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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
SECOND AMENDED COMPLAINT**

Hearing Date: February 26, 2016

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 (Docket #144) 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 largely identical to the prior Motion to Dismiss the First Amended Complaint (Docket #115) because Plaintiff's Second Amended Complaint is simply a cut-and-paste reorganization of her First Amended Complaint. The Plaintiff's

1 Second Amended Complaint is 32 pages long, exactly the same length as the First
2 Amended Complaint, and uses identical language in its prolix and confusing factual
3 narrative.

4 Accordingly, this Motion is made on six bases: first, that the statute of limitations has
5 long since run with regard to each and every factual allegation underlying the causes of
6 action, save one unrelated allegation regarding a bankruptcy proceeding; second, the
7 Plaintiff fails to allege a conspiracy sufficient to subject the Whittemore Defendants, none of
8 whom are State actors, to liability under 42 U.S.C. §1983; third, that the Plaintiff pleads her
9 bankruptcy allegation, which purports to pull the remaining, unrelated allegations out of the
10 abyss of the limitations period, without the particularity required of a fraud allegation under
11 Fed. R. Civ. P. 9(B); fourth, that her allegations regarding the bankruptcy allegation defeat
12 the reliance element of the very fraud she alleges, fifth that this Court has no personal
13 jurisdiction over the Defendants with regard to the bankruptcy allegation, and sixth, that she
14 has, for the third time, failed to formulate her complaint in the simple, concise, direct manner
15 required by Fed. R. Civ. P. 8(d).

16 **II. LEGAL STANDARDS**

17 **a. DISMISSAL FOR FAILURE TO FILE UNDER THE LIMITATIONS PERIOD**

18 “A statute of limitation defense may be raised by a motion to dismiss if the running of
19 the limitation period is apparent on the face of the complaint.” *Vaughan v. Grijalva*, 927 F.2d
20 476, 479 (9th Cir. 1991).

21 Because 42 U.S.C. § 1983 contains no limitations provision, federal courts borrow the
22 state statute of limitations for personal injury actions and borrow all applicable provisions for
23 tolling the limitations period found in state law. *Wallace v. Kato*, 549 U.S. 384, 127 S. Ct.
24 1091, 1094 (2007).

25 However, federal law applies to determine “when a cause of action accrues and the
26 statute of limitations begins to run for a § 1983 claim. A federal claim accrues when the
27 plaintiff knows or has reason to know of the injury which is the basis of the action.” *Bagley v.*
28 *CMC Real Estate Corp.*, 923 F.2d 758, 760 (9th Cir. 1991). In California, that limitations

1 period is two years. *Canatella v. Van De Kamp*, 486 F.3d 1128, 1132-33 (9th Cir. 2007)

2 **b. DISMISSAL FOR FAILURE TO ALLEGE STATE ACTOR CONSPIRACY**

3 42 U.S.C. § 1983 empowers the Plaintiff to seek redress for violations of her
4 constitutional rights by those acting under color of state law. A defendant has acted under
5 color of state law where he or she has “exercised power ‘possessed by virtue of state law
6 and made possible only because the wrongdoer is clothed with the authority of state law.’”
7 *West v. Atkins*, 487 U.S. 42, 49 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326
8 (1941)).

9 Generally, private parties are not acting under color of state law. *Price v. Hawaii*, 939
10 F.2d 702, 707-08 (9th Cir. 1991); *Simmons v. Sacramento County Superior Court*, 318 F.3d
11 1156, 1161 (9th Cir. 2003) (explaining that a lawyer in private practice does not act under
12 color of state law).

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

19 To prove such a conspiracy “the [plaintiff] must show an agreement or meeting of the
20 minds to violate constitutional rights. To be liable, each participant in the conspiracy need
21 not know the exact details of the plan, but each must at least share the common objective of
22 the conspiracy.” *United Steelworkers of Am. v. Phelps Dodge Corp.*, 865 F.2d 1539, 1540-41
23 (9th Cir. 1989) (en banc) (citations and internal quotations omitted).

24 For the purposes of a Fed. R. Civ. P. 12(b)(6) motion to dismiss, the Plaintiff is
25 subject to heightened pleadings standards requiring her to offer more than mere conclusory
26 allegations of conspiracy, which, as a matter of law, “insufficient to state a claim of
27 conspiracy.” *Simmons*, 318 F.3d at 1161; *Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772,
28 783-84 (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. Second Amended Complaint at ¶ 52, 53, 55, 93, 96, 99, 120, 124-127. 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).

d. SHORT PLAIN STATEMENT OF THE CLAIM

Fed. R. Civ. P. 8 requires, as the Court has noted in its Order dismissing the First Amended Complaint, “short and plain” statements of the claims, with factual allegations that “allow the Court to infer reasonably that the Defendant is Liable for the alleged misconduct...”. (Docket #142 at 6). “Something labeled a complaint but ... prolix in evidentiary detail, yet without simplicity, conciseness and clarity as to whom plaintiffs are suing for what wrongs, fails to perform the essential functions of a complaint. The Court cannot be expected to waste half a day in chambers preparing the ‘short and plain

statement' which Rule 8 obligated plaintiffs to submit." *Id.*, internal citations omitted.

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, ¶ 29 – 109. Specifically, she alleges the Whittemores terminated her employment in 2011. (*Id.* at ¶ 33-40), 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 ¶ 73). She further alleges that she was released on November 22nd, 2011 (*Id.* at ¶ 113).

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. Second Amended Complaint at ¶ 73. 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 and Defendants Garcia, McGuire and Hunter, the limitations period at issue for these allegations is two years. *Canatella* at 1132-33 (9th Cir. 2007). Thus, the final

1 date on which the Plaintiff could have alleged the §1983 violations was November 22, 2013.
 2 Her Complaint in this matter was filed November 17, 2014. (Docket #1). She is 360 days
 3 late in making these claims, and thus Counts I – VI must be dismissed with prejudice.

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

6 Plaintiff's Amended contains only naked allegations of conspiracy between the private
 7 actor Defendants (the Whittemores, the WPI, UNEVX, Kinne, Hillerby, Lombardi, Hunter and
 8 Pari) and the state actor defendants (Gammick, Garcia, McGuire, the Ventura County Sheriff
 9 and the Ventura Deputies). Specifically, she alleges that "[t]hey brought their political
 10 influence" to Defendant Gammick, who in his capacity as District Attorney, then "allowed
 11 Garcia and McGuire" to travel to California and "advance a false case against her that would
 12 never have been allowed had Gammick looked into the full circumstances prior to complying
 13 with the wishes of Garcia and McGuire, who were acting in concert with" the Whittemore
 14 Defendants. Second Amended Complaint at ¶ 66, 69.

15 Even construed in the light most favorable to Plaintiff, these allegations are nothing
 16 more than "vague and conclusory allegations of official participation in civil rights violations,"
 17 and, as a matter of law, "are not sufficient to withstand a motion to dismiss." *Ivey* at 268 (9th
 18 Cir. 1982). Further, as argued by Defendant Gammick in his prior Motion to Dismiss,
 19 Defendant McGuire gave an affidavit in support of the criminal complaint and warrant of
 20 arrest. (Docket #109, Exhibit 2). Defendant McGuire was acting in his capacity as a
 21 University of Nevada Police Officer, but even assuming arguendo that Mr. McGuire was
 22 somehow influenced by the WPI Defendants to swear the affidavit, it would not convert the
 23 WPI Defendants' actions into state action which to sustain a §1983 case. Indeed, the WPI
 24 Defendants would not be state actors even had they sworn out the affidavit themselves, for
 25 as a matter of law, execution by a private party of a sworn complaint which forms the basis
 26 of an arrest is not enough to convert the private party's acts into state action. *Collins* at
 27 1154-55 (9th Cir.1989). Thus, even if Plaintiff's allegations are taken as true, the neither the
 28 Whittemore Defendants nor any of the private party defendants can be held civilly liable for

her arrest.

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:

119. He issued a permanent injunction and scheduled a damages hearing for January 25, 2012. That hearing did not go forward.

120. Notwithstanding the fact that the damages assessment hearing did not go forward, FHW, 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.

...

124. 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.

125. 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, in the amount of Five Million Five Hundred Thousand (\$5,500,000.00) Dollars.

126. This fraudulent act, committed on March 1, 2013, has tolled the beginning of the running of the statute of limitations until 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 ¶ 119, 120, 124 – 126.

The "He" referenced in ¶ 119 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

1 as a result of this damages hearing. It bears mention that, at this point in time, according to
2 Plaintiff's own allegations, Mr. Whittemore had already fired her, threatened to sue her, used
3 his political influence to have her arrested and charged with a crime. Second Amended
4 Complaint. Yet, she alleges she then she took Mr. Whittemore's mere assurance that he
5 had a 5.5 million dollar judgment against her as the truth. She further alleges that, instead of
6 investigating the validity of such a claim, for instance by contacting her then attorney Scott
7 Freeman or visiting the court clerk's office, she instead filed for bankruptcy protection on
8 March 1, 2013. Then, she claims, that on the very day she filed for Bankruptcy protection,
9 the Whittemores and WPI Defendants filed in that court a fraudulent claim.

10 These allegations, however implausible, are nevertheless presumed be true for the
11 purposes of a Motion to Dismiss under Fed. R. Civ. P. 12(b)(6). Yet, even taken as true,
12 they fail to rescue the § 1983 claims under the continuing violations doctrine, as the Plaintiff
13 claims in ¶ 126.

14 The continuing violations doctrine permits repeated incidences of tortious conduct to
15 be considered in concert for the purposes of liability, even if some of the instances fall
16 outside the applicable statute of limitations. This principle has been applied in certain hostile
17 work environment claims where a claim is not based upon a series of discrete and unrelated
18 discriminatory actions, but is instead premised upon a series of closely related similar
19 occurrences that took place within the same general time period and stemmed from the
20 same source." *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1108 (9th Cir. 1998). The
21 moving Defendants also incorporate by reference the discussion of *Aryeh v. Canon*
22 *Business Solutions, Inc.*, 55 Cal 4th 1185 (2014) in the Motion to Dismiss filed by
23 Defendants Hunter, McGuire and Garcia, wherein overbilling for test copies throughout for
24 years of copy service constituted a continuing violation sufficient to render the copy service
25 liable for the overbillings that occurred outside the limitations period as well as those within
26 it. (Docket #113 at 9).

27 Contrast these circumstances with the supposed fraudulent bankruptcy claim alleged
28 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 possibility 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. Second Amended Complaint at ¶ 124. 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 ¶ 125 of the Second 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

1 dismissed.

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

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

8 "The elements of fraud are (1) misrepresentation; (2) knowledge of falsity; (3) intent to
9 defraud; (4) justifiable reliance; and (5) resulting damage." *Doe v. Gangland Productions,*
10 *Inc.*, 730 F. 3d 946, 960 (9th Cir. 2013). As reprinted from the Complaint in section c above,
11 Plaintiff alleges that she filed for bankruptcy protection as a result of Defendant Harvey
12 Whittemore's verbal assertion that he had 5.5 million dollar judgment against her as a result
13 of an injunction hearing where she was **represented by council**. She alleges that she
14 relied on the alleged naked assertion of Mr. Whittemore that he had obtained a 5.5 million
15 dollar judgment against her. Second Amended Complaint at ¶ 124. And finally, it bears
16 repeating that at the time of Mr. Whittemore's alleged assertion of the 5.5 million dollar debt,
17 upon which Plaintiff claims she relied, Mr. Whittemore had already fired her, "character-
18 assassinate" her, sued and used his political influence to have her arrested and charged
19 with a crime. (Second Amended Complaint at ¶ 51, 106, 69). Thus, her claimed reliance on
20 Mr. Whittemore's alleged assertion of the 5.5 judgment is not justifiable, defeating the fourth
21 element of fraud under *Doe*.

22 While "justifiable" reliance does not require a Plaintiff to use the same judgment as a
23 "reasonably prudent person," justifiability nevertheless has limits. A person is "required to
24 use his senses, and cannot recover if he blindly relies upon a misrepresentation the falsity of
25 which would be patent to him if he had utilized his opportunity to make a cursory
26 examination or investigation." Restatement (Second) of Torts §541, comment a; *Field v.*
27 *Mans*, 516 U.S. 59 (1995). Here, the Plaintiff asserts that she believed the assertion of debt
28 from a person who, in her view, had incarcerated her, had initiated felony criminal charges

1 and was actively trying to ruin her reputation. She further asserts that she believed her
2 enemy's claim that this debt existed as a result of an injunction proceeding at which she was
3 represented by counsel, whom she could have phoned at any time to verify the debt, which
4 was formalized in a judgment she could have substantiated with a visit to the court clerk's
5 office. Thus, even assuming under the allegations, as the Court must, that Mr. Whittemore
6 did in fact claim to have such a judgment, the Plaintiff's reliance on that assertion is so ill-
7 considered as to be plainly unjustifiable under the circumstances that she herself has
8 alleged in the complaint. She has alleged herself into a box. Her own averments defeat the
9 "justifiable reliance" element of fraud and her bankruptcy fraud claim must be dismissed.

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

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

18 Here, the Plaintiff does not allege that the Bankruptcy proceeding took place in
19 California, or that the WPI Defendants filed their allegedly fraudulent claim in California. Nor
20 do any of the allegations relating to the bankruptcy fraud establish that the WPI Defendants
21 had sufficient "minimum contacts with [the state of California] such that the maintenance of
22 the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co.*
23 *v. Wash.*, 326 U.S. 310, 316 (1945).

24 **g. The Plaintiff has Twice Failed to Take Advantage of the Court's Leave**
25 **to Amend Her Complaint.**


26 Lastly, as a final independent basis for dismissal, the Plaintiff has submitted a
27 needlessly prolix, rambling complaint composed almost entirely of narrative and often
28 deviating into unrelated (and misunderstood) discussions of other legal actions, despite this

1 Court granting her two opportunities to amend her complaint to comply with Fed. R. Civ. P.
2 8. Second Amended Complaint at ¶ 41 – 51. The Second Amended Complaint duplicates,
3 almost precisely, the First Amended Complaint that the Court previously dismissed. The
4 only identifiable differences are that the identically phrased paragraphs appear in a different
5 order and some narrative headings have been inserted. Indeed, the First and Second
6 Amended Complaints share the same typographical errors, a hallmark of a cut-and-paste
7 reorganization. The Plaintiff has made no serious effort to comply with the Court's directive
8 to comply Rule 8(a)'s short and plain statement requirement, and accordingly, the Second
9 Amended Complaint should be dismissed with prejudice.

10 **IV. CONCLUSION**

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

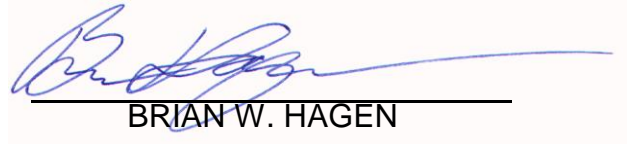
23 Dated this 5th Day of January, 2016.

24
25 By: 
BRIAN WARNER HAGEN
26
27 *Attorney for Defendants Harvey Whittemore,*
28 *Annette Whittemore, Michael Hillerby, Carli W.*
Kinne, Vincent Lombardi, the WPI, and UNEVX,
Inc.

CERTIFICATE OF SERVICE

I certify that I have on this 5th Day of January, 2016. 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.
James N. Procter, II., Esq.
Jeffrey Held, Esq.
Lisa Noel Shyer, Esq.
Robert J Liskey, Esq.
Robert M. Dato, Esq.
Sarah A. Syed, Esq.
Michael R. Hugo, Esq.



BRIAN W. HAGEN