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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JUDY ANN MIKOVITS Plaintiff, v. ADAM GARCIA, et al., Defendants.	Case No. CV14-08909-SVW(PLA) **MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT** **Hearing Date: November 16, 2015** **Hearing Time: 1:30 p.m.** **Judge: Steven V. Wilson**

COME NOW, Defendants Harvey Whittemore, Annette Whittemore, Michael Hillerby, Carli W. Kinne, Vincent Lombardi, The Whittemore-Peterson Institute ("WPI") and UNEVX, Inc., (hereinafter, "Whittemore Defendants") by and through counsel, Brian Warner Hagen Esq., to hereby Move to Dismiss Plaintiff Judy Ann Mikovits' Second Complaint for failure to state claim on which relief can be granted. This Motion is made pursuant to Fed. R. Civ. P. 12(b)(6) and in part on Fed. R. Civ. P. 12(b)(2).

I. INTRODUCTION

This Motion to Dismiss is made, generally, on five bases: first, that the statute of limitations has long since run with regard to each and every factual allegation underlying the causes of action, save one unrelated allegation regarding a bankruptcy proceeding; second,

the Plaintiff fails to allege a conspiracy sufficient to subject the Whittemore Defendants, none of whom are State actors, to liability under 42 U.S.C. §1983; third, that the Plaintiff pleads her bankruptcy allegation, which purports to pull the remaining, unrelated allegations out of the abyss of the limitations period, without the particularity required of a fraud allegation under Fed. R. Civ. P. 9(B); fourth, that her allegations regarding the bankruptcy allegation defeat the reliance element of the very fraud she alleges, and fifth that this Court has no personal jurisdiction over the Defendants with regard to the bankruptcy allegation.

II. LEGAL STANDARDS

a. DISMISSAL FOR FAILURE TO FILE UNDER THE LIMITATIONS PERIOD

"A statute of limitation defense may be raised by a motion to dismiss if the running of the limitation period is apparent on the face of the complaint." *Vaughan v. Grijalva*, 927 F.2d 476, 479 (9th Cir. 1991).

Because 42 U.S.C. § 1983 contains no limitations provision, federal courts borrow the state statute of limitations for personal injury actions and borrow all applicable provisions for tolling the limitations period found in state law. *Wallace v. Kato,* 549 U.S. 384, 127 S. Ct. 1091, 1094 (2007).

However, federal law applies to determine "when a cause of action accrues and the statute of limitations begins to run for a § 1983 claim. A federal claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Bagley v. CMC Real Estate Corp.,* 923 F.2d 758, 760 (9th Cir. 1991). In California, that limitations period is two years. *Canatella v. Van De Kamp*, 486 F.3d 1128, 1132-33 (9th Cir. 2007)

b. DISMISSAL FOR FAILURE TO ALLEGE STATE ACTOR CONSPIRACY

42 U.S.C. § 1983 empowers the Plaintiff to seek redress for violations of her constitutional rights by those acting under color of state law. A defendant has acted under color of state law where he or she has "exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *West v. Atkins*, 487 U.S. 42, 49 (1988) (quoting *United States v. Classic,* 313 U.S. 299, 326 (1941)).

Generally, private parties are not acting under color of state law. *Price v. Hawaii*, 939 F.2d 702, 707-08 (9th Cir. 1991); *Simmons v. Sacramento County Superior Court*, 318 F.3d 1156, 1161 (9th Cir. 2003) (explaining that a lawyer in private practice does not act under color of state law).

Only where a private party conspires with state officials to deprive others of constitutional rights, however, the private party is acting under color of state law. *Tower v. Glover*, 467 U.S. 914, 920 (1984); *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980); Franklin v. Fox, 312 F.3d 423, 441 (9th Cir. 2002); *DeGrassi v. City of Glendora*, 207 F.3d 636, 647 (9th Cir. 2000); *George v. Pacific-CSC Work Furlough*, 91 F.3d 1227, 1231 (9th Cir. 1996) (per curiam); *Howerton v. Gabica*, 708 F.2d 380, 383 (9th Cir. 1983).

To prove such a conspiracy "the [plaintiff] must show an agreement or meeting of the minds to violate constitutional rights. To be liable, each participant in the conspiracy need not know the exact details of the plan, but each must at least share the common objective of the conspiracy." *United Steelworkers of Am. v. Phelps Dodge Corp*., 865 F.2d 1539, 1540-41 (9th Cir. 1989) (en banc) (citations and internal quotations omitted).

For the purposes of a Fed. R. Civ. P. 12(b)(6) motion to dismiss, the Plaintiff is subject to heightened pleadings standards requiring her to offer more than mere conclusory allegations of conspiracy, which, as a matter of law, "insufficient to state a claim of conspiracy." *Simmons*, 318 F.3d at 1161; *Radcliffe v. Rainbow Constr. Co*., 254 F.3d 772, 783-84 (9th Cir. 2001); *Price*, 939 F.2d at 708-09. "Vague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss." *Ivey v. Bd. of Regents*, 673 F.2d 266, 268 (9th Cir. 1982); *Bruns v. Nat'l Credit Union Admin*., 122 F.3d 1251, 1257 (9th Cir. 1997); *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992) (per curiam).

The Ninth Circuit has elaborated on the sort of allegations contained in Plaintiff's complaint. "[M]erely complaining to the police does not convert a private party into a state actor. Nor is execution by a private party of a sworn complaint which forms the basis of an arrest enough to convert the private party's acts into state action." *Collins v. Womancare*,

878 F.2d 1145, 1154-55 (9th Cir.1989) (Internal citations omitted.)

c. FRAUD AND PLEADING WITH PARTICULARITY

Plaintiff's Amended Complaint, as was the case in her first complaint, is peppered with myriad pseudo-allegations of "fraud" by the Defendants toward her. Amended Complaint at ¶ 17, 46, 60, 61, 63, 64, 113 - 118. Although she uses the terms "defraud" and "fraudulent," she does not state a cause of action for fraud.

"The elements of fraud are (1) misrepresentation; (2) knowledge of falsity; (3) intent to defraud; (4) justifiable reliance; and (5) resulting damage." *Doe v. Gangland Productions, Inc.,* 730 F. 3d 946, 960 (9th Cir. 2013). Fed. R. Civ. P. 9(b) requires any allegation of fraud to be made with particularity. "Averments of fraud must be accompanied by the 'who, what, when, where, and how' of the misconduct charged." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003).

III. ARGUMENT

a. Plaintiff's §1983 Claims are Barred by the Statute of Limitations.

The Plaintiff's allegations of Counts I – VI of the Amended Complaint, construed in the light most favorable to Plaintiff, nevertheless mandate dismissal of her Amended Complaint. Each and every fact alleged in the complaint to support her allegations that her constitutional rights were violated under 42 U.S.C. § 1983 took place in the Autumn of 2011, while Plaintiff did not file her Complaint in this matter until November 17, 2014. Amended Complaint, ¶ 23 – 112. Specifically, she alleges the Whittemores terminated her employed on September 29, 2011 (*Id. at* ¶ 55), that on November 18, 2011, Defendants McGuire, Garcia and the three Ventura Deputies arrested her in her home and transported her to the Ventura County Courthouse (*Id.* at ¶ 74). She further alleges that she was released on November 22nd, 2011 (*Id.* at ¶ 107).

Because she does not allege specific dates within Counts I - VI, the Court must refer back to her general allegations to establish the timeline for the purposes of this Motion. For instance, In Count I, she alleges an omnibus violation of civil rights under the First, Fourth, Fifth, Sixth and Eighth Amendment to the Constitution, which she re-alleges in Counts II –

IV. Counts II, III, V and VI allege a violation of her right to be free from unreasonable search and seizure imprisonment vis-a-vis her arrest on a warrant which she claims was issued as a result of misrepresentations by Defendants Whittemore, WPI, Lombardi and Hillerby in "collusion" with Washoe County District Attorney Dick Gammick. This arrest took place on November 18, 2011. Amended Complaint at ¶ 74. Count IV alleges an unreasonable delay in her "processing" in Ventura County after her arrest. Viewing this allegation in the light most favorable to Plaintiff, this "delay" ceased when she was released on the evening of November 22, 2011.

As argued in the prior Motions to Dismiss, and in the present Motions to Dismiss by Defendants Gammick (Docket #109) and Garcia, McGuire and Hunter (Docket #113), the limitations period at issue for these allegations is two years. *Canatella* at 1132-33 (9th Cir. 2007). Thus, the final date on which the Plaintiff could have alleged the §1983 violations was November 22, 2013. Her Complaint in this matter was filed November 17, 2014. (Docket #1). She is 360 days late in making these claims, and thus Counts I – VI must be dismissed with prejudice.

b. Plaintiff Fails to Allege a Conspiracy Sufficient to Subject Private Actors to Liability under § 1983.

Plaintiff's Amended contains only naked allegations of conspiracy between the private actor Defendants (the Whittemores, the WPI, UNEVX, Kinne, Hillerby, Lombardi, Hunter and Pari) and the state actor defendants (Gammick, Garcia, McGuire, the Ventura County Sheriff and the Ventura Deputies). Specifically, she alleges that "[t]hey brought their political influence" to Defendant Gammick, who in his capacity as District Attorney, then "allowed Garcia and McGuire" to travel to California and "advance a false case" against her. Amended Complaint at ¶ 59.

Even construed in the light most favorable to Plaintiff, these allegations are nothing more than "vague and conclusory allegations of official participation in civil rights violations," and, as a matter of law, "are not sufficient to withstand a motion to dismiss." *Ivey* at 268 (9th Cir. 1982). Further, as argued by Defendant Gammick in his Motion to Dismiss, Defendant

McGuire gave an affidavit in support of the criminal complaint and warrant of arrest. (Docket #109, Exhibit 2). Defendant McGuire was acting in his capacity as a University of Nevada Police Officer, but even assuming arguendo that Mr. McGuire was somehow influenced by the WPI Defendants to swear the affidavit, it would not convert the WPI Defendants' actions into state action which to sustain a §1983 case. Indeed, the WPI Defendants would not be state actors even had they sworn out the affidavit themselves, for as a matter of law, execution by a private party of a sworn complaint which forms the basis of an arrest is not enough to convert the private party's acts into state action. *Collins* at 1154-55 (9th Cir.1989).

c. Plaintiff's "Bankruptcy Fraud" Allegations Do Not Toll the Statute of Limitations Under the Continuing Violations Doctrine.

Having, presumably, read the Motions to Dismiss her prior complaint this matter based upon the statute of limitations, Plaintiff has now added an allegation of "fraud" upon the bankruptcy court by the WPI Defendants, within the limitations period, in an effort to rescue her barred claims. Because the phrasing of the claims provides several grounds for their dismissal, those Counts are reproduced as follows:

> 113. He issued a permanent injunction and scheduled a damages hearing for January 25, 2012. That hearing did not go forward.
>
> 114. Notwithstanding the fact that the damages assessment hearing did not go forward, HW, who is an attorney and knows the process well, has repeatedly and fraudulently asserted that Judge Adams assessed a $5.5 million dollar sanction on Dr. Mikovits.
>
> 115. Dr. Mikovits heard this from HW and not fathoming that an attorney who was litigating a case against her and who was well acquainted with judicial process would make this up, she believed him that he had a judgment against her.
>
> 116. As a result of this fraudulent misrepresentation, and because she believed that she owed HW $5,500,000.00, and that he had a judgment and intended to collect what he could from it, filed for bankruptcy protection on March 1, 2013.
>
> 117. It is on that date and in furtherance of his conspiracy with AW, Kinne, Lombardi, Hillerby, that Mr. & Mrs. Whittemore filed a fraudulent claim in the Bankruptcy Court asserting a judgment that was false, fraudulent and fictitious against Dr. Mikovits.
>
> 118. This fraudulent act, committed on March 1, 2013, has triggered the statute of limitations as of that date, and has mooted all defenses by WPI, Mr. & Mrs. Whittemore, Vincent Lombardi, Carli Kinne, and Michael Hillerby, each of

whom conspired to defraud Dr. Mikovits through their wrongful acts.

Amended Complaint at ¶ 113 – 118.

The "He" referenced in ¶ 113 is now retired Second Judicial District Court Judge Brent Adams, of Washoe County, Nevada. In these allegations, Plaintiff asserts that Judge Adams issued a permanent injunction, regarding the lab materials Plaintiff was alleged by Defendant Gammick (the District Attorney) to have stolen, (Docket #109, Exhibit 1) and scheduled a "damages hearing" that did not go forward. She then alleges that Defendant Harvey Whittemore, asserted that he had a **5.5 million dollar judgment** against the Plaintiff as a result of this damages hearing. It bears mention that, at this point in time, according to Plaintiff's own allegations, Mr. Whittemore had already fired her, threatened to sue her, used his political influence to have her arrested and charged with a crime. (Amended Complaint at ¶ 55, 68, 59). Yet, she alleges she then she took Mr. Whittemore's mere assurance that he had a 5.5 million dollar judgment against her as the truth. She further alleges that, instead of investigating the validity of such a claim, for instance by contacting her then attorney Scott Freeman or visiting the court clerk's office, she instead filed for bankruptcy protection on March 1, 2013. Then, she claims, that on the very day she filed for Bankruptcy protection, the Whittemores and WPI Defendants filed in that court a fraudulent claim.

These allegations, however implausible, are nevertheless presumed be true for the purposes of a Motion to Dismiss under Fed. R. Civ. P. 12(b)(6). Yet, even taken as true, they fail to rescue the § 1983 claims under the continuing violations doctrine, as the Plaintiff claims in ¶ 118.

The continuing violations doctrine permits repeated incidences of tortious conduct to be considered in concert for the purposes of liability, even if some of the instances fall outside the applicable statute of limitations. This principle has been applied in certain hostile work environment claims where a claim is not based upon a series of discrete and unrelated discriminatory actions, but is instead premised upon a series of closely related similar occurrences that took place within the same general time period and stemmed from the same source." *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1108 (9th Cir. 1998). The moving Defendants also incorporate by reference the discussion of *Aryeh v. Canon*

Business Solutions, Inc., 55 Cal 4th 1185 (2014) in the Motion to Dismiss filed by Defendants Hunter, McGuire and Garcia, wherein overbilling for test copies throughout for years of copy service constituted a continuing violation sufficient to render the copy service liable for the overbillings that occurred outside the limitations period as well as those within it. (Docket #113 at 9).

Contrast these circumstances with the supposed fraudulent bankruptcy claim alleged by the Plaintiff. Other than being an allegation against the same Defendants, it is utterly unrelated to any conspiracy to have her wrongfully arrested. Indeed, the very nature of a bankruptcy case precludes the possible that filing a false claim could somehow have been part of the same conspiracy to have the Plaintiff arrested; a bankruptcy claim can only be filed by a creditor *after the debtor files for bankruptcy protection.* Since the Plaintiff alleges that she herself petitioned the bankruptcy court to initiate her case, as opposed to an involuntary petition filed by the Defendants in this matter, any claim could not have been part of a pre-conceived conspiracy. Amended Complaint at ¶ 116. Thus, any proof of claim filed in the bankruptcy court was, necessarily, a reaction to the filing of the petition itself, for a creditor must file a claim within 90 days of the date first set for the meeting of creditors, or risk having the debt discharged. Fed. R. Bankr. P. 3002.

d. Plaintiff Fails to Plead the Bankruptcy Fraud Claim With Particularity.

Even entertaining the Plaintiff's allegations of a fraudulent claim presented to the bankruptcy court as a cause of action separate from her allegations arising under 42 U.S.C. § 1983, the claim must be dismissed. In alleging fraud, a party must with particularity the circumstances constituting fraud or mistake. Fed. R. Civ. P. 9(b). "Averments of fraud must be accompanied by the who, what, when, where, and how of the misconduct charged." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003). Examining the wording of ¶ 117 of the Amended Complaint, reproduced above, this Court can plainly see that Plaintiff alleges only the 'who' and 'when' of the alleged fraud in question. She does not elaborate on the nature or amount of the claim. She does not state what about the claim was fraudulent. Was it a forged promissory note? A falsified judgment? A fake bill? The

Defendants are not informed. And, perhaps most critically, she fails to elaborate *how* the WPI Defendants so artfully deceived the Bankruptcy Court and somehow defeated her right to object to the claim, move for reconsideration of the claim under Fed. R. Bankr. P. 3008 or appeal any bankruptcy court judgment based upon the claim under Fed. R. Bankr. P. 8002. Such a daring scheme is doubtful, indeed fantastic. Unfortunately, the Amended Complaint leaves the reader to guess as to the mechanisms of the fraud. Accordingly, the allegation fails utterly to meet the particularity standard under Fed. R. Civ. P. 9(b) and must be dismissed.

e. Plaintiffs Bankruptcy Fraud Allegations, Taken as True, Defeat an Element of Fraud

Even if Plaintiff's bankruptcy fraud allegations were not deficient with respect to their particularity, and even though the Court must take them as true and view them in the light most favorable to the Plaintiff, they nevertheless defeat an element of the cause of action they intend to assert and must be dismissed.

"The elements of fraud are (1) misrepresentation; (2) knowledge of falsity; (3) intent to defraud; (4) justifiable reliance; and (5) resulting damage." *Doe v. Gangland Productions, Inc.,* 730 F. 3d 946, 960 (9th Cir. 2013). As reprinted from the Complaint in section c above, Plaintiff alleges that she filed for bankruptcy protection as a result of Defendant Harvey Whittemore's verbal assertion that he had 5.5 million dollar judgment against her as a result of an injunction hearing where she was **represented by council.** She alleges that she relied on this assertion "not fathoming that an attorney who was litigating a case against her and who was well acquainted with judicial process would make this up." Amended Complaint at ¶ 115. And finally, it bears repeating that at the time of Mr. Whittemore's alleged assertion of the 5.5 million dollar debt, upon which Plaintiff claims she relied, Mr. Whittemore had already fired her, threatened to sue her and used his political influence to have her arrested and charged with a crime. (Amended Complaint at ¶ 55, 68, 59). Thus, her claimed reliance on Mr. Whittemore's alleged assertion of the 5.5 judgment is not justifiable, defeating the fourth element of fraud under *Doe*.

While "justifiable" reliance does not require a Plaintiff to use the same judgment as a "reasonably prudent person," justifiability nevertheless has limits. A person is "required to use his senses, and cannot recover if he blindly relies upon a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation." Restatement (Second) of Torts §541, comment a; *Field v. Mans,* 516 U.S. 59 (1995). Here, the Plaintiff asserts that she believed the assertion of debt from a person who, in her view, had incarcerated her, had initiated felony criminal charges and was actively trying to ruin her reputation. She further asserts that she believed her enemy's claim that this debt existed as a result of an injunction proceeding at which she was represented by counsel, whom she could have phoned at any time to verify the debt, which was formalized in a judgment she could have substantiated with a visit to the court clerk's office. Thus, even assuming under the allegations, as the Court must, that Mr. Whittemore did in fact claim to have such a judgment, the Plaintiff's reliance on that assertion is so ill-considered as to be plainly unjustifiable under the circumstances that she herself has alleged in the complaint. She has alleged herself into a box. Her own averments defeat the "justifiable reliance" element of fraud and her bankruptcy fraud claim must be dismissed.

f. This Court Lacks Personal Jurisdiction Over the Bankruptcy Fraud Claim.

Finally, as a third ground for dismissing the bankruptcy fraud claim, this court lacks personal jurisdiction over the claim. The plaintiff bears the burden of demonstrating that jurisdiction is appropriate when a defendant moves to dismiss for lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2), and cannot rest on the bare allegations of the complaint. *Sher v. Johnson*, 911 F.2d 1357, 1361 (9th Cir. 1990); *Amba Marketing Systems, Inc. v. lobar International Inc.,* 551 F.2d 784, 787 (9th Cir.1977).

Here, the Plaintiff does not allege that the Bankruptcy proceeding took place in California, or that the WPI Defendants filed their allegedly fraudulent claim in California. Nor do any of the allegations relating to the bankruptcy fraud establish that the WPI Defendants had sufficient "minimum contacts with [the state of California] such that the maintenance of

the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Wash*., 326 U.S. 310, 316 (1945).

IV. CONCLUSION

Under the statute of limitations to actions arising under 42 U.S.C. § 1983, Plaintiff's complaint is tardy by a full year, and accordingly should be dismissed with prejudice as to all Defendants. Plaintiff's allegations of a fraudulent claim in a bankruptcy proceeding do not suffice as a continuing violation to save the § 1983 claims from dismissal. As an independent basis for dismissal of the § 1983 claims, Plaintiff fails to sufficiently allege conspiracy with state actors against Defendants Harvey Whittemore, Annette Whittemore, Michael Hillerby, Carli W. Kinne, Vincent Lombardi, the WPI, UNEVX, Inc., Kenneth Hunter and Greg Pari, entitling those defendants to dismissal of those claims. Lastly, even standing alone, Plaintiff's allegations of a fraudulent claim in a bankruptcy proceeding are not plead with particularity and her alleged reliance on the Defendants' assertions are so unjustifiable as to defeat the reliance element of the tort of fraud. Accordingly, Plaintiff's First Amended Complaint should be DISMISSED WITH PREJUDICE.

Dated this 31st Day of August, 2015.

By: _____
BRIAN WARNER HAGEN

Attorney for Defendants Harvey Whittemore, Annette Whittemore, Michael Hillerby, Carli W. Kinne, Vincent Lombardi, the WPI, and UNEVX, Inc.

CERTIFICATE OF SERVICE

I certify that I have on this 31st Day of August, 2015. I caused the foregoing **MOTION TO DISMISS**, to be served by electronic filing with the United States District Court for the Central District of California to the following recipients on the Master Service List:

Mary Kandaras, Esq.
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BRIAN W. HAGEN