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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) **REPLY TO PLAINTIFF'S OPPOSITION TO 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 Reply to the Plaintiff's Opposition (#128) to the Defendants' Motions to Dismiss Plaintiff Judy Ann Mikovits' Second Complaint for failure to state claim on which relief can be granted.

I. Plaintiff's Introduction Is Irrelevant to the Motions to Dismiss and Should be Stricken.

The Plaintiff's Opposition to the Motion to Dismiss, an almost verbatim copy of her prior Opposition to the Motions to Dismiss her original complaint, begins with an

unnecessary recitation of her series of imagined slights, supposedly suffered at the hands of the Whittemores, the Washoe County District Attorney, Second Judicial District Court Judge Brent Adams and various law enforcement officers. Much of the nine-page narrative recites her opinion on the character and prior business dealings of Defendant Harvey Whittemore, none of which are relevant to the Court in deciding the Motions to Dismiss.

These assertions are inappropriate in an opposition to a motion to dismiss. This proceeding has not yet reached (and should never reach) the point in which the Court must parse fact from fiction. In deciding a Rule 12(b)(6) Motion to Dismiss, the Court must assume that the factual allegations in the Complaint "are true and construe them in the light most favorable to the plaintiff." *Cervantes v. United States*, 330 F.3d 1186, 1187 (9th Cir. 2003). Motions to dismiss are matters of procedure, not of fact. The Plaintiff's Introduction does not address the procedural grounds raised for dismissal, instead offering an attempt to gain the Court's sympathies by recounting her imagined victimization at the hands of the Defendants.

II. The Plaintiff is not Entitled to Equitable Tolling of the Statute of Limitations.

The Plaintiff, despite her efforts to cram a square peg into a round hole, has not alleged facts sufficient to trigger any equitable tolling of the Statute of Limitations. Each and every fact that she alleges in her Amended 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. She alleges that she was fired by the Whittemores on September 29, 2011. *Id. at* ¶ 55. She alleges that she was arrested on November 18, 2011 and released on November 22, 2011. *Id. at* ¶ 74, 2017.

The Plaintiff's assertions that the "continuing violations doctrine" or "continuous accrual theory" entitle her to equitable tolling of the statute of limitations both misstates the facts alleged in the Complaint and misconstrues both of those doctrines. Her sole basis to attempt to invoke these doctrines is that she allegedly suffers continuing harm because 'her'

laboratory notebooks have not been returned and her reputation in the scientific community has not been restored.

Plaintiff cites, just as she cited in prior motions, *Aryeh v. Canon Business Solutions, Inc.,* 55 Cal.4th 1185, 292 P.3d 871, 875-876 (2014). She claims that *Aryeh* supports the proposition that her allegedly continuous "injuries" to her reputation and the alleged loss of her notebooks entitles her to unlimited tolling of the statute of limitations. But an examination of *Aryeh* reveals this not to be the case. In *Aryeh*, a copy service leased a number of copy machines from Canon Business Solutions. The rent paid by the copy service to Canon was subject to a maximum monthly copy allowance, and copies made in excess of the allowance required payment of additional charges, on a per-copy basis. The copy service discovered that Canon employees were running thousands of "test copies" during service visits, and then billing for those copies under the overage policy. Suit was filed in January 2008, under a law with a four-year statute of limitations. Canon attempted to assert that the four-year limitations period began when the first violation occurred, in 2002. The California Supreme Court disagreed, holding: "By its nature, the duty Canon owed the duty not to impose unfair charges in monthly bills - was a continuing one, susceptible to recurring breaches. Accordingly, each alleged breach must be treated as triggering a new statute of limitations." *Id.* at 1200.

Contrast those facts with this case, where all of the inadequately alleged conspiracies against the Defendants, taken as true, nevertheless culminate in her arrest and release in November of 2011. That she claims to suffer some ongoing injury to her reputation does not transform the discrete alleged events of 2011 into some series of wrongs that have "not been broken temporally since that day." (Docket #128 at 11). The allegation that the injuries of 2011 somehow still cause her harm now does not toll the statute of limitations under California law. Rather, the law holds that "infliction of appreciable and actual harm . . . will commence the statutory period." *Davies v. Krasna,* 13 Cal.3d 502, 514 (1975).

By way of analogy, consider a hypothetical employer who steals his employee's car, and the same day publishes a newspaper ad falsely accusing the employee of adultery. If

the employee sits on his hands for three years thereafter, he cannot complain that the employer's failure to return the car constituted a "continuing violation" that tolls the statute of limitations, as the employee knew his car was stolen and his reputation injured on the day of the theft. Like that employee, the Plaintiff here understood the forces allegedly acting against her in her 2011 firing, arrest, and the judicial proceedings in Washoe County of which she complains. That she also claims still to be harmed by these alleged acts does not excuse that she is 360 days late in making these claims, and thus Counts I – VI must be dismissed with prejudice.

III. Plaintiff Does Not Refute, and Thus Concedes that the Bankruptcy Fraud Claim Cannot Toll the Statute of Limitations as to the §1983 Claims.

As Noted in the Opposition, Plaintiff's Amended Complaint contains an allegation of fraud upon the Bankruptcy Court, in the form of a vaguely "fraudulent claim," and that this alleged act "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 ¶ 117, 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). This is not the circumstance here.

Plaintiff does not refute, because she cannot, that the nature of a bankruptcy case precludes the possibility that a fraudulent bankruptcy claim could be part of the same alleged scheme to have the Plaintiff arrested over a year earlier. A bankruptcy claim can only be filed after the debtor files for bankruptcy protection. The Plaintiff does not refute that she herself initiated the Bankruptcy claim, as opposed to an involuntary bankruptcy. Thus,

any proof of claim filed by the WPI Defendants in the bankruptcy case could not have been part of pre-conceived conspiracy. As a matter of law, after a petitioner files for Bankruptcy, 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. Thus, even accepting as true the Plaintiff's allegation that this vaguely "fraudulent" claim was filed against her and somehow survived the scrutiny of her attorneys and the Bankruptcy Court, the decision to file such a claim could not have been made until *after the Plaintiff filed for Bankruptcy,* and thus, could not have been part of the same alleged conspiracy to have her arrested some 15 months prior to the Bankruptcy. Accordingly, it cannot be part of any "continuing violation," and cannot equitably toll the statute of limitations as to the § 1983 Claim.

IV. The Plaintiff Fails to Rebut that She Insufficiently Alleged A Conspiracy with State Actors by the Whittemore and WPI Defendants to Sustain a § 1983 Claim.

In their Motion to Dismiss, the WPI Defendants argued that Plaintiff failed to allege a conspiracy sufficient to subject the Whittemore Defendants, none of whom are State actors, to liability under 42 U.S.C. §1983. This is because 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)). To withstand a motion to dismiss, the Plaintiff's allegation of conspiracy by private party actors with government officials that would deem those private actors to be acting under color of state law must be more than "[v]ague and conclusory allegations of official participation in civil rights violations." *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).

Plaintiff attempts to rebut the Defendants' argument with a rote description of the elements of civil conspiracy. In so doing, Plaintiff fails to appreciate the difference between an ordinary claim of conspiracy and claim sufficient to allege that private parties have acted under color of state law under 42 U.S.C. § 1983.

Plaintiff fails to address, because she cannot address, the dispositive argument of Defendant Gammick in his Motion to Dismiss, that Defendant McGuire gave Defendant Gammick an affidavit in support of the criminal complaint and warrant of arrest. (Docket #109, Exhibit 2). Defendant McGuire, a University of Nevada Police Officer, is a state actor for the purposes of §1983. And again, even if the WPI Defendants somehow coerced Defendant McGuire to swear the arrest affidavit, or even authored affidavits themselves for the use of Defendant Gammick, the WPI Defendants would not be state actors, as it is a matter of law that 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 v. Womancare*, 878 F.2d 1145, 1154-55 (9th Cir.1989)

V. Plaintiff Does Not Rebut, and Therefore Concedes, that her Claim of Bankruptcy Fraud is not Plead with Particularity.

In their motion to dismiss, the WPI Defendants argued that Plaintiff failed to plead her claim of Bankruptcy Fraud with the particularity required by Fed. R. Civ. P. 9(b). In her Opposition, the Plaintiff offers only that these "allegations are more than sufficient to frame the case against the Whittemore consortium." (Docket #128 at 13). Her argument is akin to a notice pleading standard. This is not, and has never been, the standard for pleading claims of fraud under 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). For the Court's convenience, the Bankruptcy Fraud allegation in the Plaintiff's Amended Complaint is:

> 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.
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> 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 ¶ 117 – 118. As argued in the Motion to Dismiss, and as

Plaintiff does not even attempt to rebut, the Amended Complaint not elaborate on the nature or amount of the allegedly fraudulent claim. The Defendants are left to guess as to what kind of document was allegedly offered before the bankruptcy court, what about it was allegedly fraudulent. And most critically, the Amended Complaint does not explain the '*how*' of the fraud, which is crucial here, because in order to have successfully pulled the wool over the eyes of the Bankruptcy Court, the WPI Defendants must have somehow defeated her procedural rights in Bankruptcy Court, including her rights 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. Since the Amended Complaint fails to explain the mechanisms of this fraud, the allegation fails to meet the particularly standard of Fed. R. Civ. P. 9(b) and must be dismissed.

VI. Plaintiff Does Not Rebut, and Therefore Concedes, that her Bankruptcy Fraud Allegations, Taken as True, Defeat an Element of Fraud.

In their Opposition, the WPI Defendants argue that Plaintiff's allegations regarding the bankruptcy fraud claim defeat the justifiable reliance element of fraud. Specifically, Plaintiff's that she relied upon the alleged naked assertion of Harvey Whittemore that he had a valid 5.5 million dollar judgment against her, compelling her to file bankruptcy in response, in not justifiable if the Court assumes, as it must, that her allegations regarding her firing and wrongful arrest at the hands of Mr. Whittemore are true. Plaintiff does not address this argument in her opposition, and therefore concedes it.

"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). 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 counsel.** She alleges that she relied on this alleged assertion from Mr. Whittemore, without inquiring of her counsel as to its truth, and in spite of the fact that, according to Plaintiff, 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, 115). Thus, her claimed reliance on Mr. Whittemore's alleged assertion of the 5.5 million dollar judgment is not justifiable, defeating the fourth element of fraud under *Doe*.

VII. Plaintiff Does Not Rebut, and Therefore Concedes, that this Court Lacks Personal Jurisdiction over the WPI Defendants as to the Bankruptcy Fraud Claim.

As a third independent ground to dismiss the bankruptcy fraud claim, the WPI Defendants argue that this Court lacks personal jurisdiction over them. 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).

The Plaintiff failed to allege that the bankruptcy fraud proceeding took place in California. Nor does she address that failure in her Opposition. Nor do any of the allegations in the complaint or passages of the Opposition relating to the bankruptcy fraud claim 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).

VIII. 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 October, 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 October, 2015. I caused the foregoing **REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT**, 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.
James N. Procter, II,, Esq.
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