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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ANTHONY JOHNSON, an individual,

Plaintiff,

vs.

DAVID KINNEY, an individual, RICHARD TURNER, an individual; MANUEL ALTAMIRANO, an individual, DAVID HUFFMAN, an individual, DAVID SMILJKOVICH, an individual; PAUL TYRELL, an individual, SEAN SULLIVAN, an individual, MARTY READY, an individual; DAVID AVENI, an individual; MICHAEL MCCLOSKEY, an individual; STORIX, INC., a California Corporation; JUDGE MARILYN HUFF, an individual; JUDGE RANDA TRAPP, an individual; JUDGE KEVIN ENRIGHT, an individual; JUDGE KATHERINE BACAL, an individual,

Defendants.

Case No. 3:20-cv-01354-CAB-MSB

DEFENDANTS MARTY READY, DAVID AVENI, AND MICHAEL MCCLOSKEY'S REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

[FED. R. CIV. PROC. 12(b)(6)]

Hearing Date: September 30, 2020
Hearing Time: 10:30 a.m.
Dept.: Courtroom 4C

District Judge: Cathy Ann Bencivengo
Magistrate Judge: Michael S. Berg

Complaint Filed: July 16, 2020
Trial Date: Not Set

Defendants Marty Ready, David Aveni, and Michael McCloskey ("Movants") submit this Reply in Support of Motion to Dismiss Plaintiff's First Amended Complaint pursuant to Fed. R. Civ. Proc. 12(b)(6).

/ / /

I. INTRODUCTION

Conceding he cannot state a claim for relief under 42 U.S.C. §§ 1985(2) and 1986 against Movants, Johnson's Opposition forecasts for the Court how he purportedly would amend his FAC to correct his pleading deficiencies: Johnson requests the Court instead construe his allegations as supporting a claim for deprivation of his civil rights under 42 U.S.C. § 1983.

Johnson's repackaging of a set of facts to support his ever-changing claims is not a new litigation tactic. On the contrary, when confronted with dispositive issues as to his claims, and adverse rulings, Johnson repackages issues already litigated under a new set of claims and seeks a favorable forum, i.e., before a Judge who has not ruled against him in the past. When that proves unsuccessful, Johnson's response is to add as defendants all the attorneys and Judges responsible for obtaining and issuing the rulings adverse to Johnson. This is the gist of Johnson's current complaint – he seeks to place the blame for being on the losing end of his prior litigation on an alleged conspiracy between the opposing attorneys and judges presiding over those matters. Johnson, however, has not alleged how Movants conspired or how the alleged conspiracy deprived him of his constitutional rights. Johnson's FAC merely recites the procedural history of his litigation campaign, and in conclusory fashion, asserts a conspiracy existed. As such, Johnson has failed to state a claim for relief under any legal theory.

Even if the Court construes Johnson's allegations against Movants as allegedly supporting a claim under 42 U.S.C. § 1983, the allegations do not satisfy essential elements of a claim under 42 U.S.C. § 1983. The most relevant issue with Johnson's § 1983 claim against Movants is the complete lack of state participation in the deprivation. Because the judges are absolutely immune from liability for acts done in the performance of their judicial functions, private persons, i.e. Movants, cannot be held liable for conspiracy under the Civil Rights Statutes. This glaring pleading deficiency is fatal to Johnson's § 1983 claim.

In addition, the *Rooker-Feldman* doctrine, litigation privilege, and statute of limitations remain applicable to, and bar, Johnson's § 1983 against Movants.

II. DISCUSSION

A. Movants Cannot Be Liable For Conspiracy Under The Civil Rights Statute When The State Actor Is Absolutely Immune From Liability

To assert a cognizable claim under § 1983, Johnson must allege facts showing: (i) the conduct complained of was committed by a person acting under color of state law; (ii) this conduct deprived a person of constitutional rights, and (iii) there is an actual connection or link between the actions of the defendants and the deprivation allegedly suffered by plaintiff. *See Parratt v. Taylor*, 451 U.S. 527, 535 (1981).

As to the first element, because Movants are private individuals, Johnson must allege a conspiracy between public officials and the Movants to maintain his § 1983 claim against Movants as private individuals. But courts have cautioned, "[the] requirement of 'State action' can rarely be satisfied when the action is taken by one not a State official." *Oller v. Bank of America*, 342 F. Supp. 21, 23 (N.D. Cal. 1972).

Assuming Johnson satisfied the pleading requirements for asserting a conspiracy theory (and he has not satisfied those requirements, as discussed below), he still would have to allege sufficient facts to overcome the immunity from liability courts have granted public officials in § 1983 suits. *See Sykes v. California (Department of Motor Vehicles)*, 497 F.2d 197, 202 (9th Cir. 1974) ("Private persons cannot be held liable for conspiracy under the Civil Rights Statutes if the other conspirators are state officials who are themselves immune to liability under the facts alleged."); *see also Haldane v. Chagnon*, 345 F.2d 601, 604-605 (9th Cir. 1965). It is well established that judges are absolutely immune from liability for acts done in the performance of their judicial functions. *Pierson v. Ray*, 386 U.S. 547, 553-55 (1967); *Robinson v. McCorkle*, 462 F.2d 111 (3rd Cir. 1972); *Haldane v. Chagnon*, 345 F.2d at 604. "The only exception to this sweeping cloak of immunity exists for acts done in 'the clear absence of all jurisdiction.'" *Gregory v. Thompson*, 500 F.2d 59, 62 (9th

Cir. 1974). For an act to be done in the clear absence of all jurisdiction it must not be of a judicial nature. *Id.* at 63. Thus, Johnson must demonstrate the judges overstepped their judicial bounds in order to state a viable § 1983 cause of action based upon the participation in an alleged conspiracy.

Here, the FAC does not contain any allegations the judges were doing anything other than performing routine judicial functions. Paragraphs 19 through 66 of the FAC are nothing more than a procedural summary of the previous litigation involving the parties, i.e., routine judicial functions. The only other allegations in the FAC regarding acts of the judges is a conclusory statement, "Defendants acted *ultra vires* beyond their legal jurisdiction when violating Johnson's clearly established constitutional rights to due process guaranteed by the Fifth and Fourteenth Amendments and Johnson's valid exercise of free speech and petitioning guaranteed by the First Amendment." (Doc. No. 5, ¶ 68.) Because Johnson has only alleged acts by the judges that are all judicial in nature, he has not, and cannot, overcome the absolute immunity afforded these judges. And pursuant to the 9th Circuit holding in *Sykes*, Movants, as private actors, cannot be held liable as conspirators under the Civil Rights Statutes where the public official enjoys absolute immunity. For this reason, Johnson cannot maintain his § 1983 claim against Movants, and his complaint should be dismissed with prejudice.

B. Even Without Derivative Immunity, Movants' Petitioning Activities Do Not Constitute Conspiracy To Deny Johnson His Constitutional Rights

Under certain circumstances a private person can act "under color of" state law and be subject to § 1983 liability. *See Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1139 (9th Cir. 2012) (quotation omitted); *see also Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155 (1978). The Supreme Court has articulated several tests for determining whether a private party's actions constitute state action. *See Tsao*, 698 F.3d at 1140 (quoting *Franklin v. Fox*, 312 F.3d 423, 444-45 (9th Cir. 2002)). Given Johnson's claims, the so-called "joint action test" is relevant here, as it asks "whether

state officials and private parties have acted in concert in effecting a particular deprivation of constitutional rights." *Franklin*, 312 F.3d at 445 (9th Cir. 2002). Typically, private action is deemed state action where the defendant willfully participates in joint activity with the state or its agents. *See, e.g., Adickes v. S.H. Kress and Co.*, 398 U.S. 144 (1970); *Hoffman v. Halden*, 268 F.2d 280 (9th Cir. 1959). By alleging facts demonstrating the existence of a conspiracy between a private party and the government, the joint action test may be satisfied. *Crowe v. County of San Diego*, 608 F.3d 406, 440 (9th Cir. 2010).

To satisfy the pleading requirements for alleging a conspiracy, a plaintiff must allege the existence of "an agreement or meeting of the minds" with a state actor to violate his constitutional rights. *Crowe*, 608 F.3d at 440; *Margolis v. Ryan*, 140 F.3d 850, 853 (9th Cir. 1998). The defendants do not need to know the exact details of the plan, but each defendant must share the conspiracy's common objective. *Id.* (quoting *United Steelworkers of Am. v. Phelps Dodge Corp.*, 865 F.2d 1539, 1541 (9th Cir. 1989)); *see also Trujillo v. City of Ontario*, 428 F. Supp. 2d 1094, 1114 (C.D. Cal. 2006) (finding a private party's "mere acquiescence to the unconstitutional demands of a state actor is insufficient").

Johnson contends the Court should construe his allegations as supporting a claim against Movants under § 1983 and more specifically based on a conspiracy to deprive him of his constitutional rights. To satisfy his pleading burden, Johnson must allege Movants had an agreement with certain judges and acted in concert to deprive him of his constitutional rights. *See Adickes v. S.H. Kress and Co.*, 398 U.S. at 156; *Hoffman v. Halden*, 268 F.2d at 294. And where the plaintiff fails to make this critical allegation, a court must dismiss the complaint for failure to state a claim upon which relief can be granted. *See, e.g., Harris v. Ward*, 418 F. Supp. 660 (S.D.N.Y. 1976); *Meyer v. Curran*, 397 F. Supp. 512 (E.D. Pa. 1975).

As discussed in Movants' opening brief, Johnson has not alleged a single fact supporting his claim of a conspiracy. Rather, Johnson simply asserts Movants

colluded "with Management, Procopio, and certain judge defendants," which is "demonstrated throughout the FAC." (Doc. No. 19, p. 2.) Johnson continues by stating Movants conspired "with their clients and Storix's counsel to use his own company profits to litigate against him." (*Id.* at 6.) But Johnson doesn't describe, at all, how Movants conspired, and how the conspiracy led to a deprivation of his constitutional rights. He simply concludes they conspired. More importantly, however, Johnson does not allege a conspiracy with a state actor to operate in concert to deprive him of his constitutional rights. This absolute pleading failure is fatal to Johnson's claims against Movants.

Further, Johnson's Opposition essentially is silent on Movants' argument that the FAC fails to plead facts supporting the conspiracy allegation. Johnson's Opposition merely argues in a conclusory manner that "Johnson alleged substantial facts to support his claims . . . ." (Doc. No. 19, p. 7.) Johnson's Opposition fails to identify any specific new facts that could be pled to support his claim of a conspiracy between Movants and the judicial defendants.

In light of Johnson's conclusory allegations that a conspiracy exists, the issue before the Court is straightforward - does the FAC state sufficient facts to establish the judges and Movants participated in the alleged wrongful conduct with the shared intention of depriving plaintiff of his constitutional rights. The acts Johnson asserts deprived him of his constitutional rights amount to nothing more than normal judicial functions and Movants' petitioning activities on behalf of their clients. (*See, e.g.* Doc. No. 11-1, pp. 3, 4.) As such, in the absence of allegations regarding a meeting of the minds between alleged conspirators, Movants' acts do not amount to state action.

C. Johnson's Claims Fail Under The *Rooker-Feldman* Doctrine, The Litigation Privilege, and Res Judicata, Because Movants Were Entitled To Take The Alleged Acts As Part Of The Underlying Litigation

Johnson's Opposition points exclusively to three acts Johnson claims Movants took in the underlying state court litigation, for which Johnson now claims Movants are liable under § 1983. Johnson states these three alleged acts are the basis for his

claims against Movants. Those three acts are as follows: (1) Movants sought to require Johnson to file a $50,000 bond to secure his standing as a shareholder derivative plaintiff; and (2) Movants sought to have Johnson dismissed as a plaintiff in the derivative suit three years later; and (3) Movants accepted funds from Storix to pay for the legal fees of Movants' clients in defending against Johnson's claims; (Doc. No. 19, pgs. 4, 7; *see also id.*, pgs. 2, 6.)

Johnson's reliance on these three acts demonstrates why Johnson's claims must fail, and why there is no set of facts or claims on which Johnson's allegations could succeed. All three acts of Movants on which Johnson relies are acts Movants took, and were entitled to have taken, as attorneys on behalf of their clients during litigation. All three acts also were previously litigated in the state court proceedings. As a result, Johnson's claims must fail under the litigation privilege, the *Rooker-Feldman* doctrine, as well as principles of res judicata. In fact, all three of the acts on which Johnson relies are acts *expressly authorized* by statute and case law, which demonstrates Johnson's allegations fail to state a claim under § 1983.

As for the first act above – that Movants sought to require Johnson to file a $50,000 bond before proceeding with the derivative suit – filing a motion for such a bond is expressly authorized by California Corporations Code section 800. Movants were entitled to file a motion seeking to require Johnson to post such a bond before proceeding with his derivative suit, and the fact Movants filed such a motion on behalf of their clients cannot create liability for Movants.[1] Again, the filing of a bond motion under § 800 is protected by the litigation privilege, and in any event, could not constitute a violation of § 1983.

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[1] The docket for the state court proceeding also reflects that Movants did not force Johnson to file the $50,000 bond. Movants filed a motion under Corporations Code section 800 for such a bond, but rather than opposing the motion, Johnson simply filed the bond voluntarily, as he was entitled to do under Corporations Code section 800(e). Thus, Johnson is now trying to sue Movants for filing a bond motion he chose not to oppose. Johnson could have proceeded to a hearing on the bond motion to argue against the motion, but he chose not to do so. (Doc. No. 11-6, ROA 16 – 22, 32.)

As for Movants' second act above – that Movants sought to have Johnson dismissed as a plaintiff in the derivative suit – again, as Judge Enright found in granting Movants' motion on that issue, the California Supreme Court has stated that a plaintiff who cannot "fairly and adequately" represent the corporation and its other shareholders is barred from bringing a derivative claim. *See Grosset v. Wenaas*, 42 Cal. 4th 1100, 1115 n.10 (2008).[2] Thus, Movants filed a motion seeking to dismiss Johnson as a derivative suit plaintiff because he could not fairly and adequately represent Storix. Judge Enright granted the motion. (*See* Doc. No. 11-5, p. 6.) Under *Grosset v. Wenaas*, Movants were entitled to file such a motion on behalf of their clients as part of the litigation. Movant's filing of that motion was protected by the litigation privilege, and again, could not constitute a violation of § 1983.

As for the third act above – that Movants accepted funds from Storix to pay for the legal fees and expenses of Movants' clients – as Judge Enright's Decision and Order in the underlying state litigation states, California Corporations Code § 317(f) expressly permits a company to advance defense costs on behalf of the company's officers and directors. In Judge Enrights' Decision and Order Thereon, he found that Cal. Corp. Code § 317(f), permits advancement of defense costs and that Storix's bylaws "mandate[d] such advancement." (*See* Doc. No. 11-5, Decision and Order Thereon, Ex. A, p. 3.) Requesting an advancement of fees from the company as part of the litigation was authorized by statute, was an act taken as part of the litigation, and was fully litigated before Judge Enright. (*Ibid.*)

As a result, Johnson's claims based on these alleged acts must fail under the litigation privilege, and the *Rooker-Feldman* doctrine, as well as principles of res judicata. In short, all of the acts of which Johnson claims are acts Movants were privileged to undertake on behalf of their clients, and were expressly authorized to

[2] The California Supreme Court's use of the phrase "fair and adequate representation" stems from Rule 23.1 of the Federal Rules of Civil Procedure, which expressly requires derivative plaintiffs to be fair and adequate representatives. *See* Fed. R. Civ. P. 23.1(a).

take by law. None of those acts could form the basis for a valid § 1983 claim against Movants, and no amendment to the FAC could fix those problems.

1. The *Rooker-Feldman* Doctrine Is Applicable To A § 1983 Claim And Bars Johnson's Claims Against Movants

Johnson's Opposition fails to appreciate the scope and applicability of the *Rooker-Feldman* doctrine to the allegations in his FAC. Johnson's view of the applicability of the *Rooker-Feldman* doctrine is that the doctrine is limited to allegations that "seek to have this Court reverse any state judgments (or Judge Huff's *federal* judgment)." (Doc. No. 19, p. 5.) Because Johnson is not seeking a reversal of a state court judgment but is seeking a "determination of whether the judges acts were constitutional and afforded Johnson due process," Johnson contends the *Rooker-Feldman* doctrine does not apply and should be disregarded. (*Ibid.*)

The doctrine is not so limited, but rather is intended "to protect state court judgments from collateral federal attack." *Doe & Associates Law Offices v. Napolitano*, 252 F.3d 1026, 1030 (9th Cir. 2001). It is settled that "[w]here a federal plaintiff asserts both a collateral challenge to a state court ruling and a claim about the conduct of adverse parties ***or their counsel*** that resulted in that ruling, both claims are barred under the *Rooker-Feldman* doctrine." *Uziel v. Superior Court of California*, U.S. Dist. LEXIS 88099 *17 (C.D. Cal., March 23, 2020) (emphasis added).

In *Uziel*, plaintiff was displeased with adverse rulings against him in state court and supported his constitutional claims by recounting the procedural history of the state court proceedings including the filing of an anti-SLAPP motion and motion for attorney's fees. *Uziel*, U.S. Dist. LEXIS 88099 *17. The Court held that "[e]ven if these allegations do not directly attack the state courts' rulings, they are inextricably intertwined with the issues resolved by the state courts." *Id.* As a result, plaintiff's claims were barred under the *Rooker-Feldman* doctrine.

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The same analysis applies here to Johnson's claims against Movants. The acts Johnson alleges support his claims of a conspiracy to deprive him of constitutional rights are merely Movants' petitioning activities on behalf of their clients. Johnson's FAC should be dismissed as barred under the *Rooker-Feldman* doctrine.

2. The Litigation Privilege Is An Absolute Bar To Johnson's Claims

The litigation privilege is an absolute bar to the claims against Movants because the allegations relate solely to petitioning activities on behalf of Movants' clients. (*See, e.g.* Doc. No. 11-1, p. 11.) Johnson's Opposition states that he is not seeking "relief from [Movants'] motions or from the resulting decisions," but is claiming deprivation of constitutional rights based on "Wilson/Elser conspiring with their clients and Storix's counsel to use his own company profits to litigate against him." (Doc. No. 19, p. 6.) But as described above, the only allegations against Movants relate solely to their petitioning activities on behalf of their clients, which are absolutely barred by the litigation privilege.

Moreover, Johnson's Opposition says he does not need to add any new facts to satisfy the elements of his constitutional claims against Movants. Johnson states in his Opposition that he can amend the FAC to allege a claim under § 1983 "without adding new allegations." (Doc. No. 19, p. 4.) Johnson's Opposition does not point to a single new fact he could add to the complaint if granted leave to amend. As discussed above and in the moving papers, the allegations as to Movants in the FAC are subject Cal. Civ. Code § 47 and are absolutely protected by the litigation privilege. Because amendment of the FAC would be futile, the Court should dismiss the FAC as to Movants with prejudice.

D. The Statute Of Limitations Bars Johnson's Claims Against Movants

"The statute of limitations applicable to an action pursuant to 42 U.S.C. § 1983 is the personal injury statute of limitations of the state in which the cause of action arose." *Douglas v. Noelle*, 567 F.3d 1103, 1109 (9th Cir. 2009). The personal injury statute of limitations in California is two years. Cal. Code Civ. Pro. § 335.1.

Johnson asserts the continuing violation doctrine applies and therefore the statute of limitations is not at issue. But here, the Ninth Circuit has made clear the statute of limitations in a § 1983 claims begins to run when the plaintiff learns of the injury. In *Limestone Dev. Corp. v. Village of Lemont, Ill.*, 520 F.3d 757 (7th Cir. 2008), the court noted that "the 'continuing violation' doctrine is misnamed." *Id.* at 801. "The statute of limitations begins to run upon injury (or, as is standardly the case with federal claims, upon discovery of the injury) and is not tolled by subsequent injuries." *Ahmad Hamad Algosaibi & Bros. Co. v. Stewart*, 2013 U.S. Dist. LEXIS 198740 **16, 17 (9th Cir. 2013) citing *Limestone Dev. Corp*, 520 F.3d at 801; *see also Morgan v. Komers*, 151 Fed. Appx. 546, 548 (9th Cir. 2005) (the Ninth Circuit held plaintiff's § 1983 claims accrued on the date each plaintiff was made aware of their alleged deprivations). Thus, Johnson cannot allege acts occurring within the limitations period to somehow toll actions taken prior to July 16, 2018 under the so-called continuing violation doctrine.

As discussed in Movants' motion to dismiss, the last overt act regarding actions related to the state court consolidated action occurred on May 16, 2018 - two months outside the two-year statute of limitations and therefore barred by the statute of limitations. (*See* Doc. No. 11-1, pp. 15, 16.) Because these actions occurred before July 16, 2018, they cannot support Johnson's § 1983 claim as they are barred by the two-year statute of limitations.

III. CONCLUSION

For all the reasons set forth above, Johnson's claims against Movants should be dismissed without leave to amend.

Dated: September 23, 2020

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

/s/ Patrick J Kearns

By: Patrick Kearns, Esq.
Attorney for Defendants
Marty Ready, David Aveni, and Michael McCloskev

Anthony Johnson v. David Kinney, et al.
Southern District of California Case No. 3:20-cv-01354-CAB-MSB

PROOF OF SERVICE

I, the undersigned, am employed in the county of San Diego, State of California. I am over the age of 18 and not a party to the within action; my business address is 401 West A Street, Suite 1900, San Diego, California, 92101.

On September 23, 2020, I caused to be served the following document(s) described as follows:

DEFENDANTS MARTY READY, DAVID AVENI, AND MICHAEL MCCLOSKEY'S REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

on the parties in this action by placing a true copy in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

☐ **PERSONAL SERVICE** - I served the documents by placing them in an envelope or package addressed to the persons at the addresses listed below, and providing them to a professional messenger service for service. (A confirmation by the messenger will be provided to our office after the documents have been delivered.)

☐ **BY MAIL** - As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at San Diego, California in the ordinary course of business. The envelope was sealed and placed for collection and mailing on this date following our ordinary practices. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ **BY E-MAIL OR ELECTRONIC TRANSMISSION** - Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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☒ **BY ELECTRONIC TRANSMISSION VIA ECF** – I electronically filed the foregoing document(s) with the Clerk of the Court through the CM/ECF system for the United States District Court, Southern District of California, which sent Notification of Electronic Filing to the persons listed. Upon completion of transmission of said documents, a certified receipt is issued to the filing party acknowledging receipt by the CM/ECF system.

Executed on September 23, 2020, at San Diego, California. I declare under penalty of perjury under the laws of the State of California, that the above is true and correct.

Katelyn Kingsley

Katelyn E. Kingsley

Anthony Johnson v. David Kinney, et al.
Southern District of California Case No. 3:20-cv-01354-CAB-MSB

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