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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

TAMARA ELISE RUBIN, Plaintiff, v. THE STATE OF OREGON, KRIS KALANGES, MICHAEL GLENN, KAREN ERTEL, MARK KLEYNA, and JOHN/JANE DOE, Defendants.	Case No. 3:19-CV-01377-IM STATE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT **REQUEST FOR ORAL ARGUMENT**

CERTIFICATE OF CONFERRAL

Pursuant to L.R. 7-1(a)(1)(C), counsel for the parties have conferred in good faith but have been unable to resolve the issues in dispute.

MOTION

The State of Oregon, Kris Kalanges, Michael Glenn, Karen Ertel, and Mark Kleyna ("State Defendants") move for summary judgment on all claims in the Third Amended Complaint ("TAC"). This motion is supported by the Memorandum below, the Joint Statement

of Agreed-Upon Facts ("JS") and the Declarations of Karen Ertel, Elizabeth Grant[1], Michael Glenn, and Tracy White[2].

LEGAL MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

This action is based on plaintiff's groundless belief that she was being criminally and administratively prosecuted in some attempt to silence her advocacy efforts. There is no evidence of this. She claims that the State Defendants lied and concealed evidence, but there is no evidence of this either. Instead, the evidence shows the State Defendants acted consistently with their duties, sought additional evidence from plaintiff, and were not the lead players in a separate criminal action filed by the Multnomah County District Attorney's officer.

All the claims should be dismissed and judgment granted for the State Defendants.

II. UNDISPUTED MATERIAL FACTS

A. 2016-2017: Background

Plaintiff Tamara Rubin claims to be an activist regarding childhood lead poisoning. TAC ¶ 5. Through 2016, she was the executive director of a nonprofit organization, Lead Safe America Foundation ("LSAF"). TAC ¶ 5; JS ¶ 1.

The Oregon Department of Justice ("DOJ") has statutory authority to investigate and enforce the Oregon Unlawful Trade Practices Act ("UTPA"), the Oregon Charitable Trust and Corporations Act, and the Oregon Charitable Solicitations Act[3]. JS ¶ 2.

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[1] Note that after Ms. Grant signed her declaration, a social security number was redacted on one of her attached exhibits for security.

[2] Excerpts from the deposition transcripts of Kris Kalanges and Michael Glenn are attached as Exhibits 1 and 2 to the White Declaration. They are referred to by the deposition pages for clarity.

[3] ORS 128.675-710 (Attorney General may sanction, investigate, and sue charitable organizations that have or may have violated Charitable Trust and Corporation Act); ORS 128.866 (Attorney General may obtain injunction against organizations that have not complied with Charitable Solicitations Act); ORS 646.605(5), 646.618(1), 646.632(1) (Attorney General is a "prosecuting attorney" that can investigate and file suit to enjoin unlawful violations of UTPA).

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In March 2016, as part of an investigation into potential statutory violations by LSAF, defendant Mark Kleyna, an attorney in the DOJ Charitable Activities Section, issued a Civil Investigative Demand[4] ("CID") to the Board of LSAF, as well as its bank and Pay Pal, seeking documents and information relevant to the investigation. JS ¶ 3; TAC ¶¶ 24, 26; Kalanges Depo 76:1-3, 79:7-25. Thereafter, defendant Kris Kalanges, a financial investigator with DOJ, prepared an analysis of funds showing cash flows between LSAF and the Rubins'[5] bank accounts. TAC ¶ 28; Kalanges Depo 82:10-12.

At that point, Kalanges lacked sufficient information to reach a conclusion on what was happening with the money. "It's very unusual to have that volume of transactions occurring between an officer of the organization and the organization. So not knowing what it was, I couldn't come to any conclusion without additional information." Kalanges Depo 83:23-84:7.

In order to obtain additional information, Kalanges met with plaintiff and her husband for an interview. Kalanges Depo 84:8-25. During the interview, Kalanges "asked questions to try and understand what was the purpose of those transactions and what, if any, substantiating documentation there might be available to support that interpretation of the transactions." Kalanges Depo 84:14-17. The Rubins explained "that they had not kept very good records," but that the transactions represented loans to the organization from the Rubins and repayments of the loans. Kalanges Depo 84:19-25.

Kalanges did not form an opinion at that time whether this explanation was true. Kalanges Depo 85:1-2. He asked the Rubins for additional documentation, which they agreed to provide. Kalanges Depo 85:3-5, 87:16-19. A portion of the material was provided about six months later, in December 2016. Kalanges Depo 87:20-88:9.

In May or June 2016, Kalanges forwarded his analysis to the Oregon Department of Human Services ("DHS"). TAC ¶ 32; JS ¶ 4. He did so "[b]ecause seeing the large volume of

[4] A Civil Investigative Demand may be served to obtain testimony, documents, or other evidence relative to an alleged or suspected violation of the UTPA. ORS 646.618(1).

[5] In context, the Rubins are plaintiff Tamara Rubin and her husband.

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transactions in the context of an organization in which it appeared that there was no meaningful accounting system set up, the directors were—appeared to be not fully engaged in their fiduciary roles. And then in part of the documents provided to us in the initial meeting there was some e-mails in which Tamara referred to herself as being on welfare." Kalanges Depo 174:25-175:7.

Defendant Michael Glenn, a DHS Fraud Investigator, then began an administrative investigation into plaintiff and her family's eligibility for state benefits they had received. JS ¶ 5. He then forwarded it to the DHS Overpayment Writing Unit for review. JS ¶ 6. The Overpayment Writing Unit determined there had, in fact, been overpayments of benefits to plaintiff and her family. Glenn Depo 93:4-9. Thereafter, in May 2017, Glenn submitted a criminal report to the Multnomah County District Attorney's Office for consideration of prosecution. Glenn Depo 54:10-16.

This Court has ruled that the initiation of the DOJ, DHS, or IRS investigations (discussed below) cannot form the basis for claims in this action. Order, ECF No. 27, at 4-5 (May 5, 2020). This ruling is based on the fact that each of the investigations started more than two years before plaintiff filed this lawsuit on August 28, 2019. *Id.*; Complaint, ECF 1.

B. <u>2017-2018: Indictment and dismissal of criminal charges.</u>

Plaintiff alleges that in May 2016, the IRS notified plaintiff and LSAF that it was auditing LSAF for the 2014 tax year. TAC ¶ 37.

On October 5 and 6, 2017, plaintiff emailed AAG Kleyna letters from herself, from her then-attorney regarding the results of the IRS audit, and from the IRS. TAC ¶ 45; JS ¶ 7; Grant Decl Exs. 1 and 2. The substance of the IRS letter was short: "Based on our audit of your Form 4720, *Return of Certain Excise Taxes Under Chapters 41 and 42 of the Internal Revenue Code,* there is no change to your tax liability." JS ¶ 7; Grant Decl Ex. 1 at 6 (italics in original).

Shortly thereafter, on October 16, 2017, plaintiff's new attorney wrote to AAG Kleyna and Kalanges referencing DOJ's request for the materials plaintiff had exchanged with the IRS.

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JS ¶ 9. The attorney stated that he expected plaintiff would be able to provide those materials. *Id.*

On November 1 and 9, 2017, defendants Glenn and Kalanges testified before the grand jury in the case of *State of Oregon v. Tamara Elise Rubin.* Kalanges Depo 108:6-7 and Ex. 3 (Indictment); Glenn Decl ¶ 2.

On November 10, plaintiff's attorney emailed AAG Kleyna and Kalanges with a letter and an internet link (zip file) for documents. JS ¶ 10; Grant Decl Ex. 3. The letter described the documents being provided as materials exchanged between plaintiff, her counsel, and the IRS. *Id.* A subsequent email from the attorney that day included a password for opening the zip file. JS ¶ 11; Grant Decl ¶ 6.

That day, Friday, November 10, was the celebrated date for Veteran's Day[6]. JS ¶ 12. As a result, Kalanges did not work that day and did not see the email until the following Monday, November 13. Kalanges Depo 151:8-17. On that Monday, November 13, Kalanges did see the email, used the password provided to download the documents, and opened a couple documents to make sure they were not corrupt. Kalanges 100:1-9, 146:21-24, 151:18-19. He thus wrote to plaintiff's attorney saying he had accessed the documents. JS at 13.

That same Monday, November 13, the grand jury issued an indictment charging plaintiff with nine felonies: seven counts of theft and two counts of welfare fraud. JS at 14; White Decl Ex. 3.

Later, in December 2017, when Kalanges attempted to open the QuickBooks file within the provided documents, he discovered that a separate password was required. Kalanges Depo 146:24-147:9. Plaintiff's attorney sent that password on December 21, 2017. TAC ¶ 60; Grant Decl Ex. 4.

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[6] Veteran's Day in Oregon is November 11. ORS 187.010(1)(h). The Court is requested to take judicial notice that November 11, 2017, fell on a Saturday. Fed. R. Evid. 201(B)(2) (judicial notice of facts "that can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."). Accordingly, the day before, Friday, November 10, was the legal holiday in Oregon. ORS 187.010(2).

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Several months later, on May 10, 2018, the indictment was dismissed. JS ¶ 15; White Decl Ex. 4.

C. 2018-2019: DHS administrative action, settlement, and final order.

The DHS Overpayment Unit determined that plaintiff and her family had been overpaid state benefits. JS ¶ 16. On June 12, 2018, DHS sent plaintiff and her family members notices of overpayment. JS ¶ 16. Plaintiff and her family requested a contested case hearing. JS ¶ 17.

On August 22, 2018, DHS sent plaintiff a Contested Case Notice reducing the amount of overpaid benefits. JS ¶ 18. The Contested Case Notice was amended on February 12, 2019, further reducing the amount. JS ¶ 18.

A contested case hearing convened on May 14, 2019; however, the case settled before any testimony was taken. JS ¶ 18; Ertel Decl Ex. 1 (Final Order) and Ex. 2 (Settlement). The settlement agreement dismissed part of the alleged overpayment and reduced the remainder to $3,500. JS ¶ 20; Ertel Decl Ex. 2, Settlement. Plaintiff and her husband agreed to work with DHS to establish a payment plan. JS ¶ 20; Ertel Decl Ex. 2, Settlement.

The Final Order incorporated the settlement agreement, and further noted that the parties agreed that plaintiff and her husband incurred and were liable to repay the $3,500 overpayment. JS ¶ 21; Ertel Decl Ex. 1, Final Order at 1. Based on this settlement, the reduced overpayment notice was affirmed; the remaining overpayment was dismissed, and the right to a contested case hearing and judicial review of the Final Order were all waived. JS ¶ 21; Ertel Decl Ex. 1, Final Order at 2.

The Final Order allowed for a request for rehearing or reconsideration within 60 days. JS ¶ 22; Ertel Decl Ex. 1, Final Order at 2. Plaintiff and her family members did file a petition for rehearing or reconsideration, which was denied. JS ¶ 23; Ertel Decl Ex. 3 (Denial). The Order denying the petition stated that plaintiff and her family members could petition to the Court of Appeals for review. JS ¶ 23; Ertel Decl Ex. 3. However, Plaintiff and her family members did not file a petition for review. JS ¶ 24.

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III. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of *law." Washington Mut. Ins. v. United States,* 636 F.3d 1207, 1216 (9th Cir. 2011); *see also* Fed. R. Civ. P. 56(a). The moving party must show the absence of a dispute as to a material fact. *Rivera v. Philip Morris, Inc.,* 395 F.3d 1142, 1146 (9th Cir. 2005). In response, the nonmoving party must go beyond the pleadings and show there is a genuine dispute as to a material fact for trial. *Id.*

"The moving party, however, has no burden to negate or disprove matters on which the non-moving party will have the burden of proof at trial. The moving party need only point out to the Court that there is an absence of evidence to support the non-moving party's case." *Sluimer v. Verity, Inc.,* 606 F.3d 584, 586 (9th Cir. 2010).

"To carry this burden, the non-moving party must 'do more than simply show that there is some metaphysical doubt as to the material facts.'" *Id.* (citation omitted). "'The mere existence of a scintilla of evidence ... will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party].'" *Id.* (citation omitted; brackets in original).

The non-moving party must offer more than speculation to avoid summary judgment. *See* Fed. R. Civ. P. 56(c) (party must support assertion that a fact cannot be disputed by pointing to evidence in the record or lack thereof); *Stephens v. Union Pacific Railroad Company,* 935 F.3d 852, 856 (2019) ("A party's own speculation is insufficient to create a genuine issue of material fact[.]").

IV. THE STATUTE OF LIMITATIONS BARS STATE OR FEDERAL CLAIMS BASED ON KALANGES' ANALYSIS.

The statute of limitations for all claims in this action is two years. As for the section 1983 claims, the statute of limitations is the same as the statute of limitations for a personal injury tort in the state where the action arose. *Wallace v. Kato*, 549 U.S. 384 (2007). In Oregon,

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that is two years. S*ee Bonneau v. Centennial School Dist. No.. 28J*, 666 F.3d 577, 580 (9th Cir. 2012) (holding same); Or. Rev. Stat. § 12.110(1) (two year statute of limitations for personal injury not otherwise enumerated)[7]. *See also* Order, ECF No. 27, at 4 (same).

The state law claims are governed by the Oregon Tort Claims Act ("OTCA"). These claims are also subject to a two-year statute of limitations. ORS 30.275(9)[8]. *See also* Order, ECF No. 27, at 4.

Accrual of the federal and state claims is essentially the same. Accrual of a section 1983 claim occurs "when 'the plaintiff knows or has reason to know of the injury.'" *Bonneau*, 666 F.3d at 581 (citation omitted). *See also* Order, ECF No. 27, at 4 (same). More specifically, this is "'when the plaintiff knew or in the exercise of reasonable diligence should have known of the injury and the cause of that injury.'" *Id.* (citation omitted).

Under the OTCA, claims accrue when the plaintiff "knows or should have known of the existence of three elements: (1) harm; (2) causation; and (3) tortious conduct." *Doe 1 v. Lake Oswego School Dist.*, 353 Or. 321, 328 (2013). "'The statute of limitations begins to run when the plaintiff knows or, in the exercise of reasonable care, should have known facts that would make a reasonable person aware of a substantial possibility that each of the elements of a claim exists.'" *Id.* at 333 (citation omitted).

In short, the federal and Oregon statutes of limitations and rules of accrual are largely identical.

This lawsuit was filed on August 28, 2019. Two years before then was August 28, 2017. Absent some indication that any of the claims was reasonably discovered after that date, that date is the date of accrual; as such, any claims arising before August 28, 2017, are barred.

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[7] There is an exception for fraud or deceit, but that is not alleged in this case. Or. Rev. Stat. § 12.110(1).

[8] The OTCA allows for exceptions that are not relevant here. ORS 30.279(9) ("Except as provided in ORS 12.120, 12.135 and 659A.875 * * *.")

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This Court has previously dismissed any claims based on the initiation of the DOJ, DHS, or IRS investigations as barred by the statute of limitations. Order, ECF 27, at 4.

The initiation of those investigations was the only issue addressed in the Order on the Motion to Dismiss. However, the Court's rationale applies equally to the Kalanges' completion of his analysis. The Court previously noted that it was unclear when plaintiff knew about the analysis. Order, ECF 27, at 5. Now, however, these facts are clear: Kalanges completed his analysis in May 2016, long before August 2017. Additionally, plaintiff met with Kalanges and discussed his analysis and tried to explain the transactions. Kalanges Depo 84:8-25.

Accordingly, all claims based on Kalanges' analysis are time-barred.

V. DEFENDANTS KALANGES AND GLENN ARE IMMUNE FROM CLAIMS BASED ON GRAND JURY TESTIMONY

The claims based on the grand jury testimony by Defendants Kalanges and Glenn should be dismissed because such testimony is subject to absolute immunity. *Rehberg v.Paulk*, 566 U.S. 356 (2012).

This Court has already ruled on this issue, granting defendants' prior motion to dismiss "as to any claim based on protected grant jury testimony[.]". Order, ECF No. 27, at 5.

Although the Court ordered plaintiff to amend to remove all references to grand jury testimony, *id.*, plaintiff has not, in fact, done so. On the contrary, the Third Amended Complaint directly or indirectly refers to that testimony in paragraphs 55, 56, 81, 82, 94, 111, and 116.

Indeed, all of the claims rest in part on the proposition that Kalanges and Glenn gave false or incomplete testimony to the grand jury, including allegedly failing to provide exculpatory evidence. First Claim (Fourth Amendment violation), TAC ¶¶ 81-83; Second Claim (due process violation), TAC ¶¶ 92, 94, 96; Third Claim (Fourth Amendment malicious prosecution), TAC ¶¶ 105; Fourth Claim (abuse of process), TAC ¶¶ 111; Fifth Claim (malicious prosecution), TAC ¶ 116.

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Statements to the grand jury—true or false—cannot be used to support the claims against Kalanges and Glenn. Accordingly, all of Plaintiff's claims that are premised on the grand jury testimony by Defendants Kalanges and Glenn should be dismissed.

VI. DEFENDANTS WITH NO PERSONAL PARTICIPATION IN ALLEGED CONSTITUTIONAL VIOLATIONS SHOULD BE DISMISSED.

The first three claims are brought under 42 U.S.C. § 1983[9]. The U.S. Supreme Court has held that state officials are not liable under section 1983 unless they play an affirmative part in the alleged constitutional deprivation. *Rizzo v. Goode*, 423 U.S. 362, 377 (1976). Additionally, "[a] plaintiff must allege facts, not simply conclusions, that show that an individual was personally involved in the deprivation of his civil rights. Liability under § 1983 must be based on the personal involvement of the defendant." *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998), *cert. denied*, 525 U.S. 1154 (1999).

Applied here, this principle requires Kleyna, Glenn, and Ertel to be dismissed from each of the section 1983 claims, leaving only Kalanges.

Each of these claims arises from the unwarranted concept that Kalanges' financial analysis was false, that Kalanges presented this allegedly false analysis to the District Attorney and/or the grand jury, and that Kalanges failed to provide the additional documentation given him by plaintiff's attorney, which plaintiff feels would have been exculpatory. TAC ¶ 81, 92, 94, 105.

The State Defendants deny all of this. But even if these allegations were supported, they do not involve defendants Kleyna, Glenn, or Ertel.

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[9] That statute provides, in relevant part, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." 42 U.S.C. § 1983.

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As for Kleyna, there is no allegation he testified to the grand jury. To the extent the allegations are based on Kalanges' financial analysis of money to and from LSAF and the Rubins, TAC ¶ 81, there is no allegation that Kleyna did the analysis or had reason to believe it was inaccurate. Simply put, Kleyna had no personal participation in the matters alleged.

Similarly, Glenn had no personal participation in those matters. While he did, in fact, testify to the grand jury, there is no evidence that he testified falsely. To the extent Glenn relied on Kalanges' financial analysis, there is no indication he believed the analysis was wrong. Moreover, to the extent the exculpatory evidence that Kalanges allegedly withheld was contained within the link provided by plaintiff's attorney in November 2017, there is no allegation that material was provided to Glenn, although Glenn did become aware of the IRS audit conclusion. Glenn Depo 107:3-13.

Ertel is even less involved. Like Kleyna, she did not testify to the grand jury. Like Glenn, there is no evidence she was a recipient of the linked documents from plaintiff's attorney. There is no indication she was involved in the criminal prosecution at all. Moreover, to the extent she allegedly relied on Kalanges' analysis in the administrative process, there is no evidence she believed it was inaccurate.

In short, defendants Kleyna, Glenn, and Ertel should all be dismissed from the First, Second, and Third Claims for Relief.

VII. DEFENDANTS HAD NO BRADY DUTIES.

Underlying all the claims, but especially the First and Second, is the assumption that the State Defendants violated some duty to disclose allegedly exculpatory evidence to the District Attorney or grand jury. This alleged evidence appears to be 1) the IRS's conclusion regarding its audit of the Rubins, and 2) the documents provided to the IRS by plaintiff. TAC ¶¶ 45-46.

The State Defendants dispute the idea that the described materials were exculpatory of the issues DOJ and DHS were investigating. Regardless, the State Defendants had no such duty.

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Plaintiff's contention is based on an incorrect application of *Brady v. Maryland*, 373 U.S. 83 (1963). In *Brady*, the Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87.

This rule does not apply in this case for three reasons.

First, the evidence in question *belonged to the plaintiff*. She is claiming the State Defendants withheld evidence that she was the one who provided in the first place. There can be no suppression or withholding when the other party has the evidence in question.

Second, the *Brady* duty requires disclosure to the *defense*. "There is no federal right to have exculpatory evidence presented before a grand jury[.]" *Lapena v. Grigas*, 736 Fed. Appx. 651, 655 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 647 (2018), *citing U.S. v. Williams*, 504 U.S. 36 (1992) (prosecutor has no duty to disclose exculpatory evidence to grand jury).

Third, the State Defendants were not part of the prosecutorial team in the criminal matter. The *Brady* duty is placed upon the prosecutor, that is, the District Attorney. It also falls on police investigating a case, who have a duty to share the information with the prosecutor. *Stocker v. Bloomfield*, 2021 WL 19112374, at * 7 (D. Or. May 12, 2021); *see also Tennison v. City and County of San Francisco*, 570 F. 3d 1078, 1087 (9th Cir. 2009) (*Brady* duty applies to police officers). However, there is no basis for imposing the duty on others who were not part of the criminal team.

Fourth, the allegedly exculpatory documents were not accessed until *after* Glenn and Kalanges had testified before the grand jury. As set forth above, Glenn and Kalanges testified on November 1 and 9, 2017. Plaintiff's attorney emailed the link to the documents the next day, November 10, *after* their testimony. However, that link was not accessed until November 13, because November 10 was a holiday followed by a weekend. Even then, the significant QuickBook evidence was not seen until December. The grand jury issued its indictment on

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November 13. Given this sequence of events, there is no basis for claiming Kalanges or any of the other State Defendants withheld information about those documents.

For these reasons, the claims based on an alleged breach of a duty to disclose exculpatory evidence have no basis.

VIII. FIRST CLAIM FOR FOURTH AMENDMENT VIOLATION HAS NO BASIS.

The First Claim for Relief improperly alleges that Kalanges, Glenn, and Kleyna violated the Fourth and Fifth Amendment in relation to plaintiff's arrest and prosecution.

Plaintiff has no support for this claim. Not only can she not show that any of these individuals offered false evidence, affidavit, or testimony, but she cannot show they were responsible for the arrest or prosecution.

Plaintiff repeatedly blends the DOJ and DHS defendants with the District Attorney. None of the State Defendants brought criminal charges against plaintiff. None of them were the prosecutors in the criminal case.

This claim has no merit and should be dismissed as groundless.

IX. SECOND CLAIM FOR DUE PROCESS VIOLATION HAS NO BASIS.

The Second Claim is equally groundless. Plaintiff claims her substantive due process rights were violated by Kalanges, Ertel, and Glenn, but has no evidence this is so.

In order to show a violation of substantive due process, plaintiff must show "'conduct that shocks the conscience, or interferes with rights implicit in the concept of ordered liberty." *United States v. Quintero*, 995 F.3d 1044, 1051 (9th Cir. 2021).

Nothing in the events here shock the conscience or interfere in any liberty rights. Kalanges prepared a report and testified to a grand jury. Ertel handled a DHS contested case process that resolved in an orderly way. Glenn investigated whether there had been an overpayment, sent it to the Overpayment Unit for further review, and only once his conclusion was confirmed, referred it to the District Attorney.

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Again, as discussed above, the State Defendants are not the prosecutors. The indictment and arrest were not theirs.

There is simply nothing here to support the claim.

Moreover, to the extent the claim is based on an alleged false arrest, that claim is more appropriately brought under the Fourth Amendment. *Tarabachia v. Adkins*, 766 F.3d 1115, 1129 (9th Cir. 2014) (claim for unlawful stop belonged in a Fourth Amendment claim, not due process claim).

This claim should be dismissed.

X. THIRD AND FIFTH CLAIMS FOR MALICIOUS PROSECUTION HAVE NO BASIS.

As with the prior claims, these claims have no support and improperly mingles the State Defendants with the District Attorney's office. Indeed, the allegations act as if the District Attorney's office is a defendant here, which it is not. *See* TAC ¶ 106 (alleging District Attorney continued prosecution despite being aware of unsubstantiated or incomplete evidence).

In order to show malicious prosecution under section 1983, "plaintiff must show (1) the elements of the state-law tort of malicious prosecution; and (2) 'an intent to deprive the plaintiff of a constitutional right.'" *Wallender v. Harney County*, 2020 WL 9074890, at *4 (D. Or. Dec. 14, 2020), *report and recommendation adopted by*, 2021 WL 794 773 (D. Or. March 2), *appeal filed*, (9th Cir. March 30, 2021).

Under Oregon law, to show malicious prosecution plaintiff must show: "'(1) the institution or continuation of the original criminal proceedings; (2) by or at the insistence of the defendant; (3) termination of such proceedings in the plaintiff's favor; (4) malice in instituting the proceedings; (5) lack of probable cause for the proceedings; and (6) injury or damage because of the prosecution.'" *Id.* (citation omitted).

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It is not enough for a witness to appear, even if the witness knows the charges are groundless; the witness must "'be active, as by insisting upon or urging further prosecution.'" *Id.* (citation omitted).

Here, plaintiff cannot show these elements. As for the individual State Defendants, only Glenn referred the case for prosecution. This eliminates Kalanges from consideration.

The case terminated, but not necessarily in plaintiff's favor. Simply because the prosecutor did not feel he could prevail on the high standard of beyond a reasonable doubt does not mean plaintiff won, in any sense.

There is no evidence of malice, lack of probable cause, or for the federal claim, an intent to deprive plaintiff of a constitutional right.

There is nothing here. The claims should be dismissed.

XI. FOURTH CLAIM FOR ABUSE OF PROCESS HAS NO BASIS.

This claim also fails. To show state law abuse of process, plaintiff must show "some ulterior purpose, unrelated to the process, and a willful act in the use of the process that is not proper in the regular conduct of the proceeding." *Singh v. McLaughlin*, 255 Or. App. 340, 355 (2013).

Plaintiff alleges all sorts of ill motives, but has no evidence of same. On the contrary, the evidence shows the DOJ was concerned about possible statutory violations by LSAF and investigated that. DHS was concerned about possible overpayment of benefits to the Rubins, which turned out to be true, as shown on the settlement agreement and final order.

The idea that the State was trying to silence plaintiff or cover up for something is nothing more than speculation.

The claim should be dismissed.

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XII. DHS CLAIMS WERE PARTIALLY SETTLED AND INCORPORATED IN UNAPPEALED FINAL ORDER.

On May 14, 2019, plaintiff and her husband entered into a settlement agreement with DHS. Ertel Decl Ex. 1. As shown on that agreement, the parties agreed that "to settle the pending claims for overpayments against the Rubins as follows[.]" *Id.* The agreement then outlined the settlement, including the fact that "[t]he Rubins will work with DHS to establish a payment plan." This agreement was signed by plaintiff, her husband, her lawyer, defendant Ertel, and a DOJ lawyer representing DHS. *Id.*

The agreement was then incorporated into a Final Order. Ertel Decl Ex. 2. The Final Order agreed that the Rubins had incurred and were liable for an overpayment of some of the benefits. Ertel Decl Ex. 2, at 1.

The conclusion of the Final Order cited the administrative regulations providing that contested cases may be resolved by settlement agreement, and that in so doing the parties waive the right to a contested case hearing and judicial review. Ertel Decl Ex. 2, at 2.

Plaintiff did request reconsideration or rehearing, which was denied. Ertel Decl ¶ 12 and Ex. 3. Although plaintiff could have appealed the Final Order to the Court of Appeal, she did not do so. Ertel Decl ¶ 13.

Under these circumstances, plaintiff's claims alleging the overpayments sought were false, incorrect, or otherwise wrongful are barred. Second Claim, TAC ¶ 93; Fourth Claim, TAC ¶ 111. Not only did plaintiff agree to pay the remaining amounts, but, according to the Final Order, she agreed she and her husband "incurred, and are liable to repay" those amounts. Ertel Decl Ex. 2, at 1. By not appealing the Final Order, she is bound by it through the doctrines of claim and issue preclusion.

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Both doctrines "are meant to preserve judicial resources, minimize inconsistent decisions, and prevent superfluous suits." *Janjua v. Neufeld*, 933 F.3d 1061, 1067 (9th Cir. 2019). Issue preclusion has four elements: "'(1) the issue at stake was identical in both proceedings; (2) the issue was actually litigated and decided in the prior proceedings; (3) there was a full and fair opportunity to litigate the issue; and (4) the issue was necessary to decide the merits.'" *Id.* at 1065 (citation omitted). Similarly, claim preclusion requires "(1) an identity of claims, (2) a final judgment on the merits, and (3) privity between parties." *U.S. v. Liquidators of European Federal Credit Bank*, 630 F.3d 1139, 1150 (9th Cir. 2011).

"[O]ne of the key distinctions between claim preclusion and issue preclusion is that the former bars relitigation of any and all matters that were or could have been raised at that adjudication, * * * while the latter precludes relitigation of only those issues that were 'actually and necessarily determined' * * * *i.e.*, those that were raised, contested, submitted for determination, and determined." *Janjua*, 933 F.3d at 1067 (citations omitted).

Here, the question of whether the Rubins incurred and were liable for at least some portion of the DHS overpayment was actually and necessarily decided. Moreover, if plaintiff believed any portion of the overpayment was false or incorrect, she could have raised that issue.

Claim and issue preclusion, as well as the doctrine of settlement and release, bars the allegations that the overpayment was incorrect or wrongly pursued.

XIII. QUALIFIED IMMUNITY APPLIES

Even if plaintiff could establish that one or more of the individual State Defendants caused a deprivation of constitutional rights, each of them should be protected from liability for damages based on qualified immunity.

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Qualified immunity is a defense to claims brought under 42 U.S.C. § 1983. Qualified immunity applies when a government official's conduct "'"does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."'" *White v. Pauly*, __ US __, 137 S. Ct. 548, 551 (2017) (citations omitted). "Qualified immunity is 'an *immunity from suit* rather than a mere defense to liability.'" *Conner v. Heiman*, 672 F.3d 1126, 1130 (9th Cir. 2012) (italics in original) (citation omitted).

There are two prongs to analyzing qualified immunity. *Tolan v. Cotton*, 572 U.S. 650, 655 (2014). The first prong is whether the officer violated the plaintiff's constitutional rights. *Id*. at 655-56. The second prong is whether the rights were "'clearly established' at the time of the violation." *Id.* at 656 (citation omitted). The prongs may be evaluated in any order. *Id*.

"'"[E]xisting precedent must have placed the statutory or constitutional question beyond debate."'" *White*, 137 S. Ct. at 551 (citations omitted, brackets in original). "In other words, immunity protects '"all but the plainly incompetent or those who knowingly violate the law.'"'" *Id.* (citation omitted).

Moreover, "the clearly established law must be 'particularized' to the facts of the case. * * * Otherwise, '[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.'" *Id.* at 552 (citation omitted, ellipses in original). The Supreme Court has "'"repeatedly told courts * * * not to define clearly established law at a high level of generality."'" *Kisela v. Hughes*, __ U.S. __, 138 S. Ct. 1148, 1152 (2018) (citation omitted).

Here, plaintiff can show no clear law suggesting the conduct here was unconstitutional. Defendants Kleyna and Kalanges began an investigation into potential statutory violations by LSAF. Kalanges made a spreadsheet based on the limited information had, all while seeking further explanation and documents from plaintiff and her husband. Glenn took the spreadsheet and did his own analysis into potential DHS overpayments. When the overpayments were confirmed by someone else at DHS, Glenn submitted a report to the District Attorney. Whether

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or not the District Attorney decided to prosecute was up to him. Later, Glenn and Kalanges testified to the grand jury. Later yet, Ertel processed the DHS overpayment claim through an orderly process through a settlement and final order. Along the way, DHS reduced the amounts as further information came to light.

Nothing in this scenario would suggest to anyone that constitutional violations were occurring.

Qualified immunity protects each of the individual defendants.

XIV. CONCLUSION.

This case demonstrates nothing more than plaintiff's unhappiness in being prosecuted, even though the criminal case was eventually dismissed. None of the speculative claims can be supported.

Summary judgment should be granted for the State Defendants on all claims.

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Respectfully submitted,

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