §§ 1983, 1985 and 1986 claims], citing Brown v City of Oneonta, 106 F.3d 1125, 1130 [2d Cir. 1997][holding that qualified immunity also exists to protect state officers alleged to have violated §1985], as well as under plaintiff's state law claim for negligent infliction of emotional distress (c.f. Moye v City of New York, 11-CV-360, 2012 WL 2569085, *10 [S.D.N.Y. July 3, 2012] ["The Court conclude[d] that [assistant district attorney] has absolute immunity for all of [plaintiff's] claims, whether based on federal or state law, and whether founded on theories of malicious prosecution, abuse of process, denial of a fair trial, fabricated evidence, conspiracy, or intentional or negligent infliction of emotional distress]).

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POINT IV

PLAINTIFF'S FIRST CAUSE OF ACTION UNDER 42 U.S.C. § 1983 SHOULD BE DISMISSED

A. Defendant Pavlovic, law guardian to Child "A" and "B" is not a state actor for purposes of 42 U.S.C. §1983

"In order to state a claim under 42 U.S.C. § 1983, [a] plaintiff[] must allege conduct under color of state law that deprives [him or her] of rights secured by the Constitution or laws of the United States." (Di Costanzo v Kenriksen, 1995 WL 447766, at *2 [S.D.N.Y. July 28, 1995]). The United States District Courts of the State of New York have "clearly and consistently held that court-appointed attorneys do not act under color of state law by virtue of their appointment" (Fisk v Letterman, 401 F.Supp.2d 362, 378 [S.D.N.Y. 2005]).

> Neither the fact that [] law guardians [are] appointed by a New York State court nor the fact that they [are] paid by state funds is sufficient to render these individuals state actors. Moreover, the independent judgment that these individuals [are] bound to exercise on behalf of their clients further negates a finding that they act[] under color of state law (Storck v Suffolk County Dept. of Social Servs., 62 F.Supp.2d 927, 941-942 [E.D.N.Y. 1999]).

(see Di Costanzo v Kenriksen, 1995 WL 447766, at *3 ["Although a law guardian is appointed by the state, once he is appointed, he must exercise independent, professional judgment on behalf of his client, and is therefore not acting under color of state law for purposes of Section 1983"]; Levine v County of Westchester, 828 F.Supp. 238, 244 [S.D.N.Y. 1993], abrogated in part on other grounds by Carnojo v Bell, 592 F.3d 121 [2d Cir. 2010] [holding that law guardian is not a state actor under §1983]; see also Allen v Mattingly, 2011 WL 1261103, at 14 ["Law guardians appointed by the Court [] are not state actors for purposes of Section 1983"]; Arena v Department of Social Servs., 216 F.Supp.2d 146, 155 [E.D.N.Y. 2002][holding that law guardian is not a state actor]; Neustein v Orbach, 732 F.Supp. 333, 345-346 [E.D.N.Y. 1990]

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[Legal Aid Society attorneys do not represent their clients under color of state law]; Parent v State of New York, 786 F.Supp2d at 538 [finding that law guardian was not a state actor for purposes of § 1983]; Bulris v Kudrle, No. 1:10-CV-922, 2010 WL 8386813 at *2 [N.D.N.Y.Aug. 26, 2010] ["The law is clear, however, that although a law guardian is appointed by the state, once he or she is appointed, he or she must exercise independent professional judgment on behalf of the client and is, therefore, ***not*** acting under color of state law for purposes of section 1983 liability"] [emphasis in original]).

Here, plaintiff has plead two (2) allegations against Pavlovic; specifically, that 1) she proposed in Court that the children be returned to Plaintiff's wife on the condition that plaintiff would be evicted from the home; and 2) she stated that the major issue that would prevent the return of the children was the Plaintiff and that the Plaintiff's wife had been complying all along and that only by evicting the Plaintiff could the situation be helped [AC at ¶¶144-145]. The conduct alleged in the complaint is attributable to Pavlovic's function as a representative of the children in the neglect proceedings [AC ¶¶144-145]. Therefore, based upon the well-established case law in the State of New York, Pavlovic is not a state actor for purposes of 42 U.S.C. § 1983 and, as such, plaintiff's Amended Complaint should be dismissed.

B. Plaintiff has failed to alleged a § 1983 conspiracy

"[U]nless a court-appointed attorney conspires with a state official to violate the plaintiff's constitutional rights, that attorney cannot be liable under Section 1983" (Fisk v Letterman, 401 F.Supp.2d at 378; see also Allen v Mattingly, 2011 WL 1261103, at *15). "To succeed on a Section 1983 conspiracy claim, a complaint 'must allege (1) an agreement between a state actor and a private actor; (2) to act in convert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages'" (Parent v State of New York, 786

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F.Supp.2d 516, 539 [N.D.N.Y. 2011], quoting Ciambriello v County of Nassau, 292 F.3d 307, 324-325 [2d Cir. 2002]).

> "A plaintiff is not required to list the place and date of defendants meeting and the summary of their conversations when he pleads conspiracy, but the pleadings must present facts tending to show agreement and convert action. Without a meeting of the minds, the independent acts of two or more wrongdoers do not amount to a conspiracy" (Fisk v Letterman, 401 F.Supp.2d at 376]).

"Conclusory allegations that a private person acted in concert with a state actor are insufficient to maintain a conspiracy claim under § 1983" (Parent v State of New York, 786 F.Supp.2d at 539).

Here, plaintiff has failed to allege any factual allegations to support a conspiracy between Defendant Pavlovic, the Children's Rights Society and any of the other named defendants. Plaintiff merely alleges in conclusory fashion that the named defendants acted "in cooperation with one another [to] deprive the Plaintiff of his Constitutional Rights pursuant to 42 USC §1983 by and through the 14th Amendment to the United State[s] Constitution" [AC at 219]. Plaintiff's conclusory allegation is insufficient to maintain a conspiracy claim under §1983 and, therefore, the claim should be dismissed (see Brown v Legal Aid Society, 367 Fed.Appx. 215, 216 [2d Cir. 2010]; Respass v New York City Police Dept., 852 F.Supp. 173, 178-179 [E.D.N.Y. 1994]).

C. There is no vicarious liability under §1983

"[P]rivate employers are not vicariously liable under § 1983 for the constitutional torts of their employees under a theory of *respondeat superior*" (Brown v City of New York, 09-CV-6834, 2010 WL 3565171, at * 5 [S.D.N.Y. Mar 2, 2010]). "However, a private corporation could be held liable under Section 1983 for its own unconstitutional policies" (Fisk v Letterman, 401 F.Supp.2d at 375). "Therefore, a plaintiff seeking to survive a motion to dismiss must allege that 'action pursuant to official policy of some nature caused a constitutional tort'" (Brown v City of New York, 2010 WL 3565171, at * 5, quoting Fisk v Letterman, 401 F.Supp.2d at 375).

Here, plaintiff has not alleged that the Children's Rights Society has a policy of violating the rights of individuals. In fact, the only allegations as against the Children's Rights Society is to name it as a defendant and as the employer of defendant Kim Pavlovic [AC at 17]. Therefore, plaintiff's first cause of action under 42 U.S.C. §1983 as against the Children's Right Society should be dismissed (see Matthews v Malkus, 377 F.Supp.2d 350, 360 [S.D.N.Y. 2005]; Brown v City of New York, 2010 WL 3565171, at * 5; Fisk v Letterman, 401 F.Supp.2d at 375]).

POINT V

PLAINTIFF'S SECOND CAUSE OF ACTION UNDER 42 U.S.C. § 1985 SHOULD BE DISMISSED BECAUSE PLAINTIFF HAS FAILED TO PLEAD THE ELEMENTS OF CONSPIRACY

"In order to state a claim under Section 1985(3), a plaintiff must allege that (1) he was a member of a protected class, (2) that the defendants conspired to deprive him of his constitutional rights, (3) that the defendants acted with class-based, invidiously discriminatory animus, and (4) that he suffered damages as a result of the defendants' actions" (Di Costanzo v Henriksen, 1995 WL 447766, at *3).

As set forth above, plaintiff has failed to allege a conspiracy, and as such, plaintiff's second cause of action should be dismissed (see id.).

POINT VI

PLAINTIFF'S THIRD CAUSE OF ACTION FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM

Plaintiff's third cause of action sounds in negligent infliction of emotional distress [AC at pg 30]. "A cause of action for negligent infliction of emotional distress must be premised upon the breach of a duty owed to plaintiff which either unreasonably endangers the plaintiff's

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physical safety or cause the plaintiff to fear for his or her own safety" (Matthews v Malkus, 377 F.Supp.2d at 361).

> This tort has been recognized in New York only where the plaintiff can establish one of the following: she suffered some physical trauma or she was caused to fear for her physical safety; she was within the so-called 'zone of danger' when an immediate family member was killed or injured; she was wrongly notified of the death of a near relative; or the mortal remains of a deceased family member were improperly handled" (Nevin v Citibank, N.A., 107 F.Supp.2d 333, 346 [S.D.N.Y. 2000] [internal citation omitted]).

"Thus, the parameters of this tort are extremely narrow" (id.).

> Furthermore, just as in a cause of action for intentional infliction of emotional distress, negligent infliction of emotional distress must be support by allegations of conduct by the defendants 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.' Such extreme and outrageous conduct must be clearly alleged in order for the complaint to survive a motion to dismiss (Matthews v Malkus, 377 F.Supp.2d at 361, quoting Murphy v American Home Prods. Corp., 58 NY2d 293, 303 [1983]).

Here, plaintiff has not alleged any duty that the Children's Rights Society or Pavlovic owed him. Moreover, plaintiff does not allege that he suffered any physical injury by the Children's Rights Society or Pavlovic, or by any other defendant in this matter. Furthermore, no reasonable trier of fact could conclude that the Children's Rights Society or Pavlovic did anything that unreasonably endangered plaintiff's physical safety. The other parameters of this tort are not applicable. Furthermore, plaintiff has failed to allege any outrageous or extreme conduct on the part of the Children's Right Society or Pavlovic. To the contrary, the allegations suggest that defendant Pavlovic acted pursuant to her duties and obligations as the children's law guardian as is professionally and ethically required of her. Lastly, as discussed supra, plaintiff has only conclusorily alleged a conspiracy among the many defendants without any factual

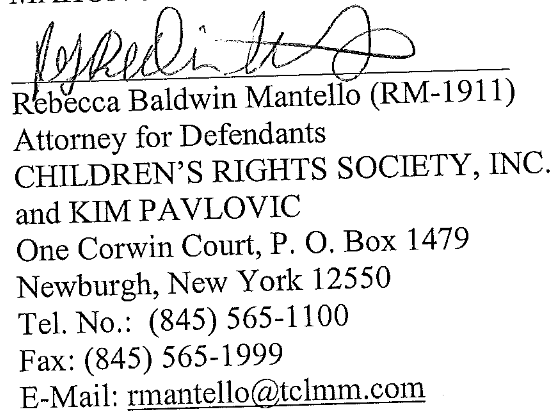
allegations to support that claim. Based on the foregoing, it is respectfully submitted that plaintiff has failed to allege a claim for negligent infliction of emotional distress and, therefore, the cause of action should be dismissed.

CONCLUSION

Based on the foregoing arguments, it is respectfully submitted that plaintiff's Amended Complaint should be dismissed in its entirety as against the Children's Rights Society and Kim Pavlovic.

Dated: Newburgh, New York
July 19, 2012

Respectfully submitted,



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