**IN THE UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

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| **JOHN LIPTOK,** | : | **CIV NO. 3:21-CV-2141** |
| | : | |
| **Plaintiff,** | : | **(Judge Wilson)** |
| | : | |
| **v.** | : | **(Magistrate Judge Carlson)** |
| | : | |
| **FACEBOOK, et al.,** | : | |
| | : | |
| **Defendants.** | : | |

## REPORT AND RECOMMENDATION

### I. Factual Background

John Liptok is undeniably an angry man, a regrettable personal quality which interferes with his ability to conduct litigation in a cogent, coherent fashion. We have, in the past, urged Liptok to temper his rage with reason, explaining to him that his "persistent petulance . . . calls to mind the wisdom of the American humorist Will Rogers, who once said: 'People who fly into a rage always make a bad landing.'" Liptok v. Bank of Am., No. 3:15-CV-156, 2016 WL 6818362, at *1 (M.D. Pa. Oct. 20, 2016), report and recommendation adopted, No. 3:15CV156, 2016 WL 6780757 (M.D. Pa. Nov. 16, 2016), aff'd, 773 F. App'x 97 (3d Cir. 2019). We have further urged Liptok to consider the fact that his:

> [L]argely inarticulate anger has frustrated every effort to fairly address his underlying concerns. This unthinking anger has also seemingly

> rendered Liptok both blind and deaf. Thus, Liptok seems blind to the consequences which must inevitably flow from a wholesale refusal to follow the court's instructions, and has consistently been deaf to the entreaties of the court that he follow the rules when prosecuting the case which he elected to file in federal court.

Id. Moreover, we have not been alone in observing that Liptok's unthinking anger stymies all efforts to address his concerns in a rational fashion. As the Pennsylvania Superior Court noted in 2015, when it dismissed a *pro se* criminal appeal by Liptok from a state summary offense conviction, oftentimes Liptok's filings are "incomprehensible and lack[ ] pertinent analysis." Com. v. Liptok, No. 176 MDA 2014, 2015 WL 6179515, at *1 (Pa. Super. Ct. Feb. 23, 2015).

Further, oftentimes, Mr. Liptok would engage in verbally abusive exchanges with others, misconduct that caused us to "warn[] Liptok on numerous occasions that 'the routine use of personal invective, acerbic asides, caustic commentaries, disgruntled digressions, and ad hominem observations' will not be permitted by the court and will result in pleadings being stricken by the court." Liptok, 2016 WL 6818362, at *2.

We are reminded of the challenges which John Liptok presents as a *pro se* litigant as we turn to the consideration of this, one of his latest filings. This *pro se, in forma pauperis* lawsuit comes before us for a legally mandated screening review of the plaintiff's complaint. (Doc. 1). Mr. Liptok's latest four-page complaint names

Facebook and Mark Zuckerberg as defendants. While the complaint is written in a stream of consciousness style that demands a great deal from the reader, the gist of Liptok's complaint seems to be that he has been placed in "virtual prison" by Facebook, i.e., he had his Facebook access restricted after some of his communications were deemed to be abusive, offensive, and violative of Facebook policies. Liptok appears to take particular umbrage at this action by Facebook because he alleges that he received 2,000,000 votes for President of the United States in 2020, and he contends that Facebook improperly puts him "in PRISON every time I say ANYTHING POLITICAL." (Id. at 3). On the basis of these averments, Liptok seeks $10,000,000 in damages and a criminal prosecution of Facebook and Zuckerberg. (Id. at 4).

Along with his complaint Liptok has filed a motion for leave to proceed *in forma pauperis*. (Doc. 2). We will direct that the lodged complaint be filed on the docket for screening purposes and will conditionally GRANT the plaintiff's motion for leave to proceed *in forma pauperis.* However, for the reasons set forth below, it is recommended that the complaint be dismissed.

## II. Discussion

### A. Screening of *Pro Se* Complaints–Standard of Review

This Court has an ongoing statutory obligation to conduct a preliminary review of *pro se* complaints brought by plaintiffs given leave to proceed *in forma pauperis*. See 28 U.S.C. § 1915(e)(2)(B)(ii). Specifically, we are obliged to review the complaint to determine whether any claims are frivolous, malicious, or fail to state a claim upon which relief may be granted. This statutory text mirrors the language of Rule 12(b)(6) of the Federal Rules of Civil Procedure, which provides that a complaint should be dismissed for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).

With respect to this benchmark standard for legal sufficiency of a complaint, the United States Court of Appeals for the Third Circuit has aptly noted the evolving standards governing pleading practice in federal court, stating that:

> Standards of pleading have been in the forefront of jurisprudence in recent years. Beginning with the Supreme Court's opinion in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) continuing with our opinion in Phillips [v. County of Allegheny, 515 F.3d 224, 230 (3d Cir. 2008)] and culminating recently with the Supreme Court's decision in Ashcroft v. Iqbal 556 U.S. 662, 129 S. Ct. 1937 (2009) pleading standards have seemingly shifted from simple notice pleading to a more heightened form of pleading, requiring a plaintiff to plead more than the possibility of relief to survive a motion to dismiss.

Fowler v. UPMC Shadyside, 578 F.3d 203, 209-10 (3d Cir. 2009).

In considering whether a complaint fails to state a claim upon which relief may be granted, the court must accept as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom are to be construed in the light most favorable to the plaintiff. Jordan v. Fox Rothschild, O'Brien & Frankel, Inc., 20 F.3d 1250, 1261 (3d Cir. 1994). However, a court "need not credit a complaint's bald assertions or legal conclusions when deciding a motion to dismiss." Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997). Additionally, a court need not "assume that a . . . plaintiff can prove facts that the . . . plaintiff has not alleged." Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters, 459 U.S. 519, 526 (1983). As the Supreme Court held in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), in order to state a valid cause of action, a plaintiff must provide some factual grounds for relief which "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of actions will not do." Id. at 555. "Factual allegations must be enough to raise a right to relief above the speculative level." Id.

In keeping with the principles of Twombly, the Supreme Court has underscored that a trial court must assess whether a complaint states facts upon which relief can be granted when ruling on a motion to dismiss. In Ashcroft v. Iqbal, 556 U.S. 662 (2009), the Supreme Court held that, when considering a motion to

dismiss, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. at 678. Rather, in conducting a review of the adequacy of complaint, the Supreme Court has advised trial courts that they must:

> [B]egin by identifying pleadings that because they are no more than conclusions are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Id. at 679.

Thus, following Twombly and Iqbal a well-pleaded complaint must contain more than mere legal labels and conclusions. Rather, a complaint must recite factual allegations sufficient to raise the plaintiff's claimed right to relief beyond the level of mere speculation. As the Third Circuit has stated:

> [A]fter Iqbal, when presented with a motion to dismiss for failure to state a claim, district courts should conduct a two-part analysis. First, the factual and legal elements of a claim should be separated. The District Court must accept all of the complaint's well-pleaded facts as true but may disregard any legal conclusions. Second, a District Court must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a "plausible claim for relief." In other words, a complaint must do more than allege the plaintiff's entitlement to relief. A complaint has to "show" such an entitlement with its facts.

Fowler, 578 F.3d at 210-11.

Two years after Fowler, the Third Circuit further observed:

> The Supreme Court in Twombly set forth the "plausibility" standard for overcoming a motion to dismiss and refined this approach in Iqbal. The plausibility standard requires the complaint to allege "enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570, 127 S. Ct. 1955. A complaint satisfies the plausibility standard when the factual pleadings "allow[ ] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 129 S. Ct. at 1949 (citing Twombly, 550 U.S. at 556, 127 S. Ct. 1955). This standard requires showing "more than a sheer possibility that a defendant has acted unlawfully." Id. A complaint which pleads facts "merely consistent with" a defendant's liability, [ ] "stops short of the line between possibility and plausibility of 'entitlement of relief.'"

Burtch v. Milberg Factors, Inc., 662 F.3d 212, 220-21 (3d Cir. 2011).

In practice, consideration of the legal sufficiency of a complaint entails a three-step analysis:

> First, the court must "tak[e] note of the elements a plaintiff must plead to state a claim." Iqbal, 129 S. Ct. at 1947. Second, the court should identify allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth." Id. at 1950. Finally, "where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief." Id.

Santiago v. Warminster Twp., 629 F.3d 121, 130 (3d Cir. 2010).

In addition to these pleading rules, a civil complaint must comply with the requirements of Rule 8(a) of the Federal Rule of Civil Procedure, which defines what a complaint should say and provides that:

> (a) A pleading that states a claim for relief must contain (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

Fed. R. Civ. P. 8.

Thus, a well-pleaded complaint must contain more than mere legal labels and conclusions. Rather, a *pro se* plaintiff's complaint must recite factual allegations that are sufficient to raise the plaintiff's claimed right to relief beyond the level of mere speculation, set forth in a "short and plain" statement of a cause of action.

**B. This Complaint Should Be Dismissed under Rule 8.**

At the outset, this complaint violates the strictures of Rule 8 of the Federal Rules of Civil Procedure in that Liptok has failed to state well-pleaded facts in support of these claims. Dismissal of a complaint is appropriate when the complaint plainly fails to comply with Rule 8's basic injunction that, "[a] pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." It is well settled that, "[t]he Federal Rules of Civil Procedure require that a complaint contain 'a short and plain statement of the claim showing that the pleader is entitled to relief,' Fed. R. Civ. P. 8(a)(2), and that each averment be 'concise, and direct,' Fed. R. Civ. P. 8(e)(1)." Scibelli v. Lebanon Cty., 219 F. App'x 221, 222 (3d Cir. 2007). Thus, when a complaint is "illegible or

incomprehensible," id., or when a complaint "is not only of an unwieldy length, but it is also largely unintelligible," Stephanatos v. Cohen, 236 F. App'x 785, 787 (3d Cir. 2007), an order dismissing a complaint under Rule 8 is clearly appropriate. See, e.g., Mincy v. Klem, 303 F. App'x 106 (3d Cir. 2008); Rhett v. N.J. State Super. Ct., 260 F. App'x 513 (3d Cir. 2008); Stephanatos, 236 F. App'x 785; Scibelli, 219 F. App'x 221; Bennett-Nelson v. La. Bd. of Regents, 431 F.3d 448, 450 n.1 (5th Cir. 2005).

Dismissal under Rule 8 is also proper when a complaint "left the defendants having to guess what of the many things discussed constituted [a cause of action]," Binsack v. Lackawanna Cnty. Prison, 438 F. App'x 158 (3d Cir. 2011), or when the complaint is so "rambling and unclear" as to defy response. Tillio v. Spiess, 441 F.App'x 109 (3d Cir. 2011). Similarly, dismissal is appropriate in "'those cases in which the complaint is so confused, ambiguous, vague, or otherwise unintelligible that its true substance, if any, is well disguised.'" Id. at 110 (quoting Simmons v. Abruzzo, 49 F.3d 83, 86 (2d Cir. 1995)); Tillio v. Northland Grp. Inc., 456 F. App'x 78, 79 (3d Cir. 2012). Further, a complaint may be dismissed under Rule 8 when the pleading is simply illegible and cannot be understood. See, e.g., Radin v. Jersey City Med. Ctr., 375 F. App'x 205 (3d Cir. 2010); Moss v. U.S., 329 F. App'x 335 (3d Cir. 2009) (dismissing illegible complaint); Earnest v. Ling, 140 F. App'x 431 (3d Cir.

2005) (dismissing complaint where "complaint fails to clearly identify which parties [the plaintiff] seeks to sue"); Oneal v. U.S. Fed. Prob., CIV.A. 05-5509 (MLC), 2006 WL 758301 (D.N.J. Mar. 22, 2006) (dismissing complaint consisting of approximately 50 pages of mostly-illegible handwriting); Gearhart v. City of Phila. Police, CIV.A.06-0130, 2006 WL 446071 (E.D. Pa. Feb. 21, 2006) (dismissing illegible complaint).[1]

In this case Liptok's complaint violates Rule 8's dictate that a complaint "must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Far from being a plain statement showing how Liptok is entitled to relief from Facebook and Zuckerberg, this filing leaves all of the "defendants having to guess what of the many things discussed constituted [a cause of action]." Binsack, 438 F. App'x 158. Therefore, Rule 8 compels dismissal of the complaint.

Furthermore, Liptok's allegations that he may be entitled to some special status because he is a leading Presidential contender who garnered 2,000,000 votes in the 2020 election implicates additional grounds for dismissal of this lawsuit since it is well-settled that:

[1]In the first instance, Rule 8 dismissals are often entered without prejudice to allowing the litigant the opportunity to amend and cure any defects. See, e.g., Rhett, 260 F. App'x 513; Stephanatos, 236 F. App'x 785; Scibelli, 219 F. App'x 221.

> [A] complaint may be subject to dismissal because it presents a cause of action that "relies on 'fantastic or delusional scenarios.' Neitzke v. Williams, 490 U.S. 319, 328, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989)." DeGrazia v. F.B.I., 316 F. App'x 172, 173 (3d Cir. 2009). Furthermore, we are obliged to "*sua sponte* dismiss a complaint for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) when the allegations within the complaint 'are so attenuated and unsubstantial as to be absolutely devoid of merit, ... wholly insubstantial, ... obviously frivolous, ... plainly unsubstantial, ... or no longer open to discussion.' Hagans v. Lavine, 415 U.S. 528, 536-37, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974)." DeGrazia, 316 F. App'x at 173.

Vance v. McGinley, No. 1:21-CV-892, 2021 WL 2906070, at *4 (M.D. Pa. June 21, 2021), report and recommendation adopted, No. 1:21-CV-892, 2021 WL 2894826 (M.D. Pa. July 9, 2021). To the extent that Liptok believes what he has averred in this regard, he appears that he is relying upon fantastic or delusional scenarios of the type which justify dismissal of his complaint.

### C. Liptok's Claims Fail on Their Merits as Pleaded.

While Liptok's cryptic style of pleading leaves us at sea in ascertaining the true nature of his complaint, very liberally construed it appears that Liptok may be endeavoring to sue Facebook and Zuckerberg under 42 U.S.C. § 1983 for alleged civil rights violations. If this is what Liptok is attempting to do, then this attempt runs afoul of settled legal principles. It is well established that § 1983 does not by its own force, create new and independent legal rights to damages in civil rights actions. Rather, § 1983 simply serves as a vehicle for private parties to bring civil

actions to vindicate violations of separate and pre-existing legal rights otherwise guaranteed under the Constitution and laws of the United States. Albright v. Oliver, 510 U.S. 266, 271 (1994); Graham v. Connor, 490 U.S. 386, 393-94 (1989). Therefore, any analysis of the legal sufficiency of a cause of action under § 1983 must begin with an assessment of the validity of the underlying constitutional and statutory claims advanced by the plaintiff.

In this regard, it is also well settled that:

> Section 1983 provides a remedy for deprivations of federally protected rights caused by persons acting under color of state law. The two essential elements of a § 1983 action are: *(1) whether the conduct complained of was committed by a person acting under color of state law*; and (2) whether this conduct deprived a person of a federally protected right. Parratt v. Taylor, 451 U.S. 527, 535 (1981).

Boykin v. Bloomsburg Univ., 893 F.Supp. 409, 416 (M.D. Pa. 1995), aff'd, 91 F.3d 122 (3d Cir. 1996) (emphasis added). Thus, it is essential to any civil rights claim brought under § 1983 that the plaintiff allege and prove that the defendants were acting under color of law when that defendant allegedly violated the plaintiff's rights. To the extent that a complaint seeks to hold private parties liable for alleged civil rights violations, it fails to state a valid cause of action under 42 U.S.C. § 1983 since the statute typically requires a showing that the defendants are state actors. Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 49-50 (1999).

This limitation on the reach of § 1983 is fatal to any federal civil rights claims Liptok wishes to bring against Facebook, since courts have repeatedly found that, "Facebook cannot be deemed a state actor. For that reason, Facebook has, as a private entity, the right to regulate the content of its platforms as it sees fit." Davison v. Facebook, Inc., 370 F. Supp. 3d 621, 629 (E.D. Va.), aff'd, 774 F. App'x 162 (4th Cir. 2019), cert. denied, 140 S. Ct. 1111, 206 L. Ed. 2d 182 (2020) citing La'Tiejira v. Facebook, Inc., 272 F.Supp.3d 981, 991 (S.D. Tex. 2017) (observing that Facebook has a "First Amendment right to decide what to publish and what not to publish on its platform"). See Freedom Watch, Inc. v. Google, Inc., 368 F. Supp. 3d 30, 40 (D.D.C. 2019), aff'd, 816 F. App'x 497 (D.C. Cir. 2020), cert. denied, 141 S. Ct. 2466, 209 L. Ed. 2d 528 (2021).

Further, when confronted with *pro se* complaints, like the complaint lodged here by Liptok, which allege that Facebook has improperly denied someone access to this social media platform due to alleged Facebook guideline violations, courts have dismissed these claims, noting that Facebook and other internet service providers are entitled to a safe harbor from liability under the Communications Decency Act, which provides that:

> **Civil liability**
>
> No provider or user of an interactive computer service shall be held liable on account of—

> **(A)** any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected

47 U.S.C. § 230 (c)(2). Accordingly, courts that have considered such *pro se* wrongful Facebook termination claims have cited § 230 when dismissing such *pro se* claims on an initial screening analysis. However, these courts have done so without prejudice to the plaintiff attempting to amend the complaint by alleging well-pleaded facts which would take Facebook's conduct beyond the safe harbor prescribed by § 230. See Gomez v. Zuckenburg, No. 520CV633TJMTWD, 2020 WL 7684956, at *3 (N.D.N.Y. July 23, 2020), report and recommendation adopted, No. 520CV633TJMTWD, 2020 WL 7065816 (N.D.N.Y. Dec. 3, 2020).

This is the course we recommend in the instant case. We recommend this course mindful of the fact that in civil rights cases *pro se* plaintiffs often should be afforded an opportunity to amend a complaint before the complaint is dismissed in its entirety, see Fletcher-Hardee Corp. v. Pote Concrete Contractors, 482 F.3d 247, 253 (3d Cir. 2007), unless granting further leave to amend is not necessary in a case such as this where amendment would be futile or result in undue delay. Alston v. Parker, 363 F.3d 229, 235 (3d Cir. 2004). Accordingly, with one exception discussed below, it is recommended that the Court provide the plaintiff with an opportunity to

correct these deficiencies in the *pro se* complaint, by dismissing this deficient complaint without prejudice to one final effort by the plaintiff to comply with the rules governing civil actions in federal court.

We note, however, that one claim that Liptok pursues in this complaint should be dismissed with prejudice. In his *pro se* pleading, Liptok urges the court to institute a criminal prosecution or investigation of Facebook and Zuckerberg on his behalf. This we cannot do. Quite the contrary:

> It is well established that decisions regarding the filing of criminal charges are the prerogative of the executive branch of government, are consigned to the sound discretion of prosecutors, and under the separation of powers doctrine are not subject to judicial fiat. Indeed, it has long been recognized that the exercise of prosecutorial discretion is a matter, "particularly ill-suited to judicial review." Wayte v. United States, 470 U.S. 598, 607, 105 S. Ct. 1524, 84 L.Ed.2d 547 (1985). Recognizing this fact, courts have long held that a civil rights plaintiff may not seek relief in civil litigation in the form of an order directing the criminal prosecution of some third parties, finding that civil plaintiffs lack standing to make such claims and concluding that such relief simply is unavailable in a civil lawsuit.

Smith v. Friel, No. 1:19-CV-943, 2019 WL 3025239, at *4 (M.D. Pa. June 4, 2019), report and recommendation adopted, No. CV 1:19-0943, 2019 WL 3003380 (M.D. Pa. July 10, 2019), appeal dismissed, No. 19-2721, 2019 WL 7630987 (3d Cir. Sept. 18, 2019). Therefore, this aspect of Liptok's complaint should be dismissed with prejudice.

## III. Recommendation

Accordingly, for the foregoing reasons, the plaintiff's motion for leave to proceed *in forma pauperis*, (Doc. 2), is CONDITIONALLY GRANTED but IT IS RECOMMENDED that the plaintiff's complaint be dismissed with prejudice to the extent that it seeks to institute a criminal prosecution and otherwise dismissed without prejudice to the plaintiff filing an amended complaint which complies with federal pleading requirements.

The plaintiff is further placed on notice that pursuant to Local Rule 72.3:

> Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Submitted this 23rd day of December 2021.

*S/Martin C. Carlson*
Martin C. Carlson
United States Magistrate Judge